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LOEB et al v. MANN.

(Supreme Court of South Carolina. Sept. 21,
1893.)

CLAIM AND DELIVERY—SPECULATIVE DAMAGES.

The value of the time consumed by plaintiff in an action of claim and delivery, in recovering the property in dispute, and his railroad and hotel expenses and attorneys' fees, are speculative damages, which cannot be recovered in such action.

Appeal from common pleas circuit court of Abbeville county; James F. Izlar, Judge.

Action of claim and delivery by Loeb Bros. & Co. against W. D. Mann to recover the possession of certain liquors taken by defendant under a mortgage by F. C. Perry to certain creditors. From a judgment in favor of plaintiffs for the property and \$50 damages, defendant appeals. Reversed, unless plaintiffs, in 10 days, remit the damages assessed.

Carker & McGowan, for appellant. Graydon & Graydon, for respondents.

MCGOWAN, J. This is an action of "claim and delivery" for certain articles of personal property. It seems that F. C. Perry was a retail liquor dealer in Abbeville; that he failed, having in his store the following articles, viz. two barrels of rye whiskey and two cases of fine brandy, worth in the aggregate \$223.60; that these articles had been seized by the defendant, Mann, as sheriff, in behalf of one claiming to be a mortgage creditor of Perry, and that the articles were covered by his mortgage. The plaintiffs are liquor dealers of Cincinnati, Ohio, and the complaint alleged that the aforesaid articles, although in Perry's store at Abbeville, were not his property, but had been "consigned" to him by the plaintiffs for sale upon their account, and that the defendant, W. D. Mann, the sheriff, wrongfully and unlawfully took said articles from the possession of Perry, and, although demanded by the plaintiffs, the said defendant refused to deliver them, and still unjustly detains them from the plaintiffs, "to their damage two hundred dollars. Wherefore, the plaintiffs demand judgment against the defendant for

the recovery of possession of the said goods, or, in case a delivery thereof cannot be had, for the value thereof,—the sum of \$223.40,—together with two hundred dollars, their damages, and for the costs and disbursements of the action." The defendant answered that he did not wrongfully and unlawfully take possession of said goods and chattels, but claimed that he seized the same under and by virtue of a certain mortgage to one Bieman by F. C. Perry, who was then in possession of said goods, and that after the seizure, and before demand by plaintiffs, the defendant was enjoined from selling or disposing of said goods by the court until further order, which has never been made. During the progress of the trial, I. S. Loeb, one of the plaintiffs, was allowed to testify that he was the traveling member of the plaintiffs' firm, and in that capacity made his regular rounds about five times in the year, and he came to Abbeville to collect a debt; that he was shown the barrels and cases of liquor in the custody of the defendant, and upon demand and refusal to deliver the articles he instituted the action, gave bond, and, having the goods delivered to him, he shipped them off upon the Richmond & Danville Railroad. Among other things, he was allowed, over objection, to state what damages he had sustained by reason of the taking of the goods by the sheriff,—the expenses he had incurred, such as railroad expenses, and all that, (objection of defendant overruled.) Witness proceeded: "Well, in all, I have lost ten days' time. I have made one trip besides the one here. When I came here for the goods, I came from Charleston, and returned just as I am doing now, and my time, at the least calculation, is worth \$5 a day, and railroad fare, \$33, for the second trip; hotel bills, \$23; and my attorneys' fees is ten per cent. on the amount recovered, \$22,—aggregating \$129.93. (Objection noted by request.)" Upon the subject of damages the circuit judge charged as follows: "Now, as to damages, in case you should find for the plaintiffs, the successful party is entitled to damages in all cases where damages are claimed. The amount may be nominal, and it is for

you to say what it shall be. In estimating the damages, you are to be governed by the evidence. You must not give remote or speculative damages, and in actions of this kind the case may arise where vindictive damages may be allowed, but I see nothing in this case which would warrant vindictive damages. There was nothing in the action of the sheriff to show that what he did was done maliciously, wantonly, or recklessly; and the mere statement of the complaint that it was 'wrongfully' done does not necessarily imply that it was a forcible and malicious taking," etc. There was no evidence that the property itself had been damaged, or even opened, or that the short delay had reduced the price. The verdict was for the plaintiffs, (already in possession of the property,) and \$50 damages. The defendant appeals upon several grounds, but, from the view which the court takes, it will not be necessary to consider any of them, except the second, which is as follows: "Because the circuit judge erred in allowing the plaintiff, over specific objections, to swear that he was damaged in the sum of \$129.93, included in which amount was an itemized statement as to the plaintiff's alleged expenses, as follows: (1) 10 days lost, (computed,) \$5 per day; (2) railroad fare, \$33; (3) hotel bills, \$23; (4) attorneys' fees, ten per cent. on amount recovered, \$22."

The complaint does not make any claim for special damage, and the circuit judge charged that the case was not one for vindictive damages; so that it must be considered as a plain and ordinary case for the recovery of personal property, and damages for its detention. "To recover damages for the detention of personal property, (the property having been delivered,) special damage cannot be recovered, unless expressly alleged." *Ipscomb v. Tanner*, 31 S. C. 49, 9 S. E. Rep. 733. What is this special damage, which cannot be proved without being specifically alleged? There is certainly a lack of clearness in the authorities on the subject, but it seems to us that what are called "general damages," as contradistinguished from "special damages," are admitted in evidence under a general allegation,—indeed, are inferred by the law itself,—for the reason that they are the immediate, direct, and proximate result of the act complained of, as, for instance, an injury to the property itself, or its value, by detention, etc., while damages which, although the natural, are not the necessary, consequence of the act, being outside of the "costs and disbursements" allowed by law, and consequently, in their nature, are not admissible in evidence without special notice of the claim in the allegations of the complaint, are therefore called "special damages." It is elementary that damages, in the ordinary sense, must be the immediate result of the act complained of. See *Woods' Mayne*, Dam. p. 48, and authorities in the notes. Section 326 of the Code

provides that the prevailing party may have taxed and inserted in the judgment "the sum of the allowances for costs and disbursements as prescribed by law—the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit," etc. See sections 2425, 2428, Gen. St. It would seem that in an ordinary case, where no special damage is asked for, this provision would limit the compensation allowed by law to the prevailing party, who had already the possession of his property. But it is urged that this action of "claim and delivery" is peculiar, in this: that the law expressly gives to the prevailing party damages in addition to costs and disbursements. It is true that section 283 of the Code provides as follows: "In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff or if it have, and the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof: and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property," etc. What damages? Why, surely, such damages as may have been sustained by reason of the seizure and detention of the property itself; that is to say, by direct and proximate injury of the property in question, or in reducing its value, and not for the purpose of allowing a party to reimburse himself, as to consequential losses alleged to have been sustained in the prosecution of the case, in respect to the speculative value of time lost, and the payment of the bills of railroads and hotels, lawyers' fees, etc. "The expense incurred by a plaintiff in consulting a solicitor and obtaining a legal opinion upon the validity of his claim is not recoverable as part of the damages. Parties must do what they think right, and the expense of getting the experience of attorneys to advise is not to be repaid by the other party. Nothing of that sort can be allowed in damages, and everything of that nature that a plaintiff is entitled to will be allowed in the taxation of costs." 2 Add. Torts, p. 79. See *Welch v. Railroad Co.*, 12 Rich. Law, 292; *Hill v. Thomas*, 19 S. C. 236; *Oelrichs v. Spain*, 15 Wall. 211; *Sedg. Dam.* p. 99. The Case of *Welch and the Railroad Company*, from *Richmond*, was an action on the case to recover against the company damages for a lost trunk; and it was held that a lawyer's fees, which the plaintiff may be required to pay his counsel in the case, is not, in this state,

to be allowed by the jury in estimating the plaintiff's damages. Judge O'Neill, in delivering the judgment of the court, said: "It cannot be said to be a necessary result of the act done by, or negligence of, the defendant. If this had been a case in which vindictive damage could be given, and the jury had found in gross beyond the value of the article lost, then, indeed, this verdict could not have been disturbed. But in this case there is nothing that calls for such a verdict. It is therefore ordered that a new trial be given, unless the plaintiff shall enter a remittitur," etc. This seems to be precisely in point. In the case of *Oelrichs v. Spain*, supra, it was held that counsel fees cannot be allowed as part of the damage covered by an injunction bond, and Mr. Justice Swayne, in delivering the opinion of the court, said: "In actions of trespass, where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant, if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto*, vindictive damages may be given by the jury. In regard to that class of cases this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as a measure of punishment, or a necessary element in its infliction.' The point here in question has never been expressly decided by this court, [*United States*,] but it is clearly within the reasoning of *Day v. Woodworth*, 13 How. 370, and we think it is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So, in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensalitis to which he may have been subjected. * * * There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary," etc. We regard it as well settled in this state, both by decisions here and in the supreme court of the United States, that counsel fees are not allowable as part of the plaintiff's damages, for the reason that they cannot be said to be the necessary result of the act done by the defendant. It is true that the decided cases do not seem to be as full and clear in reference to the other items of expenditure claimed here as damages. But we confess that, in respect to damages, we are unable to draw a distinction, in principle, between expenses incurred in paying lawyers' fees, and in making a charge for the

speculative loss of time, and paying railroad and hotel bills, etc. The judgment of this court is that the judgment of the circuit court be reversed, and a new trial ordered, unless, within 10 days after notice of this judgment, the plaintiffs or their attorney of record release on the record of this case the verdict for \$50 damages, and, thus reduced, that the judgment giving the property to the plaintiffs, with costs and disbursements, be affirmed.

McIVER, C. J., and POPE, J., concur.

CUDD et al. v. WILLIAMS et al.

(Supreme Court of South Carolina. Sept. 15, 1893.)

REFERENCE — OBJECTION — WAIVER — MARRIED WOMEN — CONTRACT FOR STOCK OF GOODS — VALIDITY.

1. Where, in an action on a contract for the sale of goods, defendants set up fraud, and ask an accounting, it is not error to send the case to a referee.

2. Where parties simply object to a reference, and afterwards attend the references, and give no notice of appeal until the final decision of the court on the referee's report, they will be deemed to have acquiesced in the order.

3. Where the purchaser of goods from a failing debtor sells them to the latter's wife, she cannot set up fraud in the sale by her husband as an excuse for her failure to perform her contract of purchase.

4. A married woman is bound by her contract for the purchase of the interest of her husband's partners in a stock of goods.

Appeal from common pleas circuit court of Spartanburg county; T. B. Fraser, Judge.

Action by Cudd & Roberts against S. B. Williams and T. A. Williams, her husband, to enforce the performance of an alleged parol contract for the sale of certain goods to defendant S. B. Williams. From a judgment for plaintiffs against her, S. B. Williams appeals. Affirmed.

Bomar & Simpson and J. K. Jennings, for appellant. Stanyarne Wilson, for respondents.

McGOWAN, J. S. B. Williams is the wife of her codefendant, T. A. Williams, a merchant of Spartanburg. The action was brought to require the defendants to perform their part of an alleged parol agreement for a lot of goods sold and delivered by the plaintiffs to the defendant Mrs. S. B. Williams for the agreed price of \$1,880.20. The testimony is voluminous, (all in the record,) and we think the careful statement made by the master, H. B. Carlisle, Esq., upon reference to him, will sufficiently explain the facts. He states "that in March, 1890, the defendant T. A. Williams, becoming embarrassed and being threatened with suit, sold out his entire stock of goods in bulk to the plaintiffs, Cudd & Roberts. The consideration for the sale was \$1,000 in

money and \$3,000 in notes, to be paid from the sale of the stock of goods. The \$4,000 amounted to 50 per cent. of the cost value of the goods, and seems to have been considered by the creditors at the time as a fair price. In addition to the consideration above mentioned, Williams was to have for his services one-half of the profits of the concern, and was to give his time to the business. The business ran on under these arrangements, Cudd & Roberts buying new goods and placing them in the stock to enable them to sell off the old articles more profitably, until the 1st of January, 1891, when an accounting was held, stock taken, and it was found that they had on hand \$4,941.86. According to the original trade, one-half of this belonged to Mr. T. A. Williams, and, under contract made at the time with T. A. Williams as agent for Mrs. S. B. Williams, Cudd & Roberts sold her their half of the goods and credits on hand for 75 per cent. of the inventory, amounting to \$1,853.50. Besides this, there were some goods overlooked, amounting to \$75. This action was brought to enforce this agreement." The defendants answered, claiming, among other things, (1) that the original transaction between T. A. Williams and Cudd & Roberts was fraudulent, and that a court of equity would not interfere in the matter, because they do not come into court with clean hands; (2) that Mrs. Williams is a married woman, and that on that ground she is relieved from any liability; and (3) that, if it should be determined that plaintiffs had any such interest, and that any sum whatever was due to them from the defendant S. B. Williams and T. A. Williams, as her agent, then these defendants say that there should be a full accounting between them and the said plaintiffs, and on such accounting defendants say that there will be due them a considerable sum of money. Further answering, these defendants allege by way of counterclaim—in case an accounting is refused in this action—that plaintiffs are justly indebted in the sum of \$500 to the defendant S. B. Williams, etc. Wherefore the defendants demand that the complaint be dismissed, or, failing in that, that the accounting be had between plaintiffs and defendants, and that plaintiffs be required to pay such sum as may be found due on such accounting, etc.

It seems that the case first came up before his honor, Judge Kershaw, who on August 10, 1891, granted an order (the defendants' attorneys objecting) that it be "referred to the master to take the testimony herein, to hear and determine the issues of law and of fact, and make his report to this court, and that all parties be allowed to except thereto." There was no appeal taken at that time from the order of reference, but under it the master held references, the attorneys of the defendants being present, offering testimony, and arguing the cause.

The master made his report, recommending that the defendants be required to perform their contract by paying the amount claimed in the complaint. No exception was made to this report, upon the ground that the order referring the case was illegal and void. The exceptions to this report were heard by his honor, Judge Fraser, who held as follows: "One of the questions raised before me at the hearing was as to the right to refer this case 'to the master to hear and determine the issues of law and fact, though not among the exceptions to the master's report.' Whether this is a law case—as I am inclined to think it is—or a case on the equity side of the court, I have no right now to consider the validity of the order of reference made August 10, 1891. I cannot review the order made by my predecessor." He sustained the exceptions as to the liability of the husband T. A. Williams, and overruled them as to Mrs. S. B. Williams, and thereupon ordered and adjudged that the plaintiffs have leave to enter up judgment against the defendant Mrs. S. B. Williams for the sum of \$1,880.20, and that the complaint be dismissed as to the defendant T. A. Williams. From this decree the defendant Mrs. Williams gave notice of appeal from the order of Judge Kershaw referring the case to the master, and also from the decree of Judge Fraser on the merits, and will ask a reversal or modification of the decree on the following grounds: "(1) That his honor, Judge Kershaw, erred in ordering said cause referred to the master, over the objections of the defendant. (2) That his honor, Judge Fraser, erred in holding that he had no right to consider the validity of the order of reference made by Judge Kershaw, and in not ordering an issue to a jury, as asked for by defendant. (3) In holding that there was no sufficient evidence of fraud in the transactions between plaintiffs and T. A. Williams. (4) In holding, even if there was fraud in such transactions, only the creditors of T. A. Williams could take advantage of it, and that the defendant could not set it up as a defense in this case. (5) In not holding that there was no consideration for the alleged contract between the plaintiffs and defendant, and that she was not bound thereby. (6) In not holding that, being a married woman, defendant had no right or capacity to make any such contract, and that she is not bound thereby," etc.

Exceptions 1 and 2 make the first question, whether the plaintiffs had the right to have the case referred to the master, over the objection of defendants. Was it a law case or a suit in chancery? At the time the question was made before Judge Kershaw the only guide in the matter was the pleadings, and it seems to us that the answer of the defendants in setting up fraud on the part of the plaintiffs in the transaction out of which their claim arose, and in claiming an account in reference thereto, presented fen-

tures of equitable cognizance, which would have authorized the old court of equity to take jurisdiction of the case. We cannot say that his honor, Judge Kershaw, should have regarded this as "an action either for the recovery of money only or of specific real or personal property." See *Pelzer v. Hughes*, 27 S. C. 418, 3 S. E. Rep. 781. Besides, while the defendants did object to the order of reference when made, we fail to find in the record that they gave notice of appeal therefrom, which they might have done; but, on the contrary, they seem to have acquiesced in the order, by attending references under it, examining witnesses, and arguing the case at every stage down to the final decision below, when for the first time they gave notice of appeal, not only from the judgment of his honor, Judge Fraser, on the merits, but also from Judge Kershaw's previous order of reference. Of course it is quite clear that Judge Fraser did not err in refusing to set aside Judge Kershaw's order referring the case, for the double reason that no such exception was before him, and also that he did not have the power to set aside the order of his predecessor. No motion was made before him for "issues from chancery," and, if there had been, it was discretionary with him whether he would grant them. *Rollin v. Whipper*, 17 S. C. 32.

Exceptions 3 and 4 make the point that Mrs. Williams cannot be made liable upon her contract to pay for the goods, for the reason that the goods sold to her by the plaintiffs arose out of a fraudulent transaction with her husband. We agree with the circuit judge that there is no sufficient evidence of fraud in the prior transactions between the plaintiffs and the defendant T. A. Williams. Mrs. Williams received the goods as her own property, and why should she not be made to pay for them according to contract? But if there was fraud in the prior transactions of her husband with the plaintiffs, Mrs. Williams had no connection with it. The fraud alleged was only against the creditors of Williams, and, as we understand it, no such creditor is here complaining. If the plaintiffs acquired the goods improperly, we cannot see how that should furnish Mrs. Williams an excuse for the violation of her agreement to pay for them.

Exceptions 5 and 6 complain that Judge Fraser erred in not holding that, being a married woman, the defendant had no right or capacity to make any such contract, and that she is not bound thereby." We agree with the circuit judge that there is nothing in our cases which holds that a married woman may not purchase the share of one or more joint tenants or tenants in common, even if the other interests are held by the husband. The husband and wife may make partition if they so desire, but the formation of a partnership instead thereof is a matter with which the seller has nothing to do and

cannot control. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

MURRAY v. AIKEN MINING & PORCELAIN MANUF'G CO. et al.

(Supreme Court of South Carolina. Sept. 16, 1893.)

RES JUDICATA—SECOND APPEAL—INTEREST—COSTS OF APPEAL.

1. On appeal in a case involving the liability of a surety company for the default of an officer of a corporation, the supreme court modified the judgment below, and held the surety company liable for the amount of its bond, less a certain sum due to the officer from the corporation, but the matter of interest was not mentioned in the supreme court judgment. *Held*, on a second appeal, that the subject of interest on the amount recovered was not res judicata.

2. In such case the interest should be allowed on the amount of the officer's default from the time it was demanded and refused.

3. In an action to settle the affairs of an insolvent corporation there was a controversy between a surety company and a bank which claimed as assignee of a bond by the surety company to the corporation guarantying the fidelity of its officer. Both were defendants to the original suit, and the bank appealed from the judgment, which held that the surety company was not liable to the bank, and obtained a modification holding that the surety was liable, although not for the full amount of the penalty, a set-off being allowed. *Held*, that the bank was the "prevailing party," within Code S. C. § 323, and the costs of appeal were properly taxed to the Fidelity Company instead of to plaintiff in the original suit.

Appeal from common pleas circuit court of Aiken county; T. B. Fraser, Judge.

For statement of facts, see former appeal, 16 S. E. Rep. 143.

Croft & Chafee, for appellant Fidelity & Casualty Co. Lord & Burke, for respondent Bank of New York National Banking Ass'n.

McGOWAN, J. This case has been in this court before. 16 S. E. Rep. 143. The following is a statement of case for the supreme court: It was commenced for the purpose of settling the affairs of the Aiken Mining & Porcelain Manufacturing Company, an insolvent corporation. The answers in the cause presented a controversy between two of the defendants therein, viz. appellant and respondent above named, in regard to the liability of the former to the latter, claiming as assignee the benefit of the bond of the former to the said insolvent company, guarantying the fidelity of its secretary and treasurer. The decree of the circuit court, made July 23, 1891, was adverse to the respondent herein, the Bank of New York, who thereupon appealed to the supreme court. The supreme court, on November 7, 1892, made a decree setting out fully the said controversy, modifying the circuit decree in regard to the con-

troversey in favor of the said respondent, the Bank of New York. The decision concludes as follows: "Now, therefore, under the terms of its contract, the defendant Fidelity Company must be prepared to answer for the default of the assured, but there must be this limitation thrown about its liability, namely, it must only be required to pay the difference between \$6,000 and the sum of \$2,065.24; that is to say, it must pay the sum of \$3,934.76. It is proper that we should explain this result. This is an equity suit, and therefore we must apply its principles. When \$6,000 of the money of the Aiken Company passed into the hands of its secretary and treasurer, that corporation was his debtor in the sum of \$2,065.24, and upon the principles advanced in the case of Bank v. Heyward, 15 S. C. 296, we think this result will follow. In the case last cited the teller was dismissed from his office, and on his settlement with the bank retained from the funds in his hands the amount he conceived the bank owed him as a salary for the year, \$1,500; but it was determined that only \$250 was due him, and judgment was duly proved against him for \$1,250. Here the secretary and treasurer was dismissed from his office. He claimed, though, that the company was his debtor, and in this very action the amount he claimed of the company has been allowed him. * * * It is the judgment of this court that the decree of the circuit court shall be modified on the principles herein announced, and in all other respects confirmed. Let the cause be remanded to the circuit court, with directions to carry into effect the modification herein provided." The appellants herein, the Security Company, then paid the sum of \$3,934.76, without prejudice of the latter to its claim for appeal costs and disbursements and interest on said sum of \$3,934.76. The amount of such costs of appeal and disbursements were taxed by the clerk at \$224.90, and there is no dispute as to items and amounts. The clerk, however, decided that these costs should be taxed against Murray, the plaintiff in the original case, as follows: "The Bank of New York and the Fidelity and Casualty Company were parties defendant. The case was tried in the court of common pleas, and afterwards on appeal by the supreme court. The Bank of New York to some extent reversed the decision of the circuit court. It is now claimed by the Bank of New York that its codefendant, the Fidelity and Casualty Company, should pay the costs and disbursements incident to the appeal. The Fidelity and Casualty Company deny their liability to pay said costs. The case is one in equity. J. E. Murray is the plaintiff, and certainly one of the principal parties to the action. He brought the action, and it seems plain to me that he should pay the costs, and I so adjudge. There is nothing either in the circuit decree or in the opinion of the supreme court which adjudges that the Fidelity Company should pay the

costs to their codefendants, the Bank of New York. I therefore fail to see what right the Bank of New York has to claim that such company should pay the costs; hence I decline to tax the costs against said company, but, as above stated, do adjudge that the costs be taxed against the plaintiff. No dispute is made as to the amount of the costs and disbursements, and they are taxed as follows, to wit:

"Disbursements.

Paid clerk of court for copy served..	\$ 7 65
Walker, Evans & Cogswell for printing record	140 00
Preparing case	10 00
Appeal to supreme court.....	15 00
Argument in supreme court.....	20 00
Printing argument for supreme court	31 95

\$224 90"

The Bank of New York filed the following exceptions to said taxation: "(1) That the clerk erred in finding that the said costs and disbursements should be taxed against the plaintiff, because they all grow out of and belong to a controversy between two of the defendants, to wit, the Fidelity, etc., Co., and the Bank of New York, and the case in the supreme court was substantially between these parties alone. (2) That the clerk erred in not holding that said costs and disbursements should be taxed in favor of said bank and against said Fidelity Company, for the aforesaid reason, and because the said last-named company was the losing party on said appeal." Thereupon the cause was again brought before the circuit court of common pleas for Aiken county, his honor, Judge Fraser, presiding, who held: (1) That the Bank of New York was entitled to recover against Murray interest on \$3,934.76 from September 26, 1888, when he was directed to deposit the money in the Aiken Bank, and refused to do so, to January 18, 1893. This amount, calculated at 7 per cent., would amount to \$1,192.10, but the liability of the Fidelity Company is limited to so much of the interest as will, with the amount already paid, amount to \$5,000,—that is to say, \$1,065.24. And (2) his honor held as follows, in reference to the question as to who was liable for the appeal costs: "The Fidelity and Casualty Company was not an original party to the bill. In the progress of the case, and upon its own application, the company was made a party, 'for the purpose of defending its own liability' under the bond which it had given to the Aiken Company for the conduct of Murray. By the same order the Bank of New York (to whom this bond had been assigned) was also made a party, for the purpose of asserting its rights. Thenceforward the litigation was confined almost exclusively to those parties. The decision on circuit was in favor of the Fidelity Company against the bank, and from this decision the bank alone appealed. The only respondent, as the record shows, who took an active part in the contest be-

fore the supreme court, was the Fidelity Company. While, upon some minor points, the appeal was overruled, the bank succeeded in reversing and modifying the decree in the most important particulars. In no respect was it modified in favor of the Fidelity Company. I am of opinion that the bank is entitled to the appeal costs, because it must be regarded as the prevailing party on the appeal; and that the Fidelity Company should pay these costs, because the decision was against them as active litigants."

From this decree and decision as to costs the Fidelity & Casualty Company appeals to this court upon the following exceptions: "(1) Because his honor should have sustained the order of the clerk taxing the costs against the Bank of New York, and he erred in not so doing. (2) Because the supreme court in its decision did not reverse the decree of Judge Norton, but only modified it, and it did not follow as matter of law that the costs were thereby thrown against the Fidelity Company; but, to the contrary, it would follow, under such circumstances, that the Fidelity Company was not liable for costs, and his honor erred in not so holding. (3) Because the supreme court in its decision fixed the amount of the liability of the Fidelity Company, and did not allow interest upon the same, and it is respectfully submitted that the circuit judge erred by increasing such liability by adding interest thereto. (4) Because it is submitted the liability of the Fidelity Company upon its bond was not known until fixed by the supreme court, and that said defendant is not liable for interest upon such before the same was ascertained, and the circuit judge erred in so deciding. (5) Because the extent of the liability of the Fidelity Company upon its bond was specifically stated in the decision of the supreme court, such question is therefore *res adjudicata*, and it was error in the circuit court in reopening and passing upon the same," etc.

In the view which the court takes there are really but two questions in the case:

First. "Was it proper to charge the Fidelity Company with the interest on the \$3,934.76, after it was demanded from the Aiken Company? or is that question *res adjudicata*?" It is true that the supreme court, in its first decision in the case, (16 S. E. Rep. 148,) did not expressly declare that the amount of Murray's default should bear interest from the time it was demanded and refused; but such was then and now is the law. See *Bank v. Heyward*, 15 S. C. 296, in which the recovery was had for the amount of the default, with interest as an incident added thereto. It is impossible to suppose that the supreme court intended by their silence as to interest to overrule in any particular the very case cited as authority for the decision then being rendered. It is, however, insisted that the former judgment of this court, which reversed the first

judgment on the circuit, without making any reference whatever to the interest on the amount recovered, must be regarded as in legal effect a final adjudication of the incidental question of interest; that it was, indeed, equivalent to an express adjudication that the bank, as the assignee of the bond in contention, was not entitled to interest on the amount recovered. We cannot accept this view. It is quite clear that the question of interest was never before Judge Norton, nor before this court on appeal, and of course was never actually adjudicated. On the contrary, we agree with Judge Fraser that the matter of interest was never considered, and that by using the figures this court did not intend to fix definitely the amount to be paid by the Fidelity Company, but to fix the principles which must be applied in ascertaining that amount when the case went back to the circuit, under the express terms of the judgment of the court: "Let the case be remanded to the circuit court, with directions to carry into effect the modification herein provided." See *Jones v. Massey*, 14 S. C. 307, and *Busby v. Mitchell*, 29 S. C. 447, 7 S. E. Rep. 613.

Second. The other question is whether it was proper to charge the Fidelity Company with the costs of the appeal. In cases in chancery costs are largely in the discretion of the circuit judge who heard the case, but, if not otherwise ordered in the judgment, follow the event of the action, and are taxed against "the losing party." Code, § 323. Judge Norton, who originally heard the case, made no order, of course, as to costs upon appeal from his own decree, and the supreme court can make no original order for costs in an equity case. Then was it error on the part of the circuit judge to reverse the clerk's taxation of the costs upon the first appeal, and charge them to the Fidelity Company? That must depend upon the issue in that appeal, and "the losing party" in it. There is no doubt that the principal issue on the appeal was between the Bank of New York, as the owner of the indemnity bond, and the Fidelity Company, as to their liability thereon. That question was substantially decided in favor of the bank. The Fidelity Company was held liable on the indemnity bond, and, whether the whole penalty of the bond or a less sum on account of a set-off was recovered, there was a recovery, and they must be considered as the "losing party" on the appeal, irrespective of the final result of the action. *Cleveland v. Cohrs*, 13 S. C. 397; *Huff v. Watkins*, 25 S. C. 245; *Sease v. Dobson*, 36 S. C. 554, 15 S. E. Rep. 703, 704. We agree with the circuit judge that the bank is entitled to the appeal costs, because it must be regarded as the prevailing party on the appeal, and that the Fidelity Company should pay these costs, because it was the only respondent and active litigant in the supreme court, and the de-

cision was against it. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., concurs. POPE, J., concurs in the result.

HAMILTON et al. v. TUCKER COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia.
Sept. 12, 1893.)

COUNTY SEAT — RELOCATION — COUNTY COURT —
SPECIAL SESSION — POSTING NOTICE — ENTRY ON
RECORD BOOK.

1. Under section 15, c. 39, Code 1891, when an election upon the relocation of a county seat has been held, and the county court has ascertained and declared its result, and entered upon its record book the fact that three-fifths of the votes cast were for relocation at a particular place, that place becomes, by operation of law, from the date of such declaration, the county seat of the county.

2. A special session of a county court can be held legally only after a notice of the time of the session and notice of the purposes for which it is to be held have been posted by the clerk at the front door of the courthouse at least two days before the session.

3. To give such special session jurisdiction in any matter, it must appear upon its record book that such notice was so posted, and also it must appear from such entry in said record book what were the particular purposes for which the special session is held, as stated and specified in such notice.

4. If such entry as is above described is not entered in such record book of such special session, everything which may be done at the special session must be held to be an absolute nullity.

5. Citizens and taxpayers of a county have such an interest in the matter of the relocation of a county seat that they may interpose in proceedings in such matter, and maintain appropriate legal process touching it.

(Syllabus by the Court.)

Petition by John Hamilton and others against the county court and sheriff of Tucker county for a writ to prohibit said sheriff from executing an order of said court directing the removal of the records of said county from the town of Parsons to the town of St. George. The circuit court refused the writ. A justice of the supreme court then granted a rule against defendants to show cause to the supreme court why the writ should not issue. Rule made absolute, and writ awarded.

J. P. Scott, A. Jay Valentine, C. O. Strieby, and Dayton & Dayton, for petitioners. L. S. Anvil, A. B. Parsons, and J. Hop. Woods, for respondents.

BRANNON, J. This case involves the location of the county seat of Tucker county. On April 28, 1893, an election was held in Tucker county to obtain the sense of its voters upon the question of the removal of its county seat from St. George to Parsons, and on May 4th the county court canvassed the returns of the election, and declared and

entered of record as its result that three-fifths and upwards of the votes cast were in favor of relocation at Parsons. Afterwards, on July 10th, the county court entered an order reciting the former order declaring the result of said election, and reciting that certain persons had tendered a lease for the term of four years of a certain house at Parsons for use as a court-house, and accepting such tender, and then declaring the said house to be the court-house of said county, and the town of Parsons to be the county seat, and ordering the removal of the county records, papers, and property pertaining to the clerk's office to said house at Parsons on the 7th day of August, and directing that bids be asked for such removal. By another order made on the said 10th of July, the court awarded to Poling Bros. the contract for removing such records, papers, etc. On August 1st said contractors, Poling Bros., removed said records, papers, and office property from St. George to Parsons, and placed them in the said house which had been so declared the courthouse of said county. Application was made to the judge of the circuit court for a writ of certiorari to take into the circuit court for review and reversal the order so made by the county court on 4th May, declaring the result of the election to have been in favor of the relocation of the county seat; and, the writ having been refused, a writ of error and supersedeas was allowed by a judge of this court on July 27, 1893, to the order of the circuit court judge refusing such writ of certiorari. On August 7, 1893, at a county court held by two of its members, an order was entered to the effect that the records and furniture belonging to the clerk's offices had been unlawfully removed by persons unknown on the night of the 1st and morning of the 2d of August, 1893, to the town of Parsons, and directing that they be restored and placed in statu quo in the clerk's offices and courthouse in the town of St. George, and commanding that the sheriff forthwith execute the order of restoration. Thereupon John Hamilton and others, on behalf of themselves and all other taxpayers of Tucker county, presented to the judge of the circuit court a petition praying for a writ of prohibition to prohibit the county court and sheriff from executing the last-mentioned order of the county court requiring such records, papers, and furniture to be restored to St. George; and, upon its refusal by the circuit judge, a judge of this court awarded a rule against said county court and sheriff to show cause to this court why the writ of prohibition should not issue; and, the county court and sheriff having tendered their answer to said rule, the petitioners objected to its being filed, and demurred to it as insufficient to prevent such writ of prohibition. This answer itself demurs to the petition asking the prohibition, and we are

required to say whether it calls for the writ of prohibition. We think it does. It shows that an election was held upon the relocation of the county seat, and that the county court declared and entered of record that more than the requisite three-fifths of the votes were in favor of removal and relocation at Parsons, and that it declared Parsons to be the county seat, if that were necessary to make it such, and that a particular building there was the lawful courthouse. The statute relating to the subject of removal of county seats (section 15, c. 39, Code 1891) declares that, "if three-fifths of all the votes cast at such election upon the question be in favor of relocation at either of the places voted for, the said county court shall enter an order declaring the place so receiving three-fifths of all the votes cast therefor to be the county seat of said county from and after said date;" and another clause provides that the county court shall examine the certificates of the votes cast at the voting places, and that "said court shall thereupon ascertain and declare the result of said vote, and enter the same of record." Now, when such election has been held, and the county court has ascertained its result, and declared that three-fifths of the votes cast are in favor of relocation at a particular place, and entered the fact in its record book, this place is from the date of such declaration, by operation of law, the county seat. It is the duty of the county court to expressly declare it the county seat; but that is directory in the statute, and if it has declared the result of the election, and that the requisite three-fifths vote is in favor of relocation at a particular place, that alone, in law, removes the county seat to the new place; otherwise, the popular will would be defeated. The statute plainly means that if three-fifths of the voters vote for the relocation, and it be so found and declared and entered by the county court, from that date—the date of such declaration—the new point is the county seat. In one clause the statute provides for the ascertainment by the county court whether a three-fifths vote has been cast for relocation, and by another clause it enacts that, if such vote has been cast, the place receiving such vote shall thenceforth be the county seat. It is the vote when so ascertained to be a three-fifths vote that works the change. All else is directory or ministerial. Having made the provisions adverted to, the statute, in other clauses, goes on to direct the court, as soon as practicable, to cause the records, papers, and property to be removed to the new county seat; but that is simply ministerial,—simply something done to enable business to be carried on at the new point. Whether the records are there or not, it is the legal county seat. Thus, when, on May 4th, the county court declared that three-fifths of the votes had been cast for relocation at Parsons, and at

least when, on the 10th July, it declared the county seat to be at Parsons, and a particular building there to be the courthouse, Parsons became the county seat, and St. George ceased to be, and the functions of the county court touching the relocation were at an end. It had fully exercised its jurisdiction. It had only to remove the records from a place which was no longer the county seat to one that had taken its place. Do you think that after all this a circuit or county court could lawfully sit at St. George? I do not. And just here I will say that the order of restoration was made at St. George, as the notice for the special term shows. Our Code (section 6, c. 114) requires circuit and county courts to sit at the courthouse. Judicial proceedings at a place not appointed by law are null and void, because the court there sitting is not a court, but usurps jurisdiction, especially as our Code, c. 39, § 6, requires the county court to sit at the courthouse. 1 Black, Judgm. § 177. It seems to me that this also is a reason why a writ of prohibition should issue.

How are we to regard the county court's order of the 7th of August? If as an attempt to restore the county seat to St. George, it was without jurisdiction. If as a recognition of St. George as still the county seat, it was without jurisdiction, since it had no such matter to deal with, because, for reasons just stated, St. George had ceased to be, and Parsons had become fully, the county seat. In such light, as based on the theory that St. George was yet the county seat, we must regard this order, and as such it was without jurisdiction. If we are to regard the order as not touching the county seat, but as dealing only with the records and papers pertaining to the courts, then we find the county court, not because of war or other emergency, removing such records from the lawful county seat and courthouse, where the law commanded them to be kept, where the clerks were compelled under their bonds to keep and preserve them, without any circumstances calling upon them in law to make such removal; removing not only county court records, but circuit court records,—all the records,—without authority or jurisdiction. On the 7th of August these records were at Parsons, removed thither by Poling Bros., under their contract to remove them. No matter now that they were removed before the date fixed for their removal. The substance of the order of 10th of July was to make the removal. The appointment of a day for removal was only directory, and, though the removal was before the date fixed, that did not make the act of removal after it had been done a nullity. On the 7th of August (the very day fixed by the court for removal) they were, as a matter of fact, at Parsons, and on that same day the county court orders them restored to St. George, in the face of its order to remove them to Parsons,—the one order being just what the statute

commanded, and now fully executed by its chosen agents; the other utterly without lawful authority.

The award of the writ of error to the order of the judge of the circuit court refusing a certiorari could not justify the order of the county court. The bond to perfect the writ of error and the process had not been given or issued when the records reached Parsons; and, moreover, it was a writ of error and supersedeas to an order of the circuit judge refusing the writ of certiorari. Its only effect likely would be to determine whether the circuit judge had erred in refusing the certiorari, and, if he had, the order of this court upon the writ of error would be, not even then to award the certiorari, but to remand the case to the circuit court, with mandate to it to award the writ of certiorari; and then, and not till then, would the record of the county court's action touching the election be removed from it so as to determine whether there was error therein, since this court upon the writ of error acts only on the petition for the writ of certiorari. This will appear from the action and opinions in *Chenoweth v. Commissioners*, 26 W. Va. 230, and *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337. An injunction might lie to restrain the execution of orders against which certiorari is sought until a decision determining whether it should issue or not.

Another decisive reason for holding the order of the county court restoring the records to St. George void for want of jurisdiction lies in the fact that it was made at a special term, and the record of its proceedings does not show the purpose for which the special term was called. *Mayer v. Adams*, 27 W. Va. 244, holds that, to give a special session of the county court any jurisdiction in any matter, it must appear, not only that notice of it was posted, but "it must also appear from such entry on its record book what were the purposes for which the special session was to be held as stated in said notice, and that, if such entry is not made in the record book, everything done as such special session must be held an absolute nullity," for want of jurisdiction, because jurisdictional facts in courts of limited and special jurisdiction must appear on its record.

Another reason justifying a prohibition, as it seems to me, is this: The order of 10th of July, directing the removal of the records, was executed on 1st of August. It had worked its legal effect. The records were at Parsons on the 4th of August, when the writ of error and supersedeas took effect; and, if that writ could restrain the execution of the county court's orders, it could not reverse the act of removal already done; and a writ of prohibition ought to go to maintain the status existing at the time when the writ of error and supersedeas took effect until a decision of that writ should be had. For these reasons I think the pe-

tition shows ground for a writ of prohibition.

The answer relies on the fact that the order of 10th July was not an unconditional order declaring Parsons and the building there the county seat and courthouse, but contained a proviso that, if the building should not be completed by the date fixed by it for removal of the records, the order should be void, and on the fact that the building was not then completed. So far as concerns the county seat, Parsons had before this become such. The statute required the court to declare it the county seat, and no more, and it could not add a condition. So far as it concerns the records, we know they were removed and placed in that building. It was thus partly completed. The defendants show that fact. How far incomplete we do not know. Would the want of a door or shelf justify the removal of the records from it? Surely not. Even the condition in the order of 10th July would not be construed to mean that. It cannot be that a building of brick or stone or any completed building must exist before a relocation can be voted by the people, or their vote carried into execution by a removal of the records. Must they build beforehand? To provide a suitable place for the courts and records is a matter for future provision by the county court, under other statute provisions. Section 14, c. 39, Code, commands the county court to provide, at the county seat, suitable courthouse, jail, and offices for clerks, and the clerks are to keep the records and papers in such offices, as provided by section 9. By what right could the court move these records eight miles away from the county seat? Mere insufficiency of the courthouse would not justify it, for the statute provides a remedy for that, not by removal of the records miles away, but by providing a sufficient building; and an answer to this ground for removal of the records back to St. George lies in the fact that, in its order of 10th July, the county court declared that it appeared to the court from inspection and otherwise that the buildings at Parsons tendered to the county were adequate and sufficient for the purpose of clerk's offices for the records of the county and circuit courts and all other public purposes for which a courthouse is directed by statute to be used. The restoration was not based on that ground, but on the theory that, pending the writ of error, St. George was the county seat, or that the removal was premature.

The answer makes the point that the petitioners are in contempt of this court, because, after a judge of this court had awarded a writ of error and supersedeas to the order of the circuit judge refusing a writ of certiorari to the action of the county court declaring the result of the election in favor of Parsons, said petitioners, in disregard of said writ of error and supersedeas, removed said records from St. George, and that, being

in contempt, they cannot be heard in this case. We regard the point untenable, (1) because the supersedeas was simply to a negative order of the circuit judge refusing a writ of certiorari, and, for reasons above stated, likely did not of itself operate as a supersedeas to the county court orders, like a supersedeas accompanying a writ of certiorari under Code, c. 110, § 6; (2) because process and bond were not issued and given until after the removal, and thus the writ had not become operative; (3) because, if it be law that in a direct proceeding for contempt the party will not be heard until he purges himself of contempt, certainly the party would not be precluded from prosecuting a separate civil proceeding like this proceeding. Would he be denied all remedial civil process?

It is argued that, as the county court has jurisdiction of the matter of the relocation of a county seat, a prohibition ought not to issue, as that lies only when a tribunal is acting without jurisdiction. It is true that a county court has jurisdiction and power over this subject for certain purposes limited and originated by the statute; but, for reasons above stated, it was acting without any jurisdiction; and besides, conceding its jurisdiction, it was exceeding its legitimate powers, and abusing its jurisdiction, which statute and common law make a ground of prohibition. Code 1891, c. 110, § 1; *McConiha v. Guthrie*, 21 W. Va. 134.

It is urged in argument that petitioners are merely citizens and taxpayers, and have no such interest as entitles them to ask this prohibition, and we are referred to *County Court v. Boreman*, 34 W. Va. 87, 11 S. E. Rep. 747. That was a proceeding to alter a road. In this case, who would interfere to prevent the improper removal of the county seat or records but citizens and taxpayers? It concerned public interest, and affected them as citizens and taxpayers. Cases in this court will show that citizens and taxpayers have such interest as will authorize them to sue touching the location of a county seat. In *Welch v. County Court*, 29 W. Va. 63, 1 S. E. Rep. 337, they were allowed to prosecute a certiorari to orders of a county court in a matter of relocation of the county seat. True, they had appeared in the county court; but, if they had no interest, they could neither appear nor have a certiorari. So, in *Poteet v. Commissioners*, 30 W. Va. 58, 3 S. E. Rep. 97, taxpayers and voters were allowed to appear, and contest validity of returns of an election touching the county seat, and have remedial process as such. In *Armstrong v. County Court*, 15 W. Va. 190, citizens and taxpayers were allowed prohibition against the action of a county reducing taxes on a railroad. We conclude that the answer presents no matter to discharge the rule. For these reasons the rule is made absolute, and the writ of prohibition is awarded.

BRUNSWICK LIGHT & WATER CO. v.
GALE et ux.

GALE et ux. v. BRUNSWICK LIGHT &
WATER CO.

(Supreme Court of Georgia. July 24, 1893.)

NEW TRIAL—FILING BRIEF OF EVIDENCE—MARRIED WOMEN—PERSONAL INJURIES—DAMAGES—NEGLIGENCE—EVIDENCE—REMITTITUR OF DAMAGES.

1. Under the act of November 12, 1889, amending section 3719 of the Code, when the term of court continues longer than 30 days after a trial is had, the expiration of the 30 days is the end of the term for that case, so far as an application for a new trial and filing a brief of evidence are concerned. The prior law was left unchanged in every other respect, and consequently the power of the court to grant by special order, passed within the 30 days, further time for filing the brief of evidence, was not taken away or affected.

2. The action being by a married woman for physical injuries and their consequences, the terms of section 3067 of the Code are not literally applicable to the same, but the principle of the section, except as to proving the worldly circumstances of the parties, is applicable. Inasmuch as the earnings of the wife belong to her husband, her individual and personal damages can be measured only by the enlightened conscience of an impartial jury.

3. If the plaintiff fell into the hole referred to and described in her declaration, and that hole was caused by the defendant's negligence, and if she could not have avoided it by the exercise of ordinary diligence, she might recover; but if the hole into which she fell was a different one from that described in the declaration, or if it was not caused by the defendant's negligence, or if she could have avoided it by the use of ordinary diligence, she could not recover.

4. That some boys pointed out a hole to the plaintiff's husband, and said it was the one into which the plaintiff fell, and that the husband afterwards pointed out the same to another witness, and said it was the hole into which his wife fell, is not competent evidence; but that a hole was found and examined by the witnesses at the street intersection where the plaintiff testified the hole was would be competent evidence, it not appearing that there was more than one hole at this street intersection. It would be a question for the jury whether all the testimony referred to the same hole.

5. The court having charged the jury as to the effect of a failure by the plaintiff to exercise ordinary care, there was no error in declining to charge as requested in the 18th, 19th, and 20th grounds of the motion.

6. The court having determined that the ground in the motion for a new trial complaining that the damages found by the jury were excessive was well taken, it was error not to grant a new trial unconditionally, there being in the evidence no guide or criterion by which the court could determine the amount which should be written off. *Railway Co. v. Harper*, 70 Ga. 119.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action by Frank P. Gale and wife against the Brunswick Light & Water Company for personal injuries. Judgment for plaintiffs. Defendant brings error. Plaintiffs bring a cross bill of exceptions. Reversed as to main bill of exceptions. Affirmed as to cross bill.

Harris & Sparks, Mershon & Smith, and Spencer R. Atkinson, for plaintiffs. Courtland Symmes and J. H. Lumpkin, for defendant.

SIMMONS, J. 1. In some counties of this state the sessions of the superior court last for several months. Formerly, under the Code, a party desirous of moving for a new trial had until the end of the term at which the case was tried to make his motion and file his brief of evidence; and the court then had power, by special order granted in term, to extend the hearing to a day in vacation. The successful party on the trial was often compelled to wait until the end of the term to ascertain whether there would be a motion for a new trial or not. To prevent this long delay in applications for a new trial, the legislature, by the act approved November 12, 1889, (Acts 1889, p. 83,) amended the Code by declaring that "when said term continues longer than thirty days, said application shall be filed within thirty days from said trial, together with a brief of evidence, as provided by law, subject to the approval of the judge, subject to the same right of amendment as is now allowed in applications for a new trial," etc. Properly construed, this act means that the term of the court, unless sooner adjourned, ends as to the particular case at the expiration of 30 days from the trial, so far as the application for a new trial and the filing of a brief of evidence are concerned. If the losing party fails within that time to file his application for a new trial, the term of the court is closed as to him the same as if it had adjourned. The old law required the losing party to make his application for a new trial during the term in which the trial was had, except in extraordinary cases, and if he failed to move during the term he was remediless; but if he made his motion during the term he could ask the judge for an order granting him further time in vacation to perfect his motion and file his brief of evidence. So, under the new law, if he fails to move in 30 days after the trial, he is barred; but if he makes his motion within the 30 days he still can ask the judge for further time in which to perfect his motion and file his brief of evidence, and the judge still has power to grant the application. In this respect the act of 1889 does not change the prior law. It appearing in this case that the motion for a new trial was filed within 30 days from the trial, the court had the right to order, as he did, that further time be allowed for filing the brief of evidence. The motion to dismiss the motion for a new trial on the ground that the brief of evidence was not filed within 30 days from the trial was therefore properly overruled.

2. The action was for damages from personal injuries alleged to have been sustained by the plaintiff Mrs. Gale from the giving way of earth under her while walking up-

on a public street of the city, causing her to fall into a hole, this resulting from the negligence of the defendant in replacing the earth over a place where a ditch had been dug for the purpose of laying piping therein. The court, in charging the jury, read from section 3067 of the Code that part of it which declares that "in some torts the entire injury is to the peace, happiness, and feeling of the plaintiff. In such cases no measure of damages can be prescribed except the enlightened conscience of impartial jurors." It was error to give in charge this section of the Code as applicable to the case under consideration, for it is only applicable as a whole to that class of cases where the entire injury is to the peace, happiness, or feelings of the plaintiff. But where, as in this case, a married woman sues for physical injuries and the pain and suffering resulting therefrom, and cannot recover for loss of earnings, medical attention, etc., the principle of the section is applicable, inasmuch as her damages can be measured only by the enlightened conscience of an impartial jury. She is not allowed, however, to prove, nor can the jury take into consideration, as provided by this section, the worldly circumstances of the parties, the amount of bad faith in the transaction, etc. Railroad Co. v. Homer, 73 Ga. 251.

3, 4, 5. Other grounds of the motion for a new trial which are ruled upon in the 3d, 4th, and 5th headnotes, do not require further discussion.

6. The jury returned a verdict for \$10,000 damages. The court ordered a new trial, unless the plaintiff would write off from the verdict \$2,500. In a case of this kind, as we have said, where the action is for a personal injury and for pain and suffering resulting therefrom, and there are no other elements of damage for which a recovery can be had, such as loss of earning capacity, etc., there is no guide or criterion by which the amount of damages may be measured except the enlightened conscience of impartial jurors. There is no criterion, therefore, by which the court can estimate the proper amount of damages, and he has no power to reduce the verdict by ordering a certain amount written off. If the verdict is so excessive as to cause him to suspect bias or prejudice, he can set it aside, and order a new trial before another jury; but he must do this unconditionally. In actions on contracts, or for torts to property, in relation to which some fixed rules for the measure of damages are recognized, he may order a certain amount written off; and in an action for the homicide of a person, where the value of a life may be shown, according to certain recognized rules, he might perhaps have power to reduce an excessive verdict to an amount which would be proper under the proof. Railway Co. v. Harper, 70 Ga. 119. And see Railroad Co. v. Crosby, 74 Ga. 739. Judgment on the main bill of exceptions reversed, and on the cross bill affirmed.

WHITE v. MOSS et al.

(Supreme Court of Georgia. June 26, 1893.)

ASSIGNMENT OF ERROR—STATUTE OF LIMITATIONS—COMMENCEMENT AND RENEWAL OF ACTION—EVIDENCE—ADMISSIONS—INSTRUCTIONS.

1. An objection to the admission of evidence which does not state what the evidence was, and only refers to it as being found upon certain pages of the record, cannot be considered.

2. Where an action of ejectment has been brought in the name of two persons as joint plaintiffs, and has been dismissed, a subsequent action of ejectment for the same land against the same defendant, brought by only one of the former joint plaintiffs, is not a recommencement of the former action.

3. Admissions made by a person, while owner of five-sixths of a tract of land, that the remaining one-sixth belonged to another, are not binding upon bona fide purchasers for value to whom he subsequently sold and conveyed the entire tract, and who had no knowledge or notice of the fact that such admissions had been made by their grantor; they standing now upon his conveyance as color of title, supported by their own personal possession for more than seven years. That the declarant was dead when the case was tried did not make his admissions binding under the circumstances.

4. The motion for a new trial assigning as erroneous a statement made by the court in its charge that the plaintiff had made a certain admission, and it not being alleged in the motion or certified by the court that the admission was not in fact made, it will be assumed that the court correctly stated the admission and its contents.

5. There was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Rabun county; C. J. Wellborn, Judge.

Action by Sarah E. White against Moss & Childs to recover an interest in land. Judgment for defendants. Plaintiff brings error. Affirmed.

Payne & Frye, for plaintiff in error. Pope Barrow, for defendants in error.

SIMMONS, J. 1. The first ground of the motion for a new trial alleged that the court erred in allowing W. D. Young to testify as to statements made to him by one Shearley, and as to statements made to him by one Weeks. What these statements were is not set forth, but, in order to find them, the court is referred to pages 13, 16, and 20 of the record. In giving the numbers of these pages reference was probably had to the original record, for in examining the pages of the transcript sent to this court which bear the above numbers no such statements can be found. Even if the paging of the original record and the transcript corresponded precisely, this court would not undertake to pass upon an assignment of error made in this extremely loose and careless manner. Under the rule that all assignments of error must be plainly and distinctly set forth, it is somewhat remarkable that counsel persist in bringing up questions in the manner indicated. This court has so often ruled that it will not pass upon assign-

ments thus made, we now call attention to the matter for the sole purpose of once more reminding our brethren of the bar that, if they desire the grounds of their motions for new trials to be considered, they must distinctly set out the alleged errors, as the law requires.

2. Under section 2932 of the Code, if a plaintiff shall dismiss his case, and recommence within six months, such renewed case shall stand upon the same footing as to limitation with the original case. It was insisted that this section is applicable to the facts of the case at bar, but in our opinion it is not. It appears that to the September term, 1884, of the superior court of Rabun county an action of ejectment was brought by Sarah E. White and another, as joint plaintiffs, against the same persons who are the defendants to the present action. The former action was dismissed at the September term, 1886, and the present action was begun by Sarah E. White alone on the 12th day of February, 1887. We think it too plain for argument that this last suit is in no proper sense a renewal or recommencement of the former one. No suit by two persons can be the same thing as a suit by one of them; and the law being that, when an action of ejectment is brought by two persons claiming title jointly, a recovery cannot be had by either of them in severalty, it is absolutely clear that the suit in which the plaintiff is now seeking a recovery is not the same action as that in which she formerly sought to recover jointly with another person. The plaintiff must therefore be treated as though her action for the land in dispute had never been begun at all until the date last above mentioned. The effect of this ruling will be briefly stated in the last division of this opinion.

3. The plaintiff's action was brought to recover a tract of land, and by amendments she undertook to set up an equitable cause of action for the recovery of an undivided twelfth interest in the land. Among other things, she sought to show that one Nichols formerly owned five-sixths of this tract, and that while he was such owner he made admissions to the effect that the remaining one-sixth belonged to another. Her contention was that these admissions were binding upon the defendants, to whom Nichols subsequently sold and conveyed the entire tract, although they were bona fide purchasers from him, and had no knowledge or notice of the fact that any such admissions had ever been made by their grantor, and stood upon his conveyance as color of title, supported by their own actual possession for more than seven years. We are at a loss to conjecture upon what principle these admissions, even if made as alleged, could possibly be binding upon the defendants. They bought from one who was apparently the owner of the entire property, with nothing to put them upon notice that this owner-

ship was not real, and in good faith paid for the land in the belief that they were obtaining a perfect title. No title to land would be safe if it could be defeated in this manner. So far as the admissibility of such evidence is concerned, it makes no difference that the person by whom the declarations were made was dead at the time the case was tried. While it is true that the declarations of deceased persons against their interests, and not made with a view to pending litigation, are admissible in evidence in any case where they are relevant and competent, such declarations cannot be received to defeat a title by prescription which has become complete and perfect in persons who never heard of such declarations. If Mr. Nichols had been alive, and at the trial, he could not properly have been permitted to testify to the facts which the plaintiff sought to establish by proof of declarations made by him; and, this being so, the declarations themselves could not be introduced for the purpose of binding the defendants. Had the defendants relied either wholly or partially upon the possession of Nichols, and not exclusively upon their own possession, to raise a prescriptive title, his admissions, made pending his possession, would be evidence against them, whether they had notice of the same or not.

4. In its charge to the jury the court stated as a matter of fact that the plaintiff had made a certain admission. One ground of the motion for a new trial assigns as error the making of this statement, but it is neither alleged in the motion nor certified by the court that the admission was not in fact made. Of course, it would be improper for the court to inform the jury that a party had made an admission which he really had not made; but we cannot assume the correctness of a ground of this sort without a distinct verification by the presiding judge. On the contrary, we are obliged to assume, in the absence of such verification, that the admission was in fact made, and that its contents were fairly stated to the jury.

5. The court was right in refusing to grant a new trial. It is not absolutely clear that the plaintiff made out a prima facie case. In her chain of title was a paper purporting to be a deed from William Beale, by his agent and attorney, James M. Beale, and signed, "James M. Beale, [L. S.] & Attorney for William Beale." This paper was accompanied by no power of attorney from William to James M. Beale, but the plaintiff contended, nevertheless, that it was admissible in evidence as a muniment of title, because it appeared upon its face to have been executed more than 30 years before the trial. The court ruled that it was admissible as color of title only. Under the facts, it was essential to the plaintiff's case that this paper be received as a full and complete deed for all purposes. If the court below was right upon this question, the plaintiff failed

to make out her case, because, treating the paper as color of title only, it was not supported by proof of proper possession under it. It is unnecessary, however, to pass upon the question thus made, for it distinctly appears by the undisputed evidence that the defendants in good faith purchased and took actual possession of the land in the summer or fall of 1879 under the deed from Nichols, and that they held adverse, peaceable, and uninterrupted possession under a bona fide claim of right up to the time when the present action was brought,—a period of more than seven years. It is therefore immaterial whether the plaintiff may or may not have had, at some time in the past, and before the bringing of her suit, a good title to the interest she claimed in the land. If she did not, of course she could not recover; and, if she did, that title was defeated by a complete and perfect title by prescription in the defendants. Judgment affirmed.

FORT v. STATE.

(Supreme Court of Georgia. July 3, 1893.)

INSURANCE—DOING BUSINESS WITHOUT LICENSE—CORPORATIONS—CRIMINAL PROSECUTION.

By the act of October 24, 1887, to regulate the business of insurance, no unincorporated company is required to obtain, or can obtain, from the insurance commissioner a license to transact the business of insurance in this state; and the penalty prescribed in the ninth section of the act for doing or performing any of the acts or things mentioned therein for any insurance company is not applicable unless the company is one incorporated by the laws of this state or some other state or of a foreign government. According to the facts appearing in the record, the Guarantee & Accident Lloyds is a voluntary association, unincorporated, consisting of 100 natural persons. This being so, that company cannot be licensed to transact the business of insurance in this state; and, although there is no statutory authority for it to transact business without a license, a person who, as its agent, assists it in doing so, is not guilty of any offense.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

C. M. Fort was convicted of violating the insurance law by rendering services to an unlicensed company, and brings error. Reversed.

Hall & Hammond, for plaintiff in error. Lewis W. Thomas, J. M. Terrell, Atty. Gen., and Hillyer & Lee, for the State.

LUMPKIN, J. A careful reading of the act of October 24, 1887, "to regulate the business of insurance in this state, and for other purposes," (Acts 1886-87, p. 113,) will satisfy the reader that the general assembly intended therein to deal only with insurance companies chartered by this state or other states or by a foreign government. The second section of the act requires incorporated insurance companies to procure licenses from the insurance commissioner as a necessary prerequisite to the transaction of the business

of insurance in this state; but neither in this section nor in any other portion of the act is there any requirement that an unincorporated insurance company shall obtain a license, or any provision for the granting of a license to such a company. In view of this fact, it may well be doubted if the general assembly had in contemplation the possibility that any insurance company without a charter would be likely to undertake to do business in Georgia; otherwise it is more than probable that the act would either have expressly provided for licensing unincorporated companies, or else have declared in terms that no such company should transact business in this state at all. It is therefore safe to assume that in the general scheme of the act unincorporated companies were entirely overlooked. We are quite certain that the general assembly could not have intended in an indirect manner to make penal the transaction of insurance business by an agent of an insurance company which had not procured a license from the insurance commissioner, when it had made no provision by which the company in question could obtain such license. It would have been much easier and more natural to declare that licenses should not be issued at all to unincorporated companies; and then, in general terms, make it penal for an agent to transact business for any insurance company not entitled by law to receive a license, or to carry on business in this state. Our conclusion, therefore, is that the penalty prescribed in the second paragraph of the ninth section of the act for rendering the services therein mentioned to "any insurance company" is not applicable unless the company is one which has been chartered under the laws of this or some other state or of a foreign government, and this conclusion seems to be sustained not only by the reasons above stated, but is also borne out by the context of the section last mentioned. The following is a copy of so much of that section as is material to the purpose in hand: "That any person who solicits in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other state or foreign government, or who takes, or transmits, other than for himself, any application for insurance, or any policy of insurance to or from such company, or agent of the same, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine, or inspect any risk at any time, or receive or collect or transmit any premiums of insurance, or make or forward any diagram of any building or buildings, or do and perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf

of any such company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken. Any person, who shall do or perform any of the acts or things mentioned for any insurance company, or agent of said company, without such company having first received a certificate of authority from the insurance commissioner of this state, as required by law, shall be guilty of a misdemeanor, and, on conviction in any court of competent jurisdiction, shall be punished as provided by section 4310 of the Code of Georgia, and shall also pay a sum equal to the state, county and municipal taxes and licenses required to be paid by insurance companies legally doing business in this state; and it is hereby made the duty of the insurance commissioner to see that all violators of the provisions of this section are prosecuted." It will be observed that the first paragraph undertakes to prescribe who shall be regarded as an agent of an insurance company chartered by the laws of this state or some other state or foreign government, and makes no allusion whatever to an agent of any insurance company of any other kind. The words "such company," "any such company," "any such insurance company," "any such company," and "such insurance company," used in the order stated in the paragraph designated, necessarily refer to an incorporated insurance company of some kind. This will be obvious from a reading of the paragraph. The next paragraph provides that "any person who shall do or perform any of the acts or things mentioned for any insurance company" shall be guilty of a misdemeanor, and, on conviction, shall be punished, etc. It will be observed that in the second line of this paragraph the use of the word "such" before the word "company" is omitted. While it is true that the words "any insurance company" are beyond doubt of themselves sufficiently general to cover all insurance companies, whether incorporated or not, they must be construed with reference to the context, and also with due regard to the general scope and purpose of the act. All of the section preceding the words last quoted was indubitably intended to be applicable to agents of incorporated companies only; and the language following these words shows, we think, conclusively that the general assembly intended to make penal the acts of those persons alone who were agents of insurance companies which the law required should obtain certificates of authority from the insurance commissioner of this state, but which had failed to do so; and these companies, as we have seen, could, under the provisions of the act, be incorporated companies only. It therefore seems free from all doubt that the words "any insurance company" must be construed to

mean any insurance company having a charter.

The tenth section of the act provides that "any insurance company not incorporated or organized under the laws of this state, desiring to transact business in this state," shall appoint an agent upon whom service can be perfected; and we think that the words just quoted were intended to apply exclusively to incorporated insurance companies, and not to foreign companies having no charter. The proviso to this section declares that its provisions "shall not be construed to alter or amend the laws now of force in this state relative to bringing suits and serving process on foreign corporations doing business in this state." As no reference whatever is here made to foreign companies other than corporations, we are strengthened in the opinion above expressed that in passing the act in question the general assembly did not have in contemplation at all insurance companies which were not incorporated. The evidence in this case showed that the "Guarantee and Accident Lloyds" is a voluntary, unincorporated association, consisting of 100 natural persons. As has been seen, there is no provision of law for granting a license to such a company authorizing it to transact insurance business in this state, nor is there any statutory authority for it to transact business without a license. Nevertheless we are fully satisfied that a person who, as its agent, assists it in conducting its business, is guilty of no criminal offense. We think this conclusion follows legitimately from what has been said, and, in view of the rule that criminal statutes must be strictly construed, there is scarcely any room to doubt its correctness. In our judgment, the whole difficulty arises from the fact that the attention of the general assembly had not been called to the question of dealing with unincorporated insurance companies; otherwise the matter would doubtless have received the proper attention and direction, and we should find in the act now before us such provisions in regard to companies of this kind as the lawmaking power deemed it expedient to make. Whether such companies should be prohibited from transacting business altogether, or, if not, upon what terms and under what penalties they should be permitted to do so, are questions purely for the general assembly. As a court, we can do nothing but enforce the law as we find it. In the present case we are therefore constrained to hold that the conviction of the accused was contrary to law. Judgment reversed.

COCHRAN v. STATE.

(Supreme Court of Georgia. July 3, 1893.)

KIDNAPPING — FEMALES FOURTEEN YEARS OLD — MARRIAGE.

A female at 14 years of age being by law as competent to contract marriage as one

of 18 years or upwards, and the validity of her marriage not depending in any degree upon the consent of her parents or guardians, it is not kidnapping, under section 4368 of the Code, for a man not himself under any disability, to lead, take, or carry her away from her parents, against their will, and without their consent, for the bona fide purpose of marrying her, which marriage is actually consummated, the girl herself freely consenting, and no force or fraud being used by the man either against her or her parents.

(Syllabus by the Court.)

Error from superior court, Putnam county; W. F. Jenkins, Judge.

E. A. Cochran was convicted of kidnapping, and brings error. Reversed.

H. A. Jenkins and S. T. Wingfield, for plaintiff in error. H. T. Lewis, Sol. Gen., Jos. S. Turner, and Hines, Shubrick & Felder, for the State.

SIMMONS, J. Under section 1699 of the Code, a female 14 years of age is capable of contracting a valid marriage, and, although the law prescribes a penalty for issuing a license for the marriage of a female under the age of 18 years, unless the written consent of the parent or guardian of the female is produced, it has never, so far as we are informed, been held that the marriage of a female in this state between the ages of 14 and 18 was in the least degree invalid because the license authorizing the marriage had been issued without observing the requirement above mentioned. In other words, a female more than 14 years of age is just as capable of entering into a contract of marriage as an adult, male or female, is of making any kind of a contract; and when she does, freely and voluntarily, make a contract of marriage, it is as valid and as binding upon her as would be such a contract by a woman more than 21 years of age. To the general disability of minors to make binding contracts of any kind, the above-cited section of the Code makes a clear and distinct exception. It follows, therefore, that a female who has arrived at the age of 14 has a legal right to marry. The law imposes a check upon the exercise of this right by providing the safeguard already mentioned with reference to the issuing of a marriage license, but the law does not declare that a marriage is void, or in any manner impeach its validity, when the young woman, notwithstanding the unwillingness of her parents or guardian, and because of a neglect by the ordinary to perform his duty in the premises, succeeds, nevertheless, in getting married. It appeared in the present case that the accused, without practicing any fraud or force, either upon the young lady or her parents, and without any malice, obtained the free and voluntary consent of the lady to run away and marry him; that his only purpose in taking her away was to marry her, and that the marriage was actually consummated. Under these circumstances, we are quite sure that his conviction of the offense of

kidnapping, under section 4308 of the Code, was illegal and wrong. That section provides that: "If any person shall forcibly, maliciously, or fraudulently lead, take, or carry away, or decoy or entice away, any child under the age of eighteen years, from its parents or guardian, or against his, her, or their will or wills, and without his, her, or their consent or consents, such person so offending shall be indicted for kidnapping," etc. The terms of this section are very broad, but, in our opinion, they do not cover, nor were they intended to cover, a case of this kind. It may be that the marriage in question was unwise and injudicious. Certainly, it is usually safe for a female of this tender age to respect the wishes and be guided by the judgment of her parents in a matter so serious; but, as the law recognizes the validity of a marriage based upon her consent alone, even when opposed to theirs, we are unable to perceive how the other contracting party can be made a felon by entering with her into a contract which she has, as we have seen, a perfect legal right to make. Since the law makes the child capable of giving her consent to a marriage, this consent must count for something, unless it is procured by improper means. It is fair and legitimate for a man to gain her consent to marry him if he can do so without force or fraud. She would be incapable of consenting to go off with him to work for him, or for purposes of prostitution, or for any other purpose except marriage alone. As to marriage, the law makes her a grown woman, and deals with her as such. It is not for us to say whether or not the law as it now stands sufficiently protects young girls from the consequences of their own folly, or from the wooings of lovers who, though more than sufficiently ardent, are not calculated to make desirable husbands. If any change in the law be needed, it is a matter for the consideration of the lawmaking power. Judgment reversed.

WHITE et al. v. HOLLAND et al.

(Supreme Court of Georgia. June 26, 1893.)

CONSTRUCTION OF WILL—DESCRIPTION OF DEVISEES—PAROL EVIDENCE.

1. Under a will by which, in one item, the testatrix, a married woman, devised and bequeathed to her husband certain property for his life, and after his death the same to be divided equally between D., H., and the lawful children of G., and by another item directed that the remainder of her property be sold, and the proceeds equally divided between D., H., and the lawful children of G., the children of G., in the distribution of the estate, took per stirpes, and not per capita; it appearing by ~~abundant~~ evidence that D. and H. were sisters, and G. a brother, of the testatrix, all in life and all having children when the will was executed, that the testatrix was very fond of her sisters and of their children and the children of her brother, and had a favorite among the children in each of the three families, and

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that she did not desire her brother should have any of her property, both on account of his financial embarrassment and of certain conduct in his past life.

2. Parol evidence was admissible to show the circumstances surrounding the testatrix at the time her will was made, in order to arrive at a correct construction thereof.

(Syllabus by the Court.)

Error from superior court, Jackson county; N. L. Hutchins, Judge.

Bill by M. E. White and others against J. H. Holland, executor of the will of Mary Gilleland, and others, to construe the will. From the decree complainants bring error. Affirmed.

W. I. Pike, for plaintiffs in error. J. B. Estes, for defendants in error.

LUMPKIN, J. 1. The substance of the material portions of Mrs. Gilleland's will, and of the evidence showing the circumstances surrounding the testatrix when the will was made, is set forth in the first headnote. We are of the opinion that the testatrix intended that each of her sisters should have one-third, and the children of her brother the remaining one-third, of the property, which was to be divided among them. If we had nothing to guide us but the will itself, the question presented would by no means be free from difficulty, but in the light of the extrinsic evidence there can be little doubt of the correctness of the conclusion we have reached. In 2 Jarm. Wills, p. 750, the doctrine is laid down that where there is a devise or bequest to a given person and the children of another person standing in the same relation to the testator, as to "my son A. and the children of my son B.," A. takes only a share equal to that of one of the children of B.; but the author also says: "This mode of construction will yield to a very faint glimpse of a different intention in the context." See, also, Schouler, Wills, § 540. If the general rule of construction be as stated by these text writers, it would seem that it ought also to yield when there is evidence outside of the will going to show a different intention on the part of the testator. This certainly should afford as good reason for departing from the usual mode of construction as would "a very faint glimpse of a different intention in the context" of the will itself. In the present case it appeared that each of the sisters of the testatrix had a number of children, that she was very fond of her sisters, and also of their children and the children of her brother, and had a favorite among the children in each of the three families, and that she did not desire her brother should have any of her property, both on account of his financial embarrassment and of certain conduct in his past life. These things being so, and there being nothing in the will expressly showing an intention on the part of the testatrix to give the children of her brother an advantage over her sis-

ters, we think it a most natural conclusion that the testatrix intended that her sisters should be equal with the family of her brother in the distribution of her bounty. The fact that the brother of the testatrix was in life when her will was made, and that she excluded him from any benefit under it, in connection with the other facts mentioned, leaves scarcely any room to doubt that by the ruling of the court below, which we have affirmed, the precise result desired by the testatrix has been reached. This is exactly what should be done in construing every will, when it can be accomplished without doing violence to the plain and obvious meaning of its terms, or to some settled rule of law.

As will have been seen, we have, in deciding this case, considered not only the language of the will, but the allunde evidence mentioned, and have not ruled what construction should be given to the will considered by itself. It was strongly urged by the able counsel who appeared for the defendants in error that even in that event the same result should follow. In support of this view he cited *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. Rep. 695, in which there was a devise to Sarah Mousseau and the children of Leonora Pellertier, and this court held that these children took per stirpes, and not per capita. That case, however, is not precisely in point, because of the fact that Mrs. Pellertier was not in life when the will was made; and undoubtedly, in construing the will of David R. Dillon, this court laid some stress upon the presumption that, in the absence of anything in the will to the contrary, the testator intended that his property should go where the law would carry it by the rules of inheritance; which reasoning is not applicable to the case at bar. The ruling of this court in *Mayer v. Hover*, 81 Ga. 308, seems to sustain, in principle, the position of the counsel referred to, but it does not appear from the report of that case what were the surroundings of the testator in making his will, or whether or not any aid from them was invoked in construing it. *Risk's Appeal*, 52 Pa. St. 209, is precisely in point, and supports the contention that under Mrs. Gilleland's will, without reference to extrinsic facts, the children of the brother should take per stirpes. There are, however, respectable authorities to the contrary, and we do not deem it necessary in the present case to decide this question. We prefer to avail ourselves of the allunde facts, because by so doing we are the more certain of reaching the right conclusion.

2. It is well settled that parol evidence is admissible to show the circumstances surrounding a testator at the time of making his will, in order to arrive at a proper construction of its terms, when there is doubt of their true meaning and intention. This was distinctly ruled in *Fraser v. Dillon*,

supra, and will, we think, be accepted as sound law without further argument. Judgment affirmed.

EAST TENNESSEE, V. & G. RY. CO. v. KANE.

(Supreme Court of Georgia. June 26, 1893.)

DEPOSITION—PRESENCE OF WITNESS IN COURT—REJECTING EVIDENCE—HARMLESS ERROR—ACCIDENT AT RAILROAD SWITCH—LIABILITY FOR ACT OF DISCHARGED EMPLOYE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Where a nonresident witness for whom interrogatories had been sued out was in court at the time of the trial, it was error to permit the answers to the interrogatories to be read to the jury over objection of the opposite party, although the witness was in attendance upon the court at the instance of the latter, the witness being actually present when the answers to the interrogatories were offered in evidence.

2. It is not cause for a new trial that the court refused to allow certain questions propounded to witnesses by defendant's counsel to be answered, it not appearing what answers were expected, and in view of other evidence and of admissions in the declaration, no possible answers to these questions being substantially material.

3. Upon the trial of an action against a railroad company for a homicide resulting in part from the misplacement of a switch, it was not error to refuse to allow the defendant to show "the common experience of railroads" in getting back switch keys from their employes, and that all railroads have great difficulty in keeping up with such keys and having them returned by discharged employes because of their real or alleged loss. Nor was there error in refusing to allow defendant to prove "the custom or usage of railroads in reference to providing a watchman for each of their switches," defendant expecting to prove "that the general custom was not to provide a watchman for such switches."

4. Though one of the main issues was whether or not the engineer for whose homicide the action was brought was guilty of negligence in bringing about the collision which resulted in his death, there was no error in refusing to allow the defendant to prove that he "was habitually reckless in running freight trains at excessive speed, and running too fast over switches," the witness' knowledge not extending to more than two or three instances.

5. The defendant may invoke and use allegations beneficial to himself made in plaintiff's declaration without offering the declaration itself in evidence, or otherwise proving the admissions contained in such allegations, and no unfavorable inference can properly be drawn against a corporation because of a failure to call as witnesses its own employes to prove the existence of facts shown by such admissions.

6. The mere fact that a railroad company fails to recover from a discharged employe a key which controls the turning of a switch is not of itself sufficient to make the company liable for the criminal act of such employe in maliciously misplacing a switch for the purpose of wrecking a train. The company is not bound to anticipate that, purely out of revenge for his discharge, a former employe might secretly commit so heinous a crime against it and the public. Nor is the company bound to exercise constant vigilance to prevent all persons whatsoever not in its employ from having the means or opportunity of tampering with its switches or its tracks. Whether or not in any particular case the company exercised the proper degree of care in protecting its switches from interference is a question for the jury, in determining which they may look to the evi-

dence to ascertain if there was any reason for the company to apprehend such interference, and, if so, whether, under all the circumstances, it used due diligence in endeavoring to prevent the same. In its charge to the jury, the court should not state or assume that a given state of facts would show negligence on the part of the company in the respect indicated.

7. A prima facie case of negligence on the part of the defendant, which the plaintiff's declaration covers, cannot be effectually answered by a given state of facts, if those facts involve a breach of diligence by the defendant in a material respect; and such breach of diligence, if shown, may be urged by the plaintiff, not to recover upon, but to defeat the defendant's justification, although no reference to it is made in the plaintiff's pleadings.

8. According to the undisputed facts, the plaintiff's husband was guilty of negligence in running his train in violation of the rules of the company, of which he had knowledge, and which he had agreed, upon entering its employment, to obey. For this reason, and because of errors committed by the court, there should be a new trial; and if, upon the next hearing, the evidence is substantially the same, there should be a verdict for the defendant.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Annie May Kane against the East Tennessee, Virginia & Georgia Railway Company for the death of plaintiff's husband. Judgment for plaintiff. A new trial was denied, and defendant brings error. Reversed.

Hill, Harris & Birch, for plaintiff in error. Lanier, Anderson & Anderson, for defendant in error.

LUMPKIN, J. 1. Section 3878 of the Code declares that if the state of facts on which a commission to take the interrogatories issued ceases to exist before the trial of the cause, and the witness is then accessible by subpoena, the testimony taken on interrogatories cannot be used. It follows, necessarily, that if the witness is accessible by being actually present in court at the trial when his testimony by interrogatories is offered, his answers to the same cannot be admitted, but the witness should be examined in person. It does not make the slightest difference that his attendance upon the court was at the instance and request of the opposite party. If, because of this fact, the party who had caused the interrogatories to be sued out does not desire to introduce the witness, it is his right to decline to do so; but if he wishes the testimony of the witness to go before the jury, he must put the witness on the stand. Testimony taken by interrogatories is, at best, unsatisfactory and imperfect, and it is the policy of the law to dispense with this method of securing evidence whenever practicable. Of course, if answers to interrogatories have already been read to the jury, and the witness afterwards comes into court, this would not require that the answers be ruled out or withdrawn. Nor must anything here said

be construed to prevent the introduction of answers to interrogatories for the purpose of impeaching a witness when his testimony on the stand is in conflict with that which had been taken by commission. Nor is the rule announced applicable to female witnesses, for they enjoy at least a qualified privilege as to attending court.

2. The evidence showed that a violent collision had taken place between the engine which the plaintiff's husband was running as engineer, and certain box cars which were standing upon a side track. The wreck resulting from this collision was of such character that there could be no possible doubt the engine must have been running at a very rapid rate of speed. Counsel for the railway company elicited from certain witnesses a full description of the wreck and its consequences, and then asked of each "whether or not a collision of that violence could have taken place unless the engine had been running at a very high rate of speed." Upon objection by plaintiff's counsel, the court refused to allow these questions to be answered; and, although it was not stated by counsel propounding the question what answers were expected, the court, perhaps, ought to have permitted the answers to go to the jury. It being manifest, however, that the engine was running very rapidly, and the plaintiff's declaration admitting this fact, the refusal of the court to allow the questions to be answered would certainly be no cause for a new trial.

3. The defendant desired to show "the common experience of railroads" in getting back switch keys from their employees, and, in this connection, to prove that all railroads have great difficulty in keeping up with such keys, and recovering them from discharged employees. It also sought to prove "the custom or usage of railroads in reference to providing a watchman for each of their switches," and "that the general custom was not to provide a watchman for such switches." The court rejected all of this testimony, and, in our opinion, did so properly. Testimony as to the common experience, customs, or usages of railroads, without reference to whether they are wisely or badly managed, or to their particular location or surroundings, or to peculiar circumstances which, in any given instance, would tend to illustrate the diligence or negligence of a company in recovering or failing to recover its switch keys, or in guarding or failing to guard its switches, would be too vague, uncertain, and indefinite to aid a jury in determining in a case on trial whether or not the railroad company was diligent or negligent in these respects. No two cases are exactly alike, and, the facts and circumstances in each being different in greater or less degree from those arising in others, the better and safer rule is to allow the jury, as to questions of the kind

presented, to determine every case upon its own individual merits, and in the light of its own particular facts. In some cases the failure to recover a switch key or to have a switch guarded, might involve little or no negligence whatever. In other cases, such failure might amount to very gross negligence. This being so, to permit evidence as to the common experience and general custom of railroads in such matters would probably be misleading, and certainly would have little weight in a given case in arriving at a fair and just conclusion upon the question of negligence.

4. The main defense relied upon was that the engineer for whose homicide the action was brought was himself guilty of negligence in bringing about the collision which resulted in his death, by running his engine at too great a speed, and in violation of the company's rules. In support of this defense the defendant offered to prove by one McCrary that the deceased was habitually reckless in running freight trains at excessive speed, and in running too fast over switches. It appeared from McCrary's testimony that he had been conductor of a freight train on defendant's road between Macon and Brunswick, on which Kane was engineer, and that Kane had pulled him two or three times on a local freight. Under these circumstances, McCrary could hardly swear with accuracy to the habitual recklessness of the deceased. The admissibility of testimony of this kind is, at best, very doubtful. While in *Railway Co. v. Flannagan*, 82 Ga. 579, 9 S. E. Rep. 471, this court held that it was not error to receive evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell, Chief Justice Bleckley, on pages 588, 589, 82 Ga., and page 472, 9 S. E. Rep., characterized this evidence as being of doubtful admissibility, and stated that the authorities upon the question were in conflict, citing quite a number on both sides. The testimony offered in the case at bar is by no means so strong or pertinent as that in *Flannagan's Case*; so, upon the whole, we conclude there was no error in rejecting it. In this connection, see, also, *Railroad Co. v. Newton*, 85 Ga. 517, 11 S. E. Rep. 776, and *Railroad Co. v. Kent*, 87 Ga. 402, 403, 13 S. E. Rep. 502.

5. It would be a long step forward in judicial procedure if each party was required to admit every allegation in the pleadings of the other party which he was unwilling to deny upon oath, and thus relieve his adversary of the necessity of proving matters concerning which there is no real contest, and saving the courts much time, vexation, and trouble. If this be so, certainly a party should be relieved from proving that which his adversary distinctly alleges. No sensible reason occurs to us why the defendant may not avail himself of all allegations in the

plaintiff's declaration, without formally tendering the declaration in evidence, or otherwise proving the admissions it contains. The declaration being the very foundation of the plaintiff's case, he certainly should be bound by whatever he chooses to allege therein; and he can have no just reason to complain if, in the progress of the trial, his own assertions be taken as true. Nor can we see any reason for requiring the defendant to offer the declaration in evidence. It is usually read to the jury, or its contents are stated in their hearing, and they have it before them in their deliberations. It is therefore available for all proper purposes, whether it be distinctly offered as evidence against the plaintiff or not. As far back as 9 Ga., in *Peacock v. Terry*, (page 137,) the principle for which we are contending was distinctly stated in the following language: "Facts alleged positively in a bill are constructive admissions in favor of the defendant, and need not be proven. The complainant cannot deny them, even if they are not true, but must recover according to the case he makes upon the record." And Judge Nisbet makes the matter as clear as daylight on pages 149, 150, of the same volume. In the present case the plaintiff's declaration alleged that her husband was running his engine at a high rate of speed, and the defendant consequently had a right to rely upon this allegation as an admitted fact, and no unfavorable inference could, therefore, be drawn against the company because of any failure on its part to call as witnesses its own employees to prove this fact.

6. While a railroad company is bound to exercise ordinary diligence to recover its switch keys from discharged employees, the mere failure to do so in a particular instance would not, per se, make the company liable for the consequences of a criminal misplacement of a switch by a discharged employee who had retained in his possession a key which enabled him to do the mischief. What would be ordinary diligence in endeavoring to recover a switch key from one no longer in the company's employ must necessarily vary according to the facts and circumstances surrounding each particular case. Very slight diligence would be "ordinary" in the absence of any reason to anticipate or fear that the key would be improperly used by the person who was allowed to retain it. If there was any reason to excite such fear, the company would be under greater obligations either to get back the key, or else guard all switches, an interference with which was to be anticipated; and the greater the reason for apprehending such interference, the greater should be the care and diligence of the company to prevent it. No fixed and unbending rule could be laid down which would be applicable to every case. It is simply one of those things which a jury

must determine in each case in the light of its own particular and peculiar facts and circumstances. This much, however, may be regarded as well settled, viz. that, in the absence of any reason other than the mere fact of his discharge from its service, a railway company is not bound to anticipate that a former employee, purely out of revenge for his discharge, will secretly commit so heinous a crime against it and the public as to maliciously misplace a switch for the purpose of wrecking a train. In *Keeley v. Railway Co.*, 47 How. Pr. 256, the evidence showed conclusively that there was no negligence or want of proper care on the part of the defendant in the management of its road or in the running of its cars at the time of the accident, but was clear and convincing that the accident was caused solely by the misplacement of a switch by some evil-disposed person, not connected with the road, shortly preceding the arrival of the train in the nighttime; and it was accordingly held that a nonsuit was proper. This case is cited approvingly in *Bish. Non-Cont. Law*, § 530. We do not think a railroad company is bound, under all circumstances, and at all times, to maintain constant vigilance to prevent all persons whatever not its employ from having the means or opportunity of tampering with its switches or its tracks. In *Keeley's Case*, supra, the court does not discuss the duty of the company to keep a constant and unremitting watch against trespassers, but seems to take it for granted that usually this would be impossible, and this we think is undoubtedly true. As stated above, the only practicable way of ascertaining whether or not, in any particular instance, the company exercised the proper degree of care in protecting its switches from interference, is to leave the question to a jury; and in determining it they may look to all the surrounding circumstances to ascertain if there was any reason for the company to apprehend such interference, and, if so, whether, in the given instance, it used due diligence in endeavoring to prevent the same. In the case with which we are now dealing, the charge of the court, in effect, made the failure of the company to recover a switch key which had been suffered to remain in the hands of a discharged employe, if ordinary diligence had not been used by the company to get the key back, a ground of recovery. This charge assumed that the mere failure to recover the key was the cause of the injury, and was therefore erroneous. Even granting that such failure amounted to a breach of ordinary diligence, it might not, of itself, have been sufficient to authorize a recovery. It was still a question for the jury, and not for the court, whether the negligence of the company, if negligent at all, in failing to recover the key, was, under the circumstances, the real cause of the injury.

7. One ground of the motion for a new trial assigned as error the refusal of the court to charge the following written request: "The plaintiff is confined to the allegations of negligence made in the petition. There is no allegation of negligence respecting the company's leaving any key in the possession of any employe, and you cannot find for the plaintiff on that ground." It is true that the plaintiff did not seek to recover because of negligence on the part of defendant in improperly leaving one of its switch keys in the custody of a discharged employe; but because of the alleged negligent misplacement of a switch which caused the death of her husband. The plaintiff proved that the switch was misplaced, and that such misplacement was the cause of the collision. The defendant sought in reply to show that the misplacement of the switch was not due to its fault, but that the mischief was done by an evil-disposed person, not in its service. The plaintiff, in turn, endeavored to meet this defense by proving that the company was negligent in affording the evil-disposed person an opportunity to carry out his designs, and in not taking the proper steps to prevent their successful accomplishment; in other words, the plaintiff sought to break down the defense of the company by showing that the facts alleged and proved by it involved a breach of diligence on its part in a material respect. It is quite clear to our minds that the plaintiff had a right to urge such breach of diligence, not as a distinct basis of recovery, but for the purpose of defeating the defendant's justification, and this the plaintiff could do although she had not in her pleadings made any special reference to this particular negligence on the part of the defendant. If the charge requested had been given, it might have misled the jury, and resulted in depriving the plaintiff of this right, and was therefore properly refused.

8. The motion for a new trial contained many grounds. We have ruled upon and disposed of such of the same as bear materially upon the real merits of the case. The questions presented by those not mentioned will most probably not arise upon the next trial. According to the plaintiff's own allegations in her declaration, her husband was running his train at a high rate of speed at the time of the collision, and the undisputed evidence is, he was running it in direct violation of positive rules of the company, of which he not only had knowledge, but which he had expressly and solemnly, upon entering the service of the company, agreed to obey. The following are such extracts from the rules introduced in evidence as are pertinent: "All trains will approach stations with great care, expecting to find the main track occupied between the station limits, (switches, when no posts are up, or other point designated.) The responsibility for accident between limit posts, (or

switches,) or at fuel and water stations, will rest with approaching trains." "All trains must reduce speed, and run with great care, after rains and storms, while passing switches, through tunnels, and crossing long bridges." "When approaching stations and sidings, enginemen must observe that switches are set right, and always look out for signals." "Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their trains, and must take every precaution for the protection of their trains, even if not provided for by the rules." The plaintiff's husband being an employee of the company, and having been guilty of negligence in bringing about the catastrophe which resulted in his death, she was not entitled, under the facts as they appear of record, to a recovery. For this reason, and because of errors committed by the court, a new trial is ordered; and if upon the next hearing the evidence is substantially the same, there should be a verdict for the defendant. Judgment reversed.

EAST TENNESSEE, V. & G. RY. CO. v. DANIEL.

(Supreme Court of Georgia. July 10, 1893.)

CREDIBILITY OF WITNESS—EVIDENCE—STOCK-KILLING CASES—DILIGENCE OF RAILROAD COMPANY—INSTRUCTIONS.

1. Where a witness, by way of accounting for his presence at the scene of the killing of an animal, states that immediately before going there he made a particular purchase at a certain store, evidence is admissible, in behalf of the opposite party, showing or tending to show that he made no such purchase on the occasion referred to. While this fact is not directly material on the circumstances of the killing, it is indirectly material, because it contradicts the witness as to the train of events which led him to be present, and thus tends to discredit him as to the fact of his presence.

2. A charge of the court which might be understood by the jury as requiring of a railroad company all possible care to avoid killing live stock by the running of its trains, although the charge be, in other parts of it, correct, on the measure of diligence required of such companies, is cause for a new trial, in a very doubtful case.

(Syllabus by the Court.)

Error from superior court, Henry county; J. S. Boynton, Judge.

Action by Albert Daniel against the East Tennessee, Virginia & Georgia Railway Company for the killing of a mule. Judgment for plaintiff. Defendant brings error. Reversed.

Dorsey, Brewster & Howell and Bryan & Dicken, for plaintiff in error. E. J. Reagan, for defendant in error.

SIMMONS, J. 1. Daniel sued the railway company for damages on account of the killing of his mule. The defendant denied that the mule was killed by its train. The evidence tending to prove that it was killed by

the defendant's train was altogether circumstantial and presumptive, except that of one Lofton, who testified that he saw the mule when it was struck by the train and knocked from the track. Upon his cross-examination he was interrogated as to where he lived, what his business was, and why he happened to be present at the time of the killing of the mule. In answer to these questions he stated, among other things, as corroborative of what he had testified as to his presence at the time of the injury, that he left home, and went to town, for the purpose of purchasing some tobacco; that he went to Mr. Copeland's store, and purchased it on credit, and on his way home he saw the accident. The defendant proposed to prove by Copeland that Lofton did not go to his store and purchase tobacco at the time referred to. This testimony was excluded by the court, and its exclusion was made one of the grounds of the defendant's motion for a new trial. While the fact which the witness proposed to prove by Copeland was not directly material on the circumstances of the killing, it was indirectly material, because it contradicted the witness as to the train of events which led him to be present, and thus tended to discredit him as to the fact of his presence. If testimony had been offered by the defendant to the effect that this witness was not present at the killing; that he was not in town, or had not left home, that day,—it is clear that no valid objection could have been made to it. And when the witness undertook to corroborate his story, and show his presence at the killing, by stating all his movements during the morning of the killing, and that his going to Mr. Copeland's store to buy tobacco had led him to be present, we think it was proper for the defendant to disprove the statement of the witness on this point. Although it was a collateral issue, it was a matter affecting his credit, and perjury could be assigned on it. Bishop says: "The credit of a witness is always an element adapted to vary the result of the trial of a fact. Therefore, it is a collateral issue therein. And it is perjury to swear corruptly and falsely to anything affecting such credit as that he has not made a specified statement material in the case; that he has not expressed hostility to the defendant; that he has never been in prison." 2 Bish. Crim. Law, (8th Ed.) § 1032. And again: "Where the evidence is simply to explain how the witness knew the thing he states, as where, testifying to an alibi, he mentions the party's residence and habits to show he could not be mistaken on the main point, since this incidental matter may incline the jury more to credit the substantial, it will sustain a conviction for perjury, if false." Id. § 1037.

2. The diligence which our Code, § 3033, requires of railroad companies in the running of trains is ordinary diligence. It was therefore error for the court to charge the

jury, where it was alleged that the defendant company had killed a mule, that the evidence must show that the officers and agents of the defendant in charge of the train exercised all possible care in their effort to avoid it. This charge required of the company a greater degree of diligence than the law requires, and, in a very doubtful case on the facts, was sufficient to authorize a new trial. Judgment reversed.

YOUNG v. WALDRIP et al.

(Supreme Court of Georgia. July 10, 1893.)

EXECUTION—CLAIM BY THIRD PERSON—LIABILITY ON FORTHCOMING BOND—ACT OF GOD.

The falling of a mule into a post hole overgrown and concealed by grass, if this occurred on the premises of the person chargeable with the care of the mule, is not the act of God, and will not relieve a bona fide claimant of the property from producing the same in fulfillment of his contract in a forthcoming bond given under the claim laws of this state. In an action upon the bond, the burden of proof being upon the defendants to account fully for the nonproduction of the property, the finding of the court in this case was unwarranted; the evidence not showing on whose premises, and under what circumstances, in detail, the mule was killed. A plea alleging the death of the mule without negligence or fault of the claimant was insufficient, and should have been stricken on demurrer, there being no allegation that the death was caused by the act of God.

(Syllabus by the Court.)

Error from city court of Cartersville; Shelby Attaway, Judge.

Action by P. M. B. Young against Fannie Waldrip and others on a forthcoming bond. Judgment for defendants. Plaintiff brings error. Reversed.

John W. Akin, for plaintiff in error. Neel & Swain, for defendants in error.

SIMMONS, J. Young obtained a judgment against J. C. Waldrip, and had it levied upon a mule, as the property of the defendant. Mrs. Waldrip claimed the mule, and gave a forthcoming bond to the sheriff, whereby she agreed to produce it on the day of sale, if it should be found subject. Upon the trial of the claim case the property was found subject, and it was readvertised by the sheriff. On the day appointed for the sale the claimant failed to produce the mule. Suit was brought upon the forthcoming bond, and a plea was filed, alleging that the mule "did, after the giving of said bond, die, without any fault or negligence upon the part of either of the defendants, and therefore they were unable to produce said mule to the sheriff, as stipulated in said bond; and these defendants say that their inability to produce said mule was on account of his death, and that this was sufficient in law to excuse and free them from their obligation to produce it under the bond." To this plea the plaintiff demurred on the ground that it set out

no legal defense to the action. The demurrer was overruled, and the court, acting by consent of the parties, without a jury, tried the case, and decided that the claimant was not liable. To this ruling and finding the plaintiff excepted. All that appears from the record as to the manner of the mule's death is the following: "Defendants proved by J. C. Waldrip that he was the husband of Mrs. Frances Waldrip, and that the mule was killed by having its leg broken, by stepping in a post hole which was concealed by an overgrowth of grass, from which the mule died, without fault or negligence on his part or on the part of his wife, and the injury to the mule occurred without fault of himself or claimant." When property is levied upon, and a claim thereto is filed, and a forthcoming bond given, and the claimant takes the property into his possession, he is responsible for its care and safe-keeping; and, if it is injured or wasted while in his possession, it is at his risk. If it is a live animal, and dies while in his possession, he is responsible for its value, unless he can show that its death was caused by the act of God, and is in no wise the result of his own conduct. Some authorities hold that even the act of God will not excuse him; but, analogizing an action for the recovery of damages on a forthcoming bond to other actions for the recovery of damages where property claimed dies or is destroyed or injured pending the litigation, we are inclined to think that the act of God should relieve a bona fide claimant from the production of the property, or from the payment of damages on account of his failure to produce it. Section 3078 of the Code declares that "the death or destruction, or any material injury to the property, pending the litigation, shall be no defense to a mere wrong-doer. If the defendant is a bona fide claimant and the injury arises from the act of God, and (is) in no wise the result of defendant's conduct, the jury may take the same into consideration," etc. We are clear that nothing else than this will, or ought to, excuse a claimant for the nonproduction of the property according to the terms of the bond. A plea, therefore, which alleges that the animal, for the forthcoming of which the bond was given, died without fault or negligence on the part of the claimant, but which does not allege that its death was produced by the act of God, is defective, and should be stricken on demurrer. The falling of a mule into a post hole overgrown and concealed with grass, if this occurred on the premises of the person chargeable with the care of the mule, is not the act of God, and will not relieve a claimant from producing the mule in fulfillment of his contract in the forthcoming bond. The evidence in this case does not show upon whose premises and under what circumstances, in detail, the mule was killed. The burden of proof being upon the defendants to account fully for the nonproduction of the property,

the finding of the court in favor of the defendants was unwarranted. Judgment reversed.

HEMATITE MIN. CO. v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. July 17, 1893.)

CARRIERS—RECEIPTS FOR GOODS—AUTHORITY OF AGENT—EVIDENCE—STATEMENTS OF AGENT—MEMORANDA TO REFRESH MEMORY.

1. The general authority of a railway agent to give receipts for goods delivered for transportation extends only to such receipts as are given at the time the goods are delivered, or so near thereto as to be, according to business usage, a part of the *res gestae*. Unless special authority be shown, receipts executed by the agent several months after the transaction—more especially if litigation was then contemplated, or had become probable—are not evidence to affect the company.

2. Information furnished a witness by an agent of a railway company as to the contents of a record kept by the company is inadmissible in evidence against the company, when it appears that the information given related to transactions long past, and it does not appear that the furnishing of such information was within the scope of the agent's employment.

3. Although the plaintiff, while a witness on the stand, testified generally that he remembered certain facts stated by him, and that he used certain books and memoranda to refresh his memory, (the memoranda, but not the books, being then before him,) his evidence as to the numbers and destinations of certain cars, and the dates of their shipment, was inadmissible; it further appearing from his testimony that he could state none of these particulars without referring to the books, or to the memoranda he had taken therefrom, and that the entries in the books were sometimes written by himself, and sometimes by another in his employ; it being also apparent that at the time of testifying the witness was unable to state which entries were made by himself, and which by the other.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the Hematite Mining Company against the East Tennessee, Virginia & Georgia Railway Company for failure to deliver freight. Judgment for defendant. Plaintiff brings error. Affirmed.

J. F. Hillyer, for plaintiff in error. McCutchen & Shumate and Hoskinson & Harris, for defendant in error.

LUMPKIN, J. 1, 2. The plaintiff sought to recover damages for an alleged failure to deliver certain car loads of ore claimed to have been received by the railway company for transportation. If the agent of the company knew personally of the delivery of the ore, he would have been a competent witness to prove the fact, and should have been introduced for this purpose. Instead of doing this, however, the plaintiff undertook to make out its case, in part, by tendering receipts for the ore executed by this agent many months after the transaction. The rejection of this evidence is one of the errors complained of. In our opinion, the ruling

of the court below was right. To render such receipts admissible, it must affirmatively appear that they were given at the time the goods were delivered for transportation, or so near thereto as to be, according to business usage, a part of the *res gestae*; otherwise they would be the mere declarations of the agent, not made *dum fervert opus*, and therefore not binding upon the company he represented. Under such circumstances the agent of a railway company has no authority to bind it by admissions of this kind, because it is manifestly not within the scope of his authority, as agent, to make them. It would be very dangerous to receive in evidence against a principal—whether an incorporated company or otherwise—declarations of an agent, made long after the business in which the agent was acting had been transacted. Of course, the individual is bound by his own admissions deliberately made, even if they relate to a matter long past. This is so because he is supposed to have in mind at all times his own interests, and, presumably, he will admit nothing against his interests which is not the truth. The policy of the law is different with reference to agents, and they cannot be allowed to take away, either in writing or otherwise, the rights of their principals, concerning a matter with which such agents have long since ceased to have any connection whatever. If, instead of offering written receipts, the plaintiff had offered the parol declarations of the railway company's agent, it is manifest that such sayings would have been properly excluded as mere hearsay. The fact that these declarations were reduced to writing, and signed by the agent, does not in the least change the principle. Of course, receipts obtained at the same time, not signed by the agent at all, but which the plaintiff proposed to show he intended to sign, but inadvertently omitted to do so, could not be received. The case before us affords an apt illustration of the wisdom of the rule above stated. The receipts in question were procured from the agent after the present litigation was in actual contemplation, and for the very purpose of being used as evidence in this case. It would have been better, and more in accord with the rules of evidence, to put the agent himself on the stand as a witness, and thus allow the company an opportunity, on cross-examination, to sift the correctness of his statements, and to test the reliability of his sources of information or recollection,—a substantial right, of which the company would have been deprived if the receipts themselves had been received in evidence. What has already been said with reference to the receipts offered is also applicable to the effort of the plaintiff to put in evidence, by introducing its own attorney as a witness, certain information which had been furnished the latter by an agent of the railway company at a point other than the alleged place of shipment, as to the contents

of a record kept by the company in one of its offices at that point; it appearing that the information thus given related to transactions long past, and there being nothing to show that it was within the scope of this agent's duty or authority to furnish such information, or even that he himself kept the record in question, or had then, or had ever had, any personal knowledge of the matters concerning which he spoke.

3. The plaintiff in this case, though its name would indicate it was either a corporation or a partnership, really consisted of but one natural person,—Linton Sparks. Having failed in every other way to make out his case, he offered himself as a witness, and undertook to testify from his own personal knowledge to the delivery of certain car loads of ore to the railway company. Although he testified, in general terms, that he remembered the numbers by which these cars were identified, their destinations, and the dates of their shipment to be as stated by him on the stand, and that he used certain books and memoranda to refresh his memory, it is apparent he did not in fact have any definite or distinct recollection concerning the matters about which he spoke. He admitted on cross-examination that without the memoranda "he could not remember numbers, dates, or destinations of any particular car." The books which he stated he used to refresh his memory were not before him while testifying, and he relied solely upon memoranda taken therefrom. It further appeared from his testimony that the entries in the books were sometimes made by himself, and sometimes by another in his employ, and he was unable to state which entries had been made by himself, and which by the other. It is therefore manifest that, deprived of his memoranda, the witness would have been utterly unable to state anything definite concerning the alleged shipment of the cars, and that his professed recollection of the transaction really amounted to nothing. He was simply undertaking to swear to the correctness of information he himself had derived solely by consulting certain books, and copying extracts therefrom. Of the reliability of the books themselves there was no proof whatsoever. If the entries in the books had all been made by himself, and he had sworn to their correctness, and had stated that he had, at the time such entries were made by him, personal knowledge of the matters in question, his testimony would have been admissible. It appearing from his own testimony, however, that some of these entries were made by another person, and he not undertaking to distinguish those entries from others made by himself, or to state that he had ever had any personal knowledge of the matters to which they related, his testimony can only be characterized as being, to a greater or less extent, mere hearsay, and utterly unreliable. No reason appears why the books themselves, together with proper proof

of their correctness, were not produced. Had this been done the witness might at least have verified the correctness of his statements based on entries made by himself, and thus have given some force to the assertion that his memory had thereby been refreshed. We think that his testimony, in the manner in which it was presented, was clearly inadmissible, and that the court properly rejected the same. The plaintiff having entirely failed to make out a case against the railway company, a nonsuit followed, as a matter of course. Judgment affirmed.

TREADAWAY v. RICHARDS.

(Supreme Court of Georgia. July 17, 1893.)

GENERAL DEMURRER—OBJECTIONS TO DEPOSITIONS
—SALE BY GUARDIAN—RATIFICATION BY WARD.

1. The refusal to strike the whole or a portion of a special plea on demurrer thereto is not cause for a new trial when the entire plea and the particular portion referred to contain some allegations which are good in law as a defense against the action, although in other respects the plea is defective and insufficient.

2. It is too late, after the plaintiff's case has been closed, and the defendant is introducing testimony, to object to the introduction of answers to interrogatories on the ground that one of the commissioners was an agent of the defendant, paid to execute the same, no objection in writing having been previously made and notice thereof given to the defendant.

3. Where a guardian sold land in which a minor ward had an interest, and the latter, after arriving at the age of 21 years, freely, voluntarily, and with a full knowledge of all the facts, received from her guardian in another state her full share of the proceeds of the sale, the same having been paid over to him by the guardian in Georgia during the ward's minority, and no fraud whatever having been practiced upon her, she was estopped from recovering any interest in the land from an innocent purchaser holding under the purchaser at the guardian's sale, even though that sale may not have been in all respects legal. The ward's actual knowledge of the facts concerning the sale, and her acceptance, after maturity and with full knowledge, of her share of the proceeds, amounted to a ratification by her of the sale, although she may not have known that under the law the sale was illegal.

4. There was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by Mrs. Weems and Mrs. Terry against W. S. Richards to recover an interest in land. Verdict for defendant. Thereafter Mrs. Weems died, and a motion for new trial was made by E. P. Treadaway, as her administrator, which was denied, and he brings error. Affirmed.

Seaborn, Wright, Dean & Smith and Max Meyerhardt, for plaintiff in error. Ewing & Thompson and J. Branham, for defendant in error.

LUMPKIN, J. Mrs. Weems and Mrs. Terry brought an action against Richards

to recover the undivided two-thirds of a certain tract of land. The plaintiffs were daughters of S. M. May, deceased, to whom the land in question had been conveyed, as trustee for his wife and children, on the 14th day of December, 1866. At that time there were in life only two children, William J. May and Mollie May, who afterwards became Mrs. Terry. Mrs. Weems had not then been born, and, consequently, her name was stricken from the declaration as a party plaintiff. Mr. and Mrs. May both died in the year 1877, the former on the 10th of May, and the latter on the 4th of August. After the death of Mr. May, R. H. Jones was appointed in his stead as trustee for the children, and he also became their guardian. Under an order from the court of ordinary, Jones, as guardian, sold the land, in February, 1886, to William J. May, and it passed from him by a regular chain of title into the defendant. Mrs. Terry, the plaintiff, contended that, under the facts above recited, the entire title to the land in question did not vest in Jones as guardian, but that he held at least an undivided interest therein in his capacity as trustee, and consequently could not, as guardian, sell and convey the whole fee. After a verdict had been rendered for the defendant, Mrs. Terry died, and a motion for a new trial was made by Treadaway, as her administrator.

1. Besides the general issue, the defendant filed a plea of *estoppel*, which was, in effect, as follows: Plaintiffs directed the land sued for to be sold by their guardian, Jones, against his advice. They were present at the courthouse on the first Tuesday in February, 1886, when the sale was made by the guardian, stood by and made no objection to the sale, and allowed the property to be sold as theirs, and purchased by innocent purchasers. They were afterwards present when the guardian executed deeds conveying the property to the purchasers, and saw the money paid by the purchasers to their guardian, without objection thereto, and afterwards each of them received her pro rata share of the purchase money. The purchasers, and those under them, believing they were getting a good title to the land, entered into immediate possession thereof, and made valuable improvements thereon, (as set forth in an exhibit to the plea,) to that extent enhancing and increasing the value of the land, wherefore defendant says plaintiffs are estopped to deny defendant's title and right to the land, and have ratified and confirmed the same. The plaintiff demurred generally to this plea, and also moved specially to strike all of it, except the part that related to putting improvements upon the land. The court overruled the demurrer, and refused to strike the plea. While the plea is in some respects obviously defective and insufficient, it certainly contains some allegations good

in law as a defense to the action upon the issues involved. This will more fully appear in the brief discussion constituting the third division of this opinion.

2. The objection to the introduction of the answers to certain interrogatories, on the ground stated in the second headnote, was not well taken. The plaintiff's case had been closed, and the defendant was introducing his testimony. The objection made was certainly "to the execution and return" of the commission, and, in order to be available, should, under section 3892 of the Code, have been "made in writing, and notice thereof given to the opposite party before the case [was] submitted to the jury." This was not done, and therefore the court was clearly right in overruling the objection and admitting the evidence.

3. We deem it unnecessary to decide whether Jones, the guardian, had the legal right, as such, to sell and convey the entire estate in the land under the order from the court of ordinary. There would be much reason for holding, under the peculiar facts of this case, that he did; but, be this as it may, he certainly undertook to exercise this right, and, if human conduct ever amounted to a ratification of the acts of another, Mrs. Terry undoubtedly ratified, after she attained her majority, all that Jones did in the premises. Her husband, who was her guardian in Tennessee, received from Jones, her guardian in Georgia, prior to her becoming of age, her full share of the proceeds of the sale; and after she became of age, and with a full knowledge of all that had been done, she received from her Tennessee guardian the money turned over to him by Jones, and receipted to him in full for the same. No fraud of any description whatever was practiced upon her by either of the guardians; so it makes no difference whether the sale of the land by Jones was in all respects legal or not. Mrs. Terry was, by her conduct, conclusively estopped from recovering any interest in the land from an innocent third party who held under the purchaser at the guardian's sale. It was contended that Mrs. Terry was not estopped because, at the time she accepted the money, she did not know that under the law the sale by the guardian was illegal. If, in point of fact, the sale was illegal, she was bound to know it, and, if she saw proper, to decline to ratify it by accepting her share of its proceeds. As already seen, she had full knowledge of all the facts, was in no way deceived nor imposed upon, and acted deliberately in the matter after reaching her majority. Her ignorance of the law, or of her special and peculiar rights thereunder, affords no reason whatever for setting aside the sale at her instance. The charge of the court was in accord with the views herein expressed, and contained no error.

4. Both the law and justice of the case coincided in bringing about the verdict in

favor of the defendant, and the court was right in refusing to set it aside. Judgment affirmed.

NORMAN v. GEORGIA LOAN & TRUST CO.
(Supreme Court of Georgia. July 17, 1893.)

EXECUTION OF NOTE—INSTRUCTIONS.

Taken in connection with the entire charge, there was no error in the charges or refusal to charge complained of, the evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Henry county; J. S. Boynton, Judge.

Action by the Georgia Loan & Trust Company against D. W. Lewis and W. P. Norman, as executor of H. C. Lewis, on a note. Judgment for plaintiff. Defendant Norman brings error. Affirmed.

Bryan & Dicken and Hall & Hammond, for plaintiff in error. Beck & Cleveland, for defendant in error.

LUMPKIN, J. This was an action upon a promissory note against D. W. Lewis and W. P. Norman, as executor of H. C. Lewis. The former made no defense. The defenses mainly relied on by the latter were (1) that H. C. Lewis was of unsound mind, and incapable of contracting, at the time the note was executed; and (2) that he did not, in fact, himself sign the note, nor authorize any person to do so for him. The evidence was voluminous, and decidedly conflicting, but that introduced on the part of the plaintiff was amply sufficient to support a finding by the jury that the deceased was mentally capable of contracting, that he freely and voluntarily authorized D. W. Lewis to sign his name to the note, and that this was done in his immediate presence. The court below was satisfied with the verdict returned by the jury, and the judgment refusing to grant a new trial ought not, therefore, upon the merits of the case, to be set aside.

Error was assigned upon the following charge of the court: "If he, [referring to H. C. Lewis] signed himself, or if he instructed another to sign it for him, and if another signs his name to the note with his consent or authority, then it would be his contract, and as legally binding on him as if he had done it himself; so that if another signed it for him, or he authorized another to sign for him, you would be authorized to find against the plea of non est factum to the note, and in favor of its being his contract." The alleged error was that this charge was given without a statement or qualification to the effect that the rule stated would be true only in case H. C. Lewis had sufficient mind to make a contract. To test the fairness of this exception, it is only necessary to refer to the charge itself. In the

charge, immediately preceding the words above quoted, we find the following language: "If you find from the evidence, gentlemen of the jury, that H. C. Lewis had mental capacity to make a contract, and that he authorized D. W. Lewis to sign his name to the paper sued on, then you would be authorized to find against the plea of non est factum." Comment is unnecessary, except to refer to the second division of the opinion of Bleckley, C. J., delivered in *Fletcher v. State*, 90 Ga. —, 17 S. E. Rep. 101, where the practice of detaching from its context a short extract from the charge of the court, and predicating an assignment of error upon it thus isolated, is declared to be altogether improper. The court was requested to charge: "It does not require a high degree of mental power to make a binding agreement. One who has enough of mind and reason equal to a clear and full understanding of the nature and consequence of his act in making a deed is to be considered sane. One who lacks this capacity is to be considered insane." This entire request was given, with the exception of the last sentence, and complaint is made of this omission. It would, perhaps, have been better to give the request as presented, but we do not think it possible that the jury could have failed to understand from the instruction as given that one who did not possess the requisite capacity, as explained to them, would be incapable of contracting, and would not be bound by a contract purporting to have been entered into by him. Besides, in view of the whole charge, we are fully satisfied the jury were not misled in this particular. Where the converse of a proposition is plainly manifest even to a mind of but ordinary comprehension, it need not be stated.

The only remaining ground of the motion for a new trial assigns as error the following charge: "If the defendant H. C. Lewis was at times insane, but had lucid intervals, during a lucid interval he would have the right to make a contract; and, if he made a contract during a lucid interval, then it would be a binding contract." This, certainly, is a sound and correct statement of the law, and counsel for the plaintiff in error so concede, but contend that it was error to give this instruction, unaccompanied by any qualification to the effect that if a person is shown to be insane, the presumption is that he remains insane, and that a person may have what are called lucid intervals, and yet not have sufficient mind to make a contract. If it was desired to have the attention of the jury specially called to these qualifications of the principle announced by the court, counsel should have preferred a request to this effect. The charge as given did not necessarily require the qualifications mentioned, and certainly cannot be said to have been misleading. On the whole, there is, so far as we can per-

ceive, no merit whatever in this writ of error, and accordingly the judgment of the court below is affirmed.

HANEY v. BOARD OF COM'RS OF ROADS & REVENUES OF BARTOW COUNTY.

(Supreme Court of Georgia. July 17, 1893.)

GENERAL ROAD LAW—GENERAL OR SPECIAL LAW—POWER OF GRAND JURIES—DELEGATING LEGISLATIVE POWERS—JURY TRIAL—UNIFORMITY OF TAXATION—TITLE OF STATUTE.

The act approved October 21, 1891, (Acts 1890-91, vol. 1, p. 135,) in relation to public roads, is a general law, and as such does not, because it provides that it "shall not go into effect in any county in this state until it is recommended by the grand jury of said county," violate the constitutional requirement that laws of a general nature shall have uniform operation throughout the state. Nor does the act confer upon grand juries the powers of legislation. This act is not unconstitutional, in that it denies the right of trial by jury, nor as creating a rate of taxation not uniform in its character, nor as containing more than one subject-matter, or matter different from what is expressed in its title.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Action by the board of commissioners of roads and revenues of Bartow county against D. J. Haney, as a defaulter, under the general road law. Judgment for the board of commissioners, and Haney brings error. Affirmed.

J. W. Harris, Jr., for plaintiff in error. A. W. Fite, A. S. Johnson, and John H. Wikle, for defendant in error.

LUMPKIN, J. This case involves the constitutionality of the act approved October 21, 1891, (Acts 1890-91, vol. 1, p. 135,) known as the "General Road Law." We will briefly deal with the several objections to this act in the order in which they were presented to us.

It was insisted that, viewed as a special or local law, this act must fall—First, because there was at the time of its passage a general law on the same subject already in existence, and embodied in the Code, from section 597 to section 606, both inclusive; and, secondly, because it was passed without local publication, as required by the constitution. We do not think this act either is, or was intended to be, special or local legislation, and will therefore proceed to inquire whether or not, viewed as a general law, it can constitutionally stand. The learned counsel for the plaintiff in error earnestly contended that, regarded as a law of a general nature, this act violates the constitutional requirement that such laws shall have uniform operation throughout the state, because the territory in which it can operate is limited to less than the whole state by the provision in the law itself that it "shall not go into effect in any county of this state until it is recommended by the grand jury of said county." That this

objection is not well taken has been settled by the principle announced with reference to the "general local option liquor law" in *Crabb v. State*, 88 Ga. 584, 15 S. E. Rep. 455. What is therein said concerning the general liquor law is equally true of the general road law, viz. that there is no county in the state to which this law will not, in certain contingencies, which the law itself anticipates, be applicable. If every grand jury in Georgia should recommend that this road law go into effect, its operation would become universal all over the state; and therefore, in our opinion, the act may and does apply to every county in the state. The distinction between this act and the county court act, as construed by this court in *Lorentz v. Alexander*, 87 Ga. 444, 13 S. E. Rep. 632, is the same as that between the latter act and the general liquor law, which was pointed out in the *Crabb Case*, supra.

The objection that the act before us confers upon grand juries the powers of legislation is, also, not well taken. It has for many years been the policy of our general assembly to leave to local authorities, such as municipal governments and grand juries, and to the people themselves, the determination of the question whether or not particular legislation should be operative in given counties or localities. This policy has been so generally recognized as sound and constitutional, we deem it unnecessary to state the numerous instances in which it has been followed. The county court act provided that it should not "take effect so as to allow a county judge to be appointed for any county until the grand jury thereof [should,] by a majority, so recommend." It has never been held that the establishment of a county court in any county of this state by recommendation of the grand jury was legislation by that body. It was argued, however, that the county court act is, in itself, complete and operative in all the counties to which it can apply, and that the only thing left for the grand jury to do is to recommend the appointment of a judge, while the road law now under review cannot go into effect in any county except by a recommendation of the grand jury that it shall go into effect, and is therefore no law at all, in any county, until such recommendation has been made. The distinction thus sought to be drawn between the two acts is practically no distinction at all. In either case the act is nugatory and inoperative in any particular county until after action by the grand jury, and the form of that action is immaterial.

The next objection to the act was that it denies to defaulters who fail to work the public roads, or to pay the commutation tax, the right of trial by jury. The ruling of this court in *Blankenship v. State*, 40 Ga. 680, in principle, decides the question thus made. In that case it was held that a judge of the superior court could try and punish defaulting road commissioners, and that they were

not entitled to demand a trial by jury. To work the public roads, or to pay a fair tax in lieu of such work, is a public duty, and a failure to perform this duty may be punished by the exercise of a police power lodged with the proper authorities. A proceeding of this kind is altogether different from an indictment and trial for an offense against the criminal statutes of the state. It is similar in many respects to the proceedings had by the various recorders' and mayors' courts in our cities and towns, and is also somewhat analogous to the proceedings by which judges compel the attendance of jurors and witnesses, and the performance by them of their respective duties. To allow demands for jury trials in such cases would practically obstruct all progress in these matters, a result which, we are quite sure, was never contemplated nor intended by the framers of our organic law.

Another objection was that the rates of the taxation provided for by the act may vary in different counties, which would be contrary to the constitutional requirement of uniformity in taxation. This objection is not sound. The several counties of this state have different rates of taxation for county purposes; and according to the doctrine announced by this court in *Railway Co. v. Wright*, 89 Ga. 574, 15 S. E. Rep. 293, so long as a county tax upon all subjects or persons within its jurisdiction is at the same rate, the uniformity required by the constitution is observed. See, specially, page 594, 89 Ga., and page 300, 15 S. E. Rep.

The only remaining objection was that the act refers to more than one subject-matter, and contains matter different from what is expressed in its title. We think an examination of the title, in connection with the body of the act, will be sufficient to show that this objection is also without substantial merit.

On the whole the act is not unconstitutional for any of the reasons presented, and we agree with our learned brother of the circuit bench in so holding. Judgment affirmed.

FERGASON et al. v. ETCHERSON et al.

ETCHERSON et al. v. FERGASON et al.

(Supreme Court of Georgia. July 24, 1893.)

WILLS—PROBATE—CAVEAT—TESTAMENTARY CAPACITY—EVIDENCE—MISCONDUCT OF WITNESS—HEARING EXCUSE—EXCLUDING WITNESS—NEW TRIAL AS TO ONE CAVEATRIX—FILING EXCEPTIONS.

1. One of the grounds of the caveat being that the testator was mentally incompetent to make a will, evidence that he derived from his wife, by marriage, the bulk of the property upon which he built up his estate, was admissible; the will making for her a provision somewhat inconsistent, in point of liberality, with this fact, according to what might be a natural course of conduct on the part of a husband. That the widow acquiesced in the will, and was no party to the caveat, would not affect the admissibility of the evidence.

2. Where a witness has been sequestered, and ordered to remain out of the court room, there is no error in hearing, in the presence of the jury, his excuse for alleged disobedience of this order.

3. When such witness, as his excuse for returning to the court room, or within hearing of other witnesses who were being examined, presented the fact that counsel had assured him he would not be introduced, and his statement was confirmed by the counsel and accepted by the court, and the witness was thereupon discharged from the proceeding for contempt, this court will not control the discretion of the trial judge in afterwards refusing to allow counsel on that side to introduce and examine this witness, the ground of the application to examine him being that the counsel was mistaken in thinking that the witness would not be sworn and examined. The facts of this case, on the point in question, are different from those in the case of *May v. State*, 17 S. E. Rep. 108, (last term.)

4. The verdict, on the pleadings and the evidence, was warranted, in so far as it found in favor of one of the caveatrixes, but not so as to the finding in favor of the other. Consequently, there was no error in refusing a new trial as to the former, and in granting a new trial as to the latter.

5. The denial in vacation of a motion to dismiss a motion for a new trial is cause for a separate and independent writ of error, and if none is sued out, and no exceptions are entered pendente lite, it is too late, after the expiration of 30 days from the date of the decision, to bring the question to this court.

(Syllabus by the Court.)

Error from superior court, Hurd county; S. W. Harris, Judge.

Robert D. Ferguson and others, executors, propounded a will for probate. A caveat was filed by Amelia Etcherson, and Mrs. Duke was made a party thereto. There was verdict for the caveatrixes. A new trial was granted as against Mrs. Duke, and refused as against Mrs. Etcherson. Propounders bring error. Caveatrixes bring a cross bill of exceptions. Affirmed.

P. F. Smith, W. H. Daniel, and Adamson & Jackson, for plaintiffs. P. H. Brewster and Frank S. Loftin, for defendants.

SIMMONS, J. 1. The will was caveated on several grounds,—among them, that the testator was not of sound and disposing mind and memory. The caveatrix proved by her mother that when she married the testator he had no property, but was a poor man, and that, as her husband, he got from the estate of her father \$4,500. This was objected to, on the part of the propounders, on the ground that it was irrelevant and immaterial. The objection was overruled, and this ruling is alleged to be error. We agree with the trial judge that the evidence was admissible. Any fact or circumstance which would tend to show unsoundness of mind on the part of the testator was admissible in evidence. The fact may not be of much weight, but it was not for the court to judge of its weight. That was the province of the jury. The testator, by his will, made a liberal provision for all of his children, except two daughters. to

whom he gave five dollars each, and left nothing to his wife, further than to direct that his son Robert should support her out of the property devised to him; this to be in lieu of dower, as well as a year's support. In other words, she was to get nothing at all under the will, unless she waived the provision which the law makes for the wife in all cases. We think a jury might properly consider, in passing upon the mental condition of the testator, that a husband who had derived his property, or the bulk of it, from his wife, might not have made a provision for her so far inconsistent with that fact, and so far different from what would be expected of a husband under such circumstances, if he had been of sound and disposing mind and memory at the time of making the will. A fact thus tending to show the unreasonableness of the will would undoubtedly have a legitimate bearing upon the question of the testator's mental condition. The fact that the widow did not contest the will would not affect the admissibility of this evidence. It could not preclude the party attacking the will from showing that the provision made for the widow was unreasonable, and indicative of mental unsoundness on the part of the testator.

2, 3. It appears from the record that at the commencement of the trial the witnesses were separated, and ordered to remain outside of the court room. During the trial one of the witnesses violated this order, and was brought before the court for contempt. The excuse offered by the witness was that Daniel, one of the counsel for the propounders, had told him that his testimony would not be used. The court accepted his excuse, and discharged him. Counsel stated to the court that after the court had adjourned they learned that the propounders had not discharged this witness; that Daniel was mistaken in thinking they would not swear the witness; that he knew but one fact, and that was a matter which no other witness had testified about, and of which no mention had been made to the jury. The court refused to allow the witness to testify, and exception was taken to this ruling, and also to the action of the court in hearing the excuse of the witness in the presence of the jury. When the witness made the statement to the court that he had been discharged as a witness, it was confirmed by counsel, and the court accepted it as an excuse. Doubtless, all the counsel and their clients were present when the excuse was offered and accepted, and the witness discharged, and allowed to remain and hear the other testimony. Under this state of facts, we do not feel authorized to interfere with the discretion of the trial judge in refusing to allow the witness to be examined. If the witness and Mr. Daniel had made a mistake as to his being discharged, the other counsel and the propounders, who were doubtless present, could have corrected the mistake,

and should have done so then and there. To compel the court to receive the testimony of the witness, under these circumstances, would be to virtually abrogate that section of the Code which gives to either party the right to require the witnesses to be separated during the trial. It would allow a witness and counsel to entrap the court, and any order the court might give to separate the witnesses would be rendered nugatory. Under the peculiar circumstances of the case, we will not control the discretion of the court below in refusing to allow the witness to testify. The facts of this case, on the point in question, are not like those in the case of *May v. State*, 17 S. E. Rep. 108, (decided at the last term.) In that case counsel asked that a brother of the accused might be allowed to remain in the court to assist in the defense. The solicitor general objected, whereupon the court ruled that he must retire. Counsel for the accused then agreed not to put him on the stand as a witness, and upon this statement the court allowed him to remain. Subsequently, this person was offered for the sole purpose of impeaching a witness. Under these facts it was held that the court erred in not allowing the witness to testify. In that case the judge ought not to have required the agreement made that the witness should not be placed upon the stand as a condition for allowing him to remain in the court room, because the accused was entitled to have him present to aid in the defense, whether he was a witness or not, it being a capital case; and, besides, in that case the witness was offered merely to impeach a witness for the state, while in this case the witness was offered upon a vitally important question. There was no error in hearing the excuse of the witness in the presence of the jury.

4. When the will was offered for probate, it was caveated by Mrs. Etcherson alone. Subsequently, her sister Mrs. Duke asked to be made a party to the caveat, and an order was taken, making her a party. Mrs. Duke filed no caveat, and did not adopt the grounds of the caveat filed by Mrs. Etcherson. The verdict of the jury was that the paper offered for probate was the last will of the testator, except as to Mrs. Etcherson and Mrs. Duke, and that as to them it was made under a mistake of fact in regard to their conduct. In passing upon the motion for a new trial made by the propounders, the court refused the motion as to Mrs. Etcherson, but granted a new trial as to Mrs. Duke. The propounders excepted to the refusal of a new trial as to Mrs. Etcherson, and Mrs. Duke filed a cross bill excepting to the judgment granting a new trial as to her. There was sufficient evidence to authorize the finding as to Mrs. Etcherson. Her caveat fully set out the grounds on which the will was made void as to her; among them, the ground upon which the jury predicated their finding. But, as before

remarked, Mrs. Duke filed no caveat, and did not adopt that already filed by Mrs. Etcherson; so there were no pleadings on the part of Mrs. Duke upon which the jury could base the finding in her favor, nor was there any evidence that the will was made on account of a mistake of fact concerning her conduct. We think, therefore, that the court was right in granting a new trial as to her and in refusing one as to Mrs. Etcherson.

5. A motion for a new trial was made in term, and an order taken to hear it in vacation. When the motion came on for a hearing in vacation, counsel for the respondents moved to dismiss it, for the reason set forth in the motion, which it is unnecessary to mention here. The court overruled the motion to dismiss, and heard the case. After the court passed upon the motion the propounders sued out their bill of exceptions, in proper time, complaining of the judgment of the court refusing to grant a new trial as to Mrs. Etcherson. Mrs. Etcherson and Mrs. Duke sued out a cross bill of exceptions, complaining jointly of the judgment refusing to dismiss the motion for a new trial, and Mrs. Duke complained separately of the judgment granting a new trial to her; but this cross bill was not sued out in 30 days from the time of the decision refusing to dismiss the motion for a new trial. The motion to dismiss a motion for a new trial is not a motion connected with the merits of the case. The refusal to sustain such a motion is cause for a separate and independent writ of error, which should be sued out within 30 days from such refusal. If not sued out within that time, or if no exceptions are entered pendente lite, it is too late after the 30 days have expired to bring the case to this court. For this reason we cannot consider the questions made in this part of the cross bill of exceptions. Judgment on both bills of exceptions affirmed.

PATTERSON v. EVANS et al.

(Supreme Court of Georgia. July 24, 1893.)

NOVATION—MORTGAGE—DESCRIPTION.

1. An absolute deed conveying land as security for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied, and surrendered up because of the execution of such a deed, the transaction operates as a novation.

2. While the description of the mortgaged premises, in these terms: "Two hundred and ninety acres, more or less, of land situate in the fifth district of Wilkinson county, upon which an incumbrance of \$125 exists, due October 15, 1888, taking priority of this mortgage; also two gins and one gristmill located on said described land,"—is meager and vague, yet whether such terms will serve to identify the premises is a question of fact, and hence the mortgage is not necessarily void because the description is not more complete.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; W. F. Jenkins, Judge.

To the fund remaining in the sheriff's hands after the foreclosure and satisfaction of a mortgage, A. W. Patterson, Evans & Turner, and others filed claims, and from the judgment determining the priority of such claims Patterson brings error. Affirmed.

Roberts & Pottle, for plaintiff in error. J. W. Lindsey, Whitfield & Allen, and F. Chambers, for defendant in error.

SIMMONS, J. 1. Eady's land was sold by the sheriff under a mortgage *fi. fa.*, which appears to have been junior to several other *fi. fas.* against him. It was agreed by all the parties that the *fi. fa.* under which the property was sold should be paid off, and the contest was over the balance of the money left in the sheriff's hands. This contest was principally between Greenwood, Evans & Turner, and Patterson. Greenwood's judgment being the oldest, the court ordered it paid, and directed that the balance be applied in part payment of the execution of Evans & Turner. To each of these rulings Patterson excepted. It appears from the record that Eady had given Patterson two mortgages, on two different tracts of land, one being dated in 1885 and the other in 1886. In 1887 he gave Evans & Turner a mortgage on some of the same land. On the 1st of February, 1888, Eady made to Patterson two deeds to secure the debts embraced in the mortgages, together with an additional debt of \$165, conveying the same land described in the mortgages, which deeds were recorded in January, 1890, and the mortgages were surrendered and canceled. Under this state of facts, we do not think Patterson was entitled to claim anything under his mortgages. When he surrendered and canceled them, and, to secure the mortgage indebtedness and the additional debt of \$165, took absolute deeds covering the same property, the lien of the mortgages was extinguished. The deeds were a security of higher dignity than the mortgages, and the change effected in the nature and form of the contract was such as amounted in law to a novation. Patterson, from being the holder simply of a lien upon the land, became vested with the absolute title. The lien of his mortgages being extinguished, he was left to stand upon his deeds, and, the Evans & Turner mortgage being older than the deeds, the court was right in awarding the money to them, instead of to Patterson.

2. On the trial, Patterson objected to the introduction in evidence of the mortgage *fi. fa.* of Evans & Turner, and the mortgage upon which it was founded, upon the ground that they were absolutely void for want of description. The descriptive part of the *fi. fa.* and the mortgage is set out in the second headnote to this opinion. The description is certainly very meager and vague, but whether such terms will serve to identify

the premises is a question of fact, and not of law. *Collier v. Vason*, 12 Ga. 441, and *Oatis v. Brown*, 59 Ga. 711. The judge, acting as a jury, having found that the land could be identified by the description as given, we cannot hold that it was so defective as to render the mortgage void. Judgment affirmed.

NATIONAL BANK OF COLUMBUS v. LEONARD et al.

(Supreme Court of Georgia. July 24, 1893.)

PROMISSORY NOTES — WHEN NEGOTIABLE — INDORSEMENT—LIABILITY OF INDORSER.

1. Under the Code, §§ 2775, 2776, a promissory note not containing any words of negotiability is so far negotiable by indorsement of the payee in blank as to pass the title to a bona fide holder, and enable him to sue the maker in his own name. This was so ruled in *Goodman v. Fleming*, 57 Ga. 350, which case is imperfectly reported, it appearing from the transcript of the record on file in this court that the indorsement involved in that case was in blank only.

2. The payee of a promissory note not negotiable, who indorses the same in blank, and delivers it to another for value, is, by virtue of the above sections of the Code, liable on his indorsement.

3. Where, at the time a promissory note was indorsed in blank, another between the same parties was folded in it, the indorsement of the former did not operate as an indorsement or to more than an equitable assignment of the latter, although such may have been the intention of the parties. Consequently, a holder could not maintain a suit upon the latter in his own name without equitable pleadings setting up the requisite facts.

(Syllabus by the Court.)

Error from superior court, Talbot county; John Peabody, Judge.

Action by the National Bank of Columbus against one Leonard and others on two promissory notes. Defendants had judgment, and plaintiff brings error. Reversed.

G. E. Thomas, Jr., for plaintiff in error.
J. H. Worrill, for defendants in error.

SIMMONS, J. It appears from the record that Leonard gave to Hatcher & Wilkerson two obligations, in writing, whereby he promised to pay them a certain amount of money. Neither contained any words of negotiability. They indorsed one of them in blank, and negotiated both of them to the First National Bank of Columbus. It seems that one of them was written upon a large piece of paper, and the other upon a smaller piece, and, when they were negotiated to the bank, the smaller one was inclosed in the other, and the indorsement was made upon the latter. There was no indorsement upon the smaller one. These obligations not being paid when due, suit was instituted thereon by the bank in its own name against the

maker and indorsers. When they were tendered in evidence at the trial, counsel for Leonard objected to their admission (1) because the indorsement on one of the papers was merely in blank, and did not put title into the plaintiff, so as to authorize it to recover against the defendant Leonard in this action; and (2) because the other paper had no indorsement at all. The court sustained the objection; and, the indorsers having filed no plea, the plaintiff moved judgment by default against them, which was refused, and the court granted a nonsuit. To each of these rulings the plaintiff excepted.

1. Under the common law, an indorsement in blank by the payee upon a promissory note containing no negotiable words did not pass the title to the indorsee, so that he could bring an action in his own name thereon. But in this state we think the rule has been changed by statute. The Code (section 2775) declares: "A promissory note is negotiable by indorsement of the payee or holder, or if payable to bearer, by transfer and delivery only. The maker may restrain the negotiability thereof by expressing such intention in the body of the instrument." Section 2776 is as follows: "All bonds, specialties or other contract in writing for the payment of money or any article of property, and all judgments and executions from any court in this state, are negotiable by indorsement or written assignment, in the same manner as bills of exchange and promissory notes," etc. Indeed, this court has decided that an indorsement in blank does pass the title so as to enable the indorsee to maintain an action in his own name against the maker. See *Goodman v. Fleming*, 57 Ga. 350. That case is not fully reported, but, upon looking at the record of file here, we find that the paper sued on had no words of negotiability; that the indorsement was in blank; and that the suit was brought by the indorsee against the maker. The maker demurred to the action, on the ground that the indorsee of a promissory note without words of negotiability in it could not maintain an action thereon in his own name. The trial judge overruled the demurrer, and, upon exception thereto, this court affirmed the judgment. See, also, the reasoning of Bleckley, J., on the same subject, in the case of *Cohen v. Prater*, 56 Ga. 203.

2. If the payee of a promissory note without negotiable words can, by indorsement in blank, transfer the title to the indorsee, it follows that when the payee thus indorses it, and delivers it to another for value, he becomes liable on his indorsement.

3. The remaining question is covered by the third headnote to this opinion. Judgment reversed.

PRINCE v. DICKSON.

(Supreme Court of South Carolina. Sept. 29, 1893.)

JUDGMENT — COLLATERAL ATTACK — RENEWAL — SUMMONS—CERTIFICATE OF SERVICE.

1. Where the record shows on its face that the court rendering a judgment had acquired jurisdiction of defendant, on a subsequent proceeding to renew the judgment, defendant will not be permitted to contradict the record by showing lack of service of summons.

2. The return on a summons for the renewal of a judgment was indorsed and signed by the sheriff in these words: "By my special deputy, [naming him,] delivered a copy of this notice to [defendant] personally, at her residence, [giving place and date,] and left the same with her." *Held* sufficient to confer jurisdiction of defendant.

Appeal from common pleas circuit court of Chesterfield county; Q. D. Witherspoon, Judge.

Action on a judgment by W. L. T. Prince, administrator of the estate of J. C. Colt, deceased, against Mary A. Dickson. Plaintiff had judgment, and defendant appeals. Affirmed.

H. H. Newton and A. A. Pollock, for appellant. Prince & Stevenson, for respondent.

McIVER, C. J. This was a summons to renew an execution issued to enforce a judgment, originally docketed on the 14th day of September, 1866, which, as the plaintiff alleges, was renewed first by an order of court bearing date 10th September, 1875. The defendant, in her answer, showed for cause why said execution should not be renewed: "(1) That the judgment debt which purports to be represented by the alleged execution has been fully paid and discharged in law. (2) That she denies the allegation in the said summons contained that the execution was renewed in 1875, and alleges that the pretended renewal thereof is void. (3) That she is advised, and therefore alleges, that there is no valid record upon which to base an execution in this case. (4) The respondent has been recently informed that there is a purported order of renewal of the alleged execution in the above cause. She is surprised at this, for the reason that no notice or summons was ever served upon her informing her that application would be made to renew the execution in this case. She is further informed that there is a notice in the record of this case, which has upon it a certificate or statement purporting to be made by Sheriff Spofford, to the effect that by his special deputy, Isham Drake, he served a copy of said notice upon her on the 2d day of January, A. D. 1875, at deponent's place of residence in Chesterfield county; that the said certificate is based upon an erroneous statement of facts; that Isham Drake never delivered to respondent any such copy, notice or other paper on 2d day of January, A. D. 1875, nor at any other time." Appended to her answer was the

affidavit of one Isham Drake, in which he says "that he never served any papers for Sheriff Spofford on Mrs. Mary A. Dickson in his life, and that said return, so far as it alleges service by this deponent, is erroneous; that he never did carry any paper of any kind from Sheriff Spofford to her." The case came before his honor, Judge Witherspoon, for hearing, when the original record was produced, showing that judgment had been duly entered as stated in the summons in the present case; and accompanying said record, as a part thereof, were the proceedings showing that the execution had been renewed in 1875, to wit, the summons, bearing date the 1st of January, 1875, calling upon defendant to show cause why a new execution should not issue, upon which were the following indorsements: "Lodged 1st January, 1875. [Signed] P. F. Spofford, S. C. C." "By my special deputy, Isham Drake, delivered a copy of this notice to Mary A. Dickson personally, at her place of residence in Chesterfield county, on the 2d day of January, 1875, and left the same with her. [Signed] P. F. Spofford, S. C. C." Also an affidavit of the plaintiff to the effect that no part of the judgment had ever been paid, but the same remains wholly unsatisfied for the whole amount; and an order signed by his honor, Judge Townsend, renewing the execution. The plaintiff in the case was permitted to testify, against objection by defendant, that no part of the judgment had ever been paid. The circuit judge rendered judgment that the plaintiff was entitled to renew his execution, and granted an order of renewal accordingly. From this the defendant appeals, upon the several grounds set out in the record, which, under the view which we take, need not be repeated here.

Inasmuch as more than 20 years had elapsed from the original entry of the judgment before the present proceedings were instituted, it is quite clear that defendant's plea of payment, by operation of law, would have to be sustained, unless the proceedings instituted in 1875 will rebut the presumption of payment arising from lapse of time. The real question, therefore, is as to the legal effect of those proceedings. If those proceedings show on their face that the court which granted the order of renewal in September, 1875, had then acquired jurisdiction of the person of the defendant by legal service of the summons by which such proceedings were commenced, then, even if in fact no such service had been made, the order of renewal would be final and conclusive in any subsequent collateral inquiry into the validity and effect of such order of renewal, for its validity could only be inquired into under some direct proceedings, in which alone the question of fact as to whether such service was really made or not could be determined. In other words, where the record of a judgment shows upon its face that the court rendering the judgment has

acquired jurisdiction of the party against whom it is rendered, neither that party nor any other person can assail such judgment for want of jurisdiction, except by some direct proceeding instituted for the purpose of correcting any alleged error in what appears upon the record, and such record must be treated as importing absolute verity until it has been so corrected. *Turner v. Malone*, 24 S. C. 398; *Crocker v. Allen*, 34 S. C. 452, 13 S. E. Rep. 650. Unless, therefore, the present proceeding can be regarded as a direct proceeding instituted for the purpose of correcting an alleged error in the record of the proceedings instituted in 1875, it is very obvious that the court could not now enter into any inquiry as to whether the defendant was in fact served with the summons by which that proceeding was inaugurated. It seems to us that it cannot be so regarded, for, in the first place, this proceeding was not instituted by the party claiming that there was an error in the record; and, if the defense which is set up here should be allowed to prevail, the record would still stand as it stood before. This matter of correcting errors in records is too serious a matter to allow any laxity in the proceedings for that purpose. The public records are designed for the information of all persons who may have occasion to consult them, and hence the importance of the rule that a proceeding to correct an error in the record must be taken in the same case, (*Crocker v. Allen*, supra,) so that the inquirer may at once see that what purports to be a valid judgment is not so in fact. We do not think, therefore, that the defendant can be permitted, by way of defense to another proceeding, to set up an alleged error in the record, and hence any inquiry into the fact of service upon her of the summons under which the order of renewal was obtained in 1875 was not competent to the inquiry here presented.

The question, therefore, is narrowed down to the inquiry whether it appears by the record of the proceedings to renew the execution in 1875 that the court had then acquired jurisdiction of the person of the defendant in that proceeding. As will be seen by the indorsement found upon the notice or summons by which the proceeding to renew the execution in 1875 was inaugurated, which is copied above, the sheriff certified that by his special deputy he delivered a copy thereof to the defendant, and left the same with her, and it is contended by the appellant that it was no proof of service at all, and hence that the record does not show on its face that the defendant was properly made a party. The ground upon which this contention seems to be made is that, by section 161 of the Code in force at the time, proof of service of the summons must be made as follows: "(1) If served by the sheriff, his certificate thereof. (2) If served by any other person, his

affidavit thereof." And, as there was no affidavit of the special deputy who made the service, (as it is assumed erroneously, as we think,) there was no legal proof of service. In the first place, it will be observed that section 161 relates solely to the service of a summons by which a civil action is commenced; and as the summons here in question was not issued for the commencement of a new action, but a mere continuance of the original action, (*McDowall v. Reed*, 28 S. C. 466, 6 S. E. Rep. 300,) it may well be questioned whether the legislature intended to require the same strictness of proof of service of a paper issued after the action was commenced as would be required for the service of a summons by which an action is commenced. But waiving this, and assuming, without deciding, for the present, that there is no difference in the requirement as to proof of service, it seems to us that the proof of service in this case was sufficient. Reading the indorsement according to its terms, it must be regarded as a certificate that the service was made by the sheriff, through his agent or "special deputy," as he is termed; and, under the maxim "*qui facit per alium facit per se*," it should be regarded as a certificate that the sheriff had made the service. The phraseology of the certificate is somewhat peculiar. "By my special deputy, Isham Drake, delivered a copy of this notice to Mary A. Dickson, personally; * * * left the same with her,"—signed by the sheriff in his official character, is equivalent to saying that he, by his agent, delivered the paper to the defendant, and left it with her, and that certainly would be a service by the sheriff. Suppose that the sheriff had handed the paper to Drake with a request to deliver it to defendant, who was present at the time, standing on the other side of Drake; would not that be a service by the sheriff? And, if necessary to sustain the return, the court would assume, after this lapse of time, that such were the facts. The extent to which the court has gone in order to give effect to a sheriff's return may be seen by reference to the case of *Mathewson v. Moore*, 2 McCord, 315, cited by respondent's counsel.

It is earnestly contended, however, by the counsel for appellant, that so much of the act of 1839 (11 St. 41) as provided for the appointment of a special deputy has been impliedly repealed by the act of 1870, (14 St. 332,) and expressly repealed by Gen. St. 1872, p. 829; and therefore there was no statute in force in 1875 authorizing the appointment of a special deputy at that time, and hence the alleged service by a special deputy of the summons to renew the execution in 1875 was illegal and void. This position is founded upon the erroneous assumption that a special deputy is an "officer," whereas, in fact, he is nothing more than an "agent" of the sheriff. Accordingly it has been held that even a minor, who is incapable of holding any

office, may act as a special deputy of the sheriff, and service made by him is legal and valid. *McConnell v. Kennedy*, 29 S. C. 190, 7 S. E. Rep. 76; *State v. Toland*, 36 S. C. 520, 15 S. E. Rep. 599. See, also, to same effect, *Railroad Co. v. Fisher*, 109 N. C. 1, reported also in 13 S. E. Rep. 698. In the absence, therefore, of any statute forbidding the sheriff to act through an agent or special deputy, (and we know of no such statute,) the sheriff, like all other persons, may, and oftentimes must, act through the agency of another. It seems to us, therefore, that the record of the proceedings to renew the execution in 1875 shows on its face that the court had then acquired jurisdiction of the person of the defendant, and the order of Judge Townsend passed on the 10th September, 1875, rebuts the presumption of payment of the original judgment by adjudicating that the same was then still due and unpaid; and, as 20 years have not elapsed since the date of that adjudication, the said judgment, in the absence of any evidence (and there is none) of any payment thereon, must still be regarded as unsatisfied either in whole or in part. The cases of *State v. Cohen*, 13 S. C. 198, and *Barron v. Dent*, 17 S. C. 75, relied on by appellant's counsel, are not in point; for those cases originated in a trial justice's court, and, what is more important, the record in neither of those cases purported to show any service by any competent authority, or rather any service by a person who could prove the service except by affidavit, and no such affidavit appeared on the record. It follows, therefore, that there was no error on the part of Judge Witherspoon in granting the order for the renewal of the execution. This would be conclusive of the case, but it may be as well to refer briefly to some other points made by the grounds of appeal.

The fourth ground is based upon alleged error on the part of Judge Witherspoon in allowing the plaintiff in execution to testify that the judgment debt had never been paid. As we understand the law, it is always necessary for a plaintiff, when he applies for a renewal of execution, to satisfy the court that the amount due on the judgment is still unpaid, and in this view the testimony objected to was clearly competent. Besides, it was directly in reply to the plea of payment set up in the answer of the defendant.

The seventh ground of appeal takes exception to the form of the notice issued to renew the execution in 1875, and the point of the objection seems to be that such paper was not in the form, and did not contain the requisites, of a summons. We are not informed of any statute prescribing any form or any special requisites of a summons. As has been held in the case of *Genobles v. West*, 23 S. C. 154, a summons is a mere notice addressed to the defendant giving him information that a certain proceeding has been commenced for a certain purpose; and

when the defendant was informed, by the notice here in question, that a motion would be made, at a specified time and place, "for an order to issue a new execution for the enforcement of the judgment above stated," it seems to us that all the essential requirements were complied with. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

NORFOLK & W. R. CO. v. WILSON.
(Supreme Court of Appeals of Virginia. Sept. 12, 1893.)

RAILROADS—INJURIES TO PERSONS ON TRACK.

Plaintiff, having started to cross two main tracks 50 feet east of a depot, saw a west-bound train moving on the northern track, and, thinking he could not cross in front of it, turned onto the east-bound track. He testified that he then looked west, and the track was clear to a curve 400 yards away; that he crossed the track diagonally to the south ends of the ties, and walked slowly east, watching the west-bound train, and waiting for it to pass; that after a few steps he was struck by the engine of an east-bound freight; that he heard no bell or whistle. Two of his witnesses swore that the whistle blew "about the depot," and a third was sure that, when plaintiff turned, the train was in sight and hearing. Defendant's evidence went to show that the whistle blew about the west end of the depot. The train was running 25 or 30 miles an hour. The place was not a regular crossing, but had long been used by foot passengers, with defendant's consent. Held, that plaintiff had failed to look and listen carefully enough, knowing, as he did, that he was on a main track.

Error to circuit court, Montgomery county.

In an action of trespass on the case, where in *J. W. Wilson* was plaintiff, and the Norfolk & Western Railroad Company was defendant, the defendant demurred to the evidence, and the jury thereupon conditionally assessed the plaintiff's damages at \$680. The circuit court gave judgment on the demurrer for the plaintiff, to which judgment the company obtained a writ of error from one of the judges of this court. Reversed.

Plegar & Johnson, for plaintiff in error.
Hoge & Hoge and Penn & Cocke, for defendant in error.

LEWIS, P. The plaintiff was struck by a freight train on the defendant's tracks at Christiansburgh, and this action was brought to recover damages for the injuries thus inflicted. The company's tracks at this point run east and west, and there are two main tracks,—one for east-bound trains, the other for west-bound trains,—and there are one or more sidings. The accident occurred about 40 or 50 feet east of the depot building, which is on the south side of the tracks. The plaintiff's account of the matter is that, immediately before the accident, he started to cross the tracks, on his way to his boarding house, on the north side of the railroad;

that, after he had partially crossed, he observed a west-bound train moving on the northern track, and, deeming it too near for him to safely cross in front of it, he turned, and stepped back on the middle, or east-bound, track; that, as he did so, he looked west to see if the track was clear, and no train was in sight between him and a certain curve in the road, about 400 yards west of him; that he then walked diagonally across the middle track to the southern ends of the cross-ties, upon which he slowly walked eastwardly, at the same time "watching the west-bound train, and waiting for it to get out of his way;" and that he had taken but a few steps when he was struck by the engine of an east-bound freight train, and seriously injured. He says, if the whistle was sounded or the bell rung before he was struck, he did not hear it. But two of his own witnesses say the whistle blew "about the depot;" and while a third, who was an eyewitness of the accident, says no signal was given, he is equally positive that the train had rounded the curve, and was in full sight and hearing, when the plaintiff turned to cross the middle track. The evidence for the defendant tended to show that an alarm whistle was sounded about the time the engine reached the west end of the depot, or more than 50 yards from the place of the accident. The train was running 25 or 30 miles an hour. About 50 yards west of the depot is a highway grade crossing; and a rule of the company provides that "the engine bell must be rung for a quarter of a mile before reaching every road crossing at grade, and until it is passed," which rule was not observed in the present case. The plaintiff, however, was not at this crossing, but over 100 yards east of it.

It appears that for many years before the accident the public had been in the habit of crossing the railroad, on foot, at the place of the accident, without objection by the company; that the spaces between the ties were filled with cinders; and that there was a wide and well-beaten path there. This acquiescence amounted to a license, and imposed upon the company the duty to exercise reasonable or ordinary care to avoid injuring pedestrians crossing at that point. *Railroad Co. v. White*, 84 Va. 498, 5 S. E. Rep. 573; *Railroad Co. v. Carper*, 88 Va. 556, 14 S. E. Rep. 328; *Troy v. Railroad Co.*, 99 N. C. 298, 6 S. E. Rep. 77. But the plaintiff was, nevertheless, bound to take ordinary precautions for his own safety, and the necessity for his doing so was not relieved by negligence, if there was any, on the part of the company. It was his duty to listen, and to keep a constant lookout, for approaching trains, to make sure the track was safe. He admits he knew he was on one of the main tracks, over which east-bound trains pass at all hours; and had he exercised the vigilance the rule, in such a case, requires, instead of fixing his attention

on the west-bound train, after he had changed his course to avoid it, he would not have been injured. It is unnecessary, therefore, to decide whether or not the company was negligent, for, be that as it may, the negligence of the plaintiff defeats a recovery. *Railroad Co. v. Houston*, 95 U. S. 697; *Marks' Adm'r v. Railroad Co.*, 88 Va. 1, 13 S. E. Rep. 299; *Hogan's Adm'r v. Tyler*, (Va.) 17 S. E. Rep. 723. Judgment reversed.

JOHNSON v. NORTON LAND & IMP. CO.
(Supreme Court of Appeals of Virginia. Sept. 12, 1893.)

APPEAL—RECORD—EVIDENCE.

In the absence of a bill of exceptions, agreed facts copied in the record by the clerk, and certified as the facts on which the judgment rested, cannot be considered, since the clerk has no power to add anything to the record.

Error to circuit court, Wise county; H. S. K. Morison, Judge.

Action by the Norton Land & Improvement Company to enforce a forfeiture of Mr. Johnson's title to certain land. Judgment for plaintiff. Defendant brings error. Affirmed.

Duncan, Mathews & Maynor, for plaintiff in error. Burns & Fulton, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Wise county rendered on the 12th day of December, 1892. The suit was instituted by the defendant in error company against the plaintiff in error to enforce a forfeiture of his title to a lot of land in the town of Norton because of a violation of a condition in the deed. The facts were agreed, and the forfeiture adjudged by the court. The defendant in the action thereupon applied for and obtained a writ of error to this court. There is no bill of exceptions in the case, and no evidence certified in the record, and no motion to set aside the finding of the court, (a jury being waived,) and no exception taken and certified by the court throughout the proceedings. There is nothing, therefore, by which this court can review the judgment. The case must be heard and considered in this court upon the errors apparent upon the face of the record. If no exceptions are taken to any supposed errors of the court which tries the case, these acts are not in the record, and cannot appear in the transcript thereof, and the party aggrieved remains, as at common law, without relief. 4 Minor, Inst. 728, 729. And this applies to the action of the court in refusing to set aside the judgment, and grant a new trial, because the same is contrary to the law and the evidence. The evidence cannot be reviewed by the court, because it is not in the record, and is not made a part of the record by bill of exceptions in any form; and a deposition taken in such case is not

a part of the record, although copied in the transcript, and certified by the court, and certified by the clerk. It is not the province of the clerk to add anything to the record. *Cunningham v. Mitchell*, 4 Rand. (Va.) 189; *Bowyer v. Chesnut*, 4 Leigh, 1. In the case of *Improvement Co. v. Karn*, 80 Va. 592, this subject is fully considered, and the authorities controlling this question cited and approved. In that case the deposition taken in the case, and certified by the clerk, and affidavits filed in the case, and notices copied and certified by the clerk, were not considered by this court; this court saying of these they are not made a part of the record by the court, and it is not the province of the clerk to make anything a part of the record; his province is to copy the record as it is,—citing Judge Green as saying in *Cunningham v. Mitchell*, supra, that “the certificate of the clerk that these papers were the evidence upon which the judgment was founded cannot be received as part of the record. His certificate to that effect, can have no more effect than that of any other individual. He can certify that such records exist in his office, but not what use was made of them. That ought to have been shown by the record; and it was the duty of the party wishing to avail himself of the fact to have made it a part of the record.” Judge Tucker, P., said in *Bowyer v. Chesnut*, supra: “The evidence produced upon the trial can only be known by its being spread upon the record by bill of exceptions, or by the certificate of the judge himself.” 2 Bac. Abr. 527; 2 Minor, Inst. 428. The court sees nothing but the process, the pleadings, the verdict, and the judgment, (or the judgment when the jury was waived by the parties.) The certificate of counsel affords no evidence of evidence, of opinion expressed or evidence given, nor the certificate of the clerk of the papers produced before the jury, or the depositions read in the cause. Mr. Minor says, (4 Minor, Inst. 242:) “The record proper is nothing but the formal allegations or pleadings on either side, the issue, the impaneling of the jury, the verdict, and the judgment.” See, also, *Magarity v. Shipman*, 82 Va. 806, 7 S. E. Rep. 381. There is no question better settled in this court. It follows that the agreed facts copied in the record by the clerk, and certified as the facts upon which the judgment rested, cannot be considered here, and that the case cannot be reviewed here. We can therefore perceive no errors in record by which the judgment can be reversed. See, also, *Scott v. Lloyd*, 9 Pet. 418, (opinion of Chief Justice Marshall); *Lawrence v. Com.*, 86 Va. 579, 10 S. E. Rep. 840; *Offendinger v. Ford*, 86 Va. 920, 12 S. E. Rep. 1; *Fry v. Leslie*, 87 Va. 275, 12 S. E. Rep. 671. In the case of *Newberry v. Williams*, (Va.) 15 S. E. Rep. 865, cited by counsel as the most recent adjudication upon the subject, it was held that, as there was no ob-

jection to the verdict at the proper time, this failure to object must be considered as a waiver of the exceptions taken during the trial. In this case there was no exception to the finding and judgment of the court, and for that reason, also, we are unable to review and correct the judgment, and the same must be affirmed.

McMAHAN v. MITCHELL.

(Supreme Court of Georgia. July 24, 1893.)

EJECTMENT—EVIDENCE—HARMLESS ERROR.

On the evidence as a whole and the unmistakable merits of the controversy, the verdict of the jury was correct, and, although the court may have committed some immaterial errors, the denial of a new trial was also correct. The newly-discovered evidence could not rightly change the result.

(Syllabus by the Court.)

Error from superior court, Dale county; Thomas W. Milner, Judge.

Ejectment by L. C. Mitchell against Alexander Gibson and John McMahan. Plaintiff had judgment, and defendant McMahan brings error. Affirmed.

The following is the official report:

An action of ejectment was brought by L. C. Mitchell against Alexander Gibson, tenant, the real defendant being McMahan. The petition was filed July 12, 1890. There was a verdict for plaintiff, and, defendant's motion for new trial being overruled, he excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the court erred in charging: “Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party;” alleged to be error because without evidence to justify it. Error in charging: “In order to perfect the defendant's title under these deeds, it must appear that he took possession under his deed in good faith, believing that he had good title thereunder, and that he kept possession in an open and notorious manner, and continuously, for seven consecutive years before the commencement of this suit, and that the possession of defendant must be for the whole of the seven years under a continuous claim of right;” alleged to be error as being misleading, and calculated to lead the jury to believe that, even if he went in in good faith, yet, if he afterwards learned his title was bad, it would vitiate his holding. Because the court, in charging as to character of possession, erred in charging: “Such acts as amount only to casual acts of trespass do not constitute the kind of possession on which prescriptive title can be perfected;” alleged to be error because without evidence on which to base it. In a note to this ground the court states that the charge complained of immediately followed this charge: “The possession must be continuous, open, and notorious, and of such character that the true owner might, by

going on the premises, see that some one else is in adverse possession." Error in charging: "If the evidence shows that Gentry went into possession under plaintiff Mitchell, or went into possession under Morrison, who was authorized to put a tenant in possession, then such possession by Gentry constituted a break in defendant's possession, and he (defendant) cannot tack any possession he may have had before that time to his possession subsequently, to make up the requisite seven years;" alleged to be error because it affects McMahan by the acts of plaintiff's agent, who obtained permission of defendant to put the tenant in possession without disclosing anything about his instructions from plaintiff. Error in charging: "If Gentry went into possession as the tenant of plaintiff and defendant both, then this would also break the defendant's possession. Possession to support prescription must be exclusive during the whole term necessary to perfect his prescription, and, if he and plaintiff had a joint tenant, such possession would not be a possession on which prescription could be based;" alleged to be error for the same reason as stated in the exception to the charge last above mentioned, and because without evidence on which to base the charge as to a joint tenant. Error in charging: "When the party having the legal title is in possession, every one in possession without legal title is in law considered as holding under the party having the legal title;" alleged to be error because inapplicable to the facts, and because there was no evidence that plaintiff ever had possession. Error in refusing to give in charge the following written request of defendant: "If Gentry got permission of the defendant to take possession of the property as his tenant, and he so went into possession, it would not cause any break in defendant's possession, even if Gentry went in also by permission of Morrison, acting as agent for Mitchell, if the jury should find that Morrison got permission for Gentry to go in from defendant, and did not tell him that he was also putting Gentry in as tenant of Mitchell." Because of newly-discovered testimony. In support of this ground, defendant produced the affidavit of one Cummings that on November 2, 1883, Alexander Gibson was living on the land in dispute; also the affidavit of Tatum that Gibson was living on the land in the latter part of 1883; also the affidavit of W. G. Morrison that he was a witness and testified on the trial of the case, and that since he testified he has examined his old books, and now swears that Gentry went into the house on the land in the spring of 1883, and remained there until the latter part of the summer or fall of the same year; also affidavit of defendant and his counsel that they did not know that they could prove the facts shown by the affidavits above mentioned until after the trial of the case. It is proper to state the following, as bearing upon the question made as to new-

ly-discovered evidence: It appeared on the trial, from the evidence for defendant, that the land in dispute was sold under a *fi. fa.* to W. U. Jacoway, March 2, 1880; that on March 6, 1880, Jacoway conveyed it by deed to McMahan; that defendant claimed to have bought the land in good faith, and without notice that the title was not good; that soon after his purchase he went into possession, and cut off wood from an acre or so, that in 1881 he cut off more, but put no house or fence on the land; that in the winter of 1881-82 he sold some iron ore from it to one Woolbright, and in the spring he and Woolbright built a house on it, which was occupied by men working for Woolbright in raising ore, and a small lot was also inclosed that year, the men living there until the fall; that, after this, defendant let a man named Davis live on it; that a few days after one would go out another would go in; that in the spring of 1883 a man named Gentry came to him, and got permission to go in the house, and stayed there until the summer or fall, and soon after he went out defendant rented it to Alexander Gibson, who paled in a garden, enlarged the inclosure, taking in three or four acres, and continued to live there until the spring of 1890, when he left, but left his daughter there, who has continued to live there until the present; that defendant has paid taxes on it all the time. Gibson testified that he moved to the county in the fall of 1882, and rented the place from McMahan, moved into the house, paled in a garden, cleared up and inclosed a field, and had been living on the land all the time up to the spring of 1890, when he left, leaving his daughter there, who lives there still. There was evidence by Mrs. Gentry that about May 15, 1883, her husband went into possession of the land as tenant for McMahan, and remained there until July 1, 1883; that he never went in as tenant of Mitchell, never knew such a man, or had any contract with him. Morrison testified, among other things, that in 1883 or 1884 plaintiff asked him to put some one in the house for him, but his recollection was he neither promised nor declined to do so, but wanted the house to put in a man who was working for him, (Morrison,) and, knowing that defendant claimed the land, went to defendant, and got permission from him to put the man in, and, under this authority from both parties, told Gentry to go into the house, which he did, but learned from Gentry that defendant had given Gentry permission to go in. Witness did not tell defendant anything about putting the man in as Mitchell's tenant; did not want to get into trouble with anybody. This was before August, 1883 or 1884. There was other evidence to the effect that it was in the spring of 1883, or before August, 1883, when Gentry went into possession under permission from defendant, and that Morrison said nothing to defendant about Mitchell giving him any

authority to put Gentry in. Plaintiff testified that in March, 1884, the house was empty, and he authorized Morrison to put a tenant in the house for him, which Morrison promised to do.

R. J. & J. McCamy and W. U. & J. P. Jacoway, for plaintiff in error. McCutchen & Shumate, for defendant in error.

PER CURIAM. Judgment affirmed.

LANIER v. HUGULEY.

(Supreme Court of Georgia. July 24, 1893.)

ANTENUPTIAL CONTRACT—ACTION AGAINST EXECUTOR—BURDEN OF PROOF—NEW TRIAL.

1. The instruction on the burden of proof, as applied to the facts of this case, was correct.

2. An executor who has notice of a debt outstanding against the testator, and who resists payment on the ground that the debt was discharged by the testator in his lifetime, cannot justify himself for the nonproduction of assets with which to pay it by setting up that he retained in his hands an ample amount of stock in a private corporation, and that, pending litigation which he inaugurated and carried on in resistance to the creditor's suit, the stock became depreciated in value, so as to be insufficient to satisfy the creditor. This is true, notwithstanding the will disposed of the whole estate, including the stock, by directing the executor to deliver the same to the legatees in kind.

3. In a suit by a widow against the executor of her husband on an antenuptial contract, neither the will of the husband nor any expressions of the testator contained therein can be used by the executor as evidence that the antenuptial contract was discharged by the testator in his lifetime.

4. There was no error in refusing to grant a new trial on any of the grounds stated in the motion.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action on a contract by Sallie H. Huguley against La Fayette Lanier, executor of the estate of George Huguley, deceased. Plaintiff had judgment, from which, and an order denying a new trial, defendant brings error. Affirmed.

P. H. Brewster, T. H. Whitaker, and R. A. S. Freeman, for plaintiff in error. F. M. Longley and N. J. & T. A. Hammond, for defendant in error.

SIMMONS, J. 1. George Huguley, in consideration of a marriage about to be solemnized between himself and Sallie White, made a contract with her wherein he agreed and directed that his executors should, of the first money coming into their hands of his estate, and as soon as it should come into their hands, after paying his debts, expenses of last sickness, and funeral expenses, pay over to his then widow \$4,000. After his death the widow sued Lanier, the executor, upon this contract, and one of the pleas filed was that of payment. Upon this branch of the case the court charged the

jury that, the burden being upon the defendant to prove the truth of the plea of payment, it must be shown by a preponderance of the evidence, or the plea would fail. This charge is alleged to be error. The plea of payment is an affirmative defense, and the Code (section 3758) declares that "the burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defense the proof of such fact is essential." The plaintiff tendered in evidence a valid subsisting contract calling for the payment of \$4,000 by the executor. If payment had been made, as alleged in the defendant's plea, the burden was upon him to establish the fact to the satisfaction of the jury by a preponderance of evidence. The party upon whom the law casts the burden of proof cannot make out his case or defense by evidence which simply raises a doubt as to the matter in issue, or leaves the proof equally balanced in the minds of the jury. See *Tipplin v. Brockwell*, 89 Ga. 467, 15 S. E. Rep. 539.

2. The executor also filed the plea of plene administravit, alleging therein, in substance, that, at the time notice of the plaintiff's demand was served upon him, he had in his hands assets of sufficient amount and value to pay all the claims against the estate; that he held certain factory stock worth \$11,200, and other assets; that this stock had without fault on his part and unexpectedly, and by reason of the financial failure of the factory, become worthless; and that other debts of higher dignity would consume the other assets of the estate. The court was requested to charge that, if the allegations of this plea were established, the executor would not be liable. The request was refused, and the court charged to the contrary. The evidence in the record discloses that the executor took possession of a large amount of stocks and bonds at the death of the testator; that, in accordance with the will, he distributed these stocks and bonds in kind to the legatees; that, before this was done, he had notice of the widow's claim, and reserved 112 shares of factory stock to pay it in case the defense thereto was not successful; and that, pending the litigation over this claim, the stock became worthless, by reason of the failure of the manufacturing company. It was the duty of the executor to administer this estate, and for this purpose the law allowed him 12 months. It was his duty to convert the assets into cash, especially the surplus which he reserved after paying the bequests in kind as directed by the will. According to the allegations of the plea, the stock which he reserved to pay this debt in case his defense should not prevail was worth nearly \$12,000. He should have converted enough of this into cash to pay the debt. The antenuptial contract, of which he had notice, was not payable in stock, but in cash, and he should have turned the

stock into cash in order to make the payment when required of him. If, by reason of his failure to do this, he was unable to make the payment, the stock having become worthless while in his hands, the loss should not fall upon an innocent creditor, especially where nearly \$100,000 in value was paid to the legatees while the litigation over this claim was pending. When an executor or administrator pays out money to heirs or legatees, or turns over assets to them, after he has notice of a claim against the estate, he does so at his own risk, and this is so, although the will may direct the executor to turn over the assets in kind to the legatees. In the case of *McIntosh v. Hambleton*, 35 Ga. 94, this court held: "Though an administrator is not liable for property lost or destroyed without fault on his part, he is bound to administer the estate according to law, by paying the debts before making distribution to legatees or heirs. This duty is enjoined upon him by law, by his oath of office, and by a sound public policy. An administrator who, with notice of an outstanding debt, paid to the heir, before the expiration of 12 months from the grant of administration, a portion of the estate, retaining, in slaves and other property, enough to meet said debt, is not protected against the creditor's claim by the results of the late war in the way of the abolition of slavery and the serious depreciation of the other assets retained. The administrator, in such case, must make good the deficiency caused by his own illegal act." See, also, *Sharp v. Bonner*, 36 Ga. 421.

3. As to the exclusion of the will as evidence that the contract was discharged in the lifetime of the testator, it is unnecessary to add anything to what is said in the third headnote to this opinion. There was no error in refusing a new trial on other grounds of the motion. Judgment affirmed.

SOUTHERN RAILWAY NEWS CO. v. RUSSELL.

(Supreme Court of Georgia. July 24, 1893.)

WITNESS—SELF-CRIMINATION—EXTENT OF PRIVILEGE.

1. The privilege of a witness not to give testimony tending in any manner to criminate himself continues, although a prosecution for the offense would, if commenced after the time of testifying, be barred by the statute of limitations, unless it affirmatively appears that no prosecution against him, commenced in due time in any court having jurisdiction of the offense, is then pending.

2. From the interrogatories propounded to the witness in the present case, it sufficiently appears, in view of the statute of Alabama, that truthful answers to the same might tend to criminate him, and, this being so, the claim of privilege was properly allowed.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Proceedings by the Southern Railway

News Company to compel O. E. Russell to answer certain interrogatories. From the judgment refusing to compel respondent to answer, applicant brings error. Affirmed.

Fort & Watson, for plaintiff in error. B. P. Hollis and E. A. Hawkins, for defendant in error.

SIMMONS, J. It appears from the record that Russell had been a locomotive engineer on a railroad in Alabama, and that on one occasion, while so employed, he left the depot in Birmingham, with his train, without orders to do so, and leaving the conductor of the train behind; that after running several miles he discovered that the conductor was missing, and thereupon started to back the train towards the depot, first sending Davis, a news agent who was on the train, to the rear, to act as watchman for him. While backing the train he came into collision with another train, and Davis was killed. It seems that a suit was instituted against the railroad company, in the state of Missouri, for the homicide of Davis, and the plaintiff in that suit sued out a set of interrogatories for Russell. Russell had in the mean time removed from Alabama to this state. When the interrogatories were presented to him, he refused to answer, and this fact was reported to the judge of the superior court of the circuit wherein Russell resided; and the judge, under section 3885 of the Code, required Russell to appear before him to show cause why he should not answer. Russell appeared, and in response to the rule stated that the answers to the interrogatories would tend to criminate him, under the laws of Alabama. The judge refused to compel him to answer, and the plaintiff in error excepted, and brought the case here for review.

It was claimed on the part of Russell that his answers would tend to criminate him under the following section of the Criminal Code of Alabama, (Code 1886, § 4110): "If from the negligence, carelessness or want of proper skill of any engineer or conductor having the control or management of any steam engine running on any railroad in this state, or any brakeman, the engine or cars are thrown off the track, or any other accident occurs, and the life of any human being is thereby endangered, such engineer, conductor or brakeman must, on conviction, be fined not less than five hundred nor more than two thousand dollars, and may also be imprisoned in the county jail or sentenced to hard labor for the county for not more than twelve months." The plaintiff in error insists that under section 3711 of the same Code, which declares that "the prosecution of all misdemeanors before the circuit, city or county court, unless otherwise provided, must be commenced within twelve months next after the commission of the offense," any prosecution of Russell under section 4110, above quoted, is barred,—the offense

punishable by that section being a misdemeanor, and more than 12 months having elapsed since the homicide in question,—and therefore his answers could not tend to criminate him. We think it was not enough for the petitioner in the court below to show that the period of limitation prescribed by the statute had elapsed, but that he should have gone further, and shown affirmatively that no accusation had been preferred or no indictment found against Russell within that period in any court having jurisdiction of the offense, or that no prosecution was then pending. Until this is shown the privilege of the witness continues, and he cannot be compelled to answer any questions which would tend to criminate him under the statute. See *Rap. Wit. (Ed. 1887.)* p. 442, where it is said: "It is no answer to a witness' claim of privilege that the statute of limitations has run against the offense, unless it appears affirmatively that no proceedings to enforce a penalty were commenced within the period of limitation." If it is shown that the period of limitation has elapsed, and no indictment or accusation was preferred within that period, and none is pending, the witness cannot excuse himself on the ground that his answer would tend to criminate him.

2. Under section 4110 of the Code of Alabama, above quoted, it sufficiently appears that the answers of the witness to the interrogatories propounded might tend to criminate him. The court was therefore right in refusing to compel him to answer. Judgment affirmed.

CHAPMAN et al. v. ATLANTA GUANO CO.

(Supreme Court of Georgia. July 26, 1893.)

ACTION ON NOTE—DEFENSE—FRAUD OF PLAINTIFF'S AGENT.

On the trial of an action upon a promissory note for \$90.20, it was error to strike pleas alleging that the real consideration of the note was the price of certain guano sold to defendant for \$53.10; that the signing of the note was induced by fraud on the part of plaintiff's agent, and done through mistake on the part of defendant; that the note was signed at night, when defendant could not well see, and he was informed by plaintiff's agent that it represented only the indebtedness above set forth, and upon that representation defendant signed it; and, further, that the note was made at night, when defendant signing it could not see the amount, but, relying on and having confidence in the plaintiff, defendant signed the same upon the representation that the note was for the account, at the price stated in the plea; that the note was procured by fraud or mistake, and is in excess of the amount due, \$37.10, and defendant did not know said excess was in the note, when signing.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action on a promissory note by the Atlanta Guano Company against J. A. Chapman & Son. Plaintiff had judgment, and defendants bring error. Reversed.

Hutcheson & Key, for plaintiffs in error.
Geo. S. Thomas, for defendant in error.

LUMPKIN, J. The question made in this case is a close one, concerning which we have been unable to reach a perfectly satisfactory conclusion. We have endeavored, however, to follow what seems to be the true spirit of previous adjudications by this court, and in so doing have decided that the merits of the defendants' pleas, the substance of which is set forth in the headnote, should have been submitted to the jury. The two cases most like the case at bar are those of *Bostwick v. Duncan*, 60 Ga. 383, and *Angier v. Brewster*, 69 Ga. 362. Both came from Spalding county, and in each the action was brought upon a promissory note given for the purchase of guano. At first glance, the two cases cited do not seem to be in harmony. We think, however, having reference to the particular facts upon which the decision in each of them was based, they may be reconciled, and that our ruling in the case now before us can be upheld, consistently with both. In the *Bostwick Case* the pleas of the defendant alleged that the plaintiffs, by one W. T. Cole, "obtained said note by fraudulent representations, saying the same was an ordinary guano note; that, relying upon said agent, he [defendant] did not read the same, or have the same read, said agent saying, 'Sign note,—that is all right,' and defendant signed the same, not knowing that plaintiff did not — the same, and, shortly before signing, said agent saying, if the guano was not good, not to pay for the same;" that "at the date of said note said agent sent to defendant the note sued on, and represented that he desired to close up the contract as to the purchase of said guano, as made with said defendant, relying upon the contract made at the time of said purchase, with said agent, and believing that the said guano note, so presented to be signed, contained only the terms of ordinary guano notes, and in which ordinary notes only the cotton option delivery and the waiver of homestead were contained, said defendant, without reading said note sued on, but relying on the contract and agreement in said note contained as being the same existing in parol, made and signed said note." The plea still further alleged that by the fraudulent conduct and representation of plaintiff's agent, as before alleged, the conditions and terms of the note were falsely and fraudulently imposed on defendant as to the clause, "without warranty of vendor, and with all faults, and at purchaser's risk," to which he never really assented. A close inspection of these pleas will show that the defendant does not assert that the plaintiff's agent represented to him that the note in question did or did not contain any particular statement or stipulation. According to these pleas the plaintiff's agent merely characterized the note as "an or-

duary guano note," and he might have been perfectly honest in entertaining this opinion of the note, as it stood. The defendant did not take the trouble to inquire of the agent what he meant by the expression, "an ordinary guano note," nor did he inform the agent what his (defendant's) idea of such a note was. The defendant, with equal good faith, might have had an entirely different conception from that entertained by the plaintiff's agent of what constituted "an ordinary guano note." Indeed, the expression is certainly ambiguous, and does not convey any very clear idea of the kind of note sought to be described. The writer would find it a very difficult, if not impossible, task to accurately define what is "an ordinary guano note." It therefore does not appear by these pleas that the plaintiff's agent made the defendant any clear and definite statement as to the contents of the note in question, or that the statements he did actually make could, with any fairness, be said to have been made with intent to defraud. Again, it would seem that the plaintiff's agent was not present when the note was actually executed. The plea says the agent sent the note to defendant some time after the guano was purchased, and that defendant, without reading it, signed it upon the faith of the representations made by the agent at the time of the purchase as to the character of the note he would take. Certainly, under all these circumstances, there was no excuse whatever for not reading the note before signing the same, and accordingly this court declared, through Chief Justice Warner, that the pleas were bad, and that it was not the duty of courts to relieve parties from the results of their own gross negligence. In the Angier Case the purchaser of the guano read the note, and objected to signing it, so long as certain stipulations remained in it. The plaintiff's agent then agreed to strike the same out, and with a pen pretended to do so, but in fact struck out some other portion of the note. The defendant, relying upon the honesty of the agent, and seeing him apparently make the correction desired, signed the note without taking the pains to see if the proper erasure had been made. Here there was an actual, positive, and inexcusable fraud perpetrated upon the defendant by the plaintiff's agent. Accordingly, this court held that the plea was not demurrable, and could be sustained by parol evidence; Speer, J., stating the rule to be that "parol evidence would be admissible under a plea alleging fraud, where the fraud charged is some device or trick by which either stipulations were fraudulently left in a paper, which it was expressly agreed should be left out, or where it was agreed the stipulations should be inserted, and they were fraudulently left out." This rule seems to be founded upon the idea that one is not bound to exercise, as against actual, deliberate, and palpable

fraud, that degree of diligence which could reasonably be expected and required when persons are dealing with each other at arm's length, and when each is expressing to the other his mere opinions with regard to the transaction in which they are mutually engaged. The distinction, therefore, between the two cases, may be said to be that in one the defendant acted with the grossest kind of negligence, without attempting to inform himself what the plaintiff's agent really meant by using certain words of description, and, very probably, without himself having any clear or definite conception of what those words meant, while in the other the plaintiff's agent practiced upon the defendant a fraudulent trick, and the latter was deceived and injured by relying upon the good faith and honesty of the agent, who, well knowing of the confidence reposed in him, deliberately and willfully took undue advantage of the same. The present case more closely resembles the latter of these two cases. The pleas, in effect, state that the plaintiff's agent represented the note to be for \$53.10, while in point of fact it turned out to be a note for \$90.20. This was not a matter for a mere difference of opinion. If the pleas speak the truth, the plaintiff's agent perpetrated a palpable fraud upon the defendants, involving nothing short of actual dishonesty. It is true that in the last plea the defendants aver that the note was signed upon the representation that it was for the amount at the price stated in the plea, to wit, \$53.10, without alleging by whom this representation was made; but, construing all the pleas together, we think it was sufficiently alleged that the representation in question was made by the plaintiff's agent, and that the note was signed upon the faith of this representation. In our opinion, therefore, this case is clearly distinguishable from that of *Bostwick v. Duncan*, supra, as to the character of the representations made by the plaintiff's agent, and the tendency of these representations to mislead and deceive the defendants. We also think it is distinguishable from the case last mentioned upon the question of diligence. In the former case no reason whatever was given for failing to read the note, except that the defendant chose to rely upon the agent's statement as to what kind of a note it was. In the case at bar one of the pleas alleges that the note was signed at night, when defendant signing the same could not well see, and another avers that the note was made at night, when defendant could not see the amount. These allegations, it is true, are not strong. They do not show that a light might not easily have been obtained, if the defendant had desired it, or that there was any haste about the transaction, or that the plaintiff's agent urged or requested an immediate execution of the note, or did anything, except the making of the representations complained of, to prevent the defendant from

fully informing himself of the amount set forth in the note. Still, we think the pleas contain enough to authorize the case to be submitted to a jury, and allow them to determine whether or not a fraud was actually practiced upon the defendant. We are fully aware of the great importance of the rule that persons who are diligent in having their contracts reduced to writing ought to be amply protected, and that, generally, neither by plea nor by the introduction of parol evidence should a party be permitted to contradict or vary the terms of a valid written instrument. But we do not understand the law to cut off defendants from pleading and proving actual frauds upon them by the insertion in written contracts of something which one of the parties well knew could not be honestly incorporated in it, and which the other party never intended should be embraced within its terms. If, in the present case, the defendants did not actually owe the plaintiff more than \$53.10, and if the amount of \$90.20 was dishonestly inserted in the note, and the defendants signed the note under the circumstances set forth, in ignorance of this fact, they ought not to be compelled to pay the larger amount. As already stated, the question with which we have here attempted to deal is not free from doubt or difficulty, but we have endeavored to follow what we regard as the safer and better course. It will be observed that, even under the law as we have ruled it, the plaintiff will still have the advantage of making out a prima facie case by the introduction of its written contract, and the burden will rest upon the defendants to establish, by a preponderance of the testimony, the fraud complained of, if it in fact exists. We express no opinion as to the merits of this particular case, but leave the same to be determined by the jury at the next trial, in view of the evidence which may be offered in support of the pleas, and of the evidence with which the same may be met by the plaintiff. Judgment reversed.

GWIN v. ANDERSON et al.

(Supreme Court of Georgia. July 26, 1893.)

NEGOTIABLE INSTRUMENTS — ALTERATION — EFFECT — PLEADINGS.

1. Where a promissory note due at a future time did not when executed specify any place of payment, nor any rate of interest from date, it is materially altered by inserting the name of a bank, which name includes the location of the bank, as the place of payment, and 6 as the rate per cent. of interest from date. This is true although the body of the note was printed, and blank spaces were left in the printing for expressing a place of payment and rate of interest. With these spaces unfilled, the note would be payable generally, and not at any particular place, and would bear no interest at any rate whatever until after maturity.

2. A special plea on oath offered in due time as an amendment to a plea of non est factum should have been allowed if it had been pleaded as a partial defense only, the same al-

leging that "the note, the foundation of plaintiff's action, has been altered or changed since signed by defendant, and without defendant's knowledge, consent, or authority, in this: that, as signed, the note was payable generally, and not at any bank, whereas it is now, as altered or changed, made payable to National Bank of Dalton; further, defendant says said note when signed did not have on its face the figure 6 between the words "at" and "per," but that same has been added since signed, without defendant's knowledge, consent, or authority." The effect of the plea, if sustained by evidence, would be only to defeat the action as to interest from the date to the maturity of the note, there being in the plea no allegation that either of the alterations was made by a person claiming a benefit under the note, with intent to defraud the defendant. In order to render the note void, these allegations as to one or both of the alterations would have to be made and supported by proof. Code, § 2832. As the plea was to the whole action, and set up that the note was void by reason of the alteration, and was not insisted upon as a partial defense only, there was no error in striking the same.

3. Where a plea of non est factum has been filed to a suit on a promissory note, the note is admissible in evidence upon proof of the defendant's admission that he signed it, and without explanation of any of its contents, which do not appear as alterations on the face of the note.

4. The court did not err in overruling the certiorari, inasmuch as the special plea stricken was not a defense to the whole action, and was not pleaded or insisted upon as a partial defense only.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

Action on a promissory note by Anderson & Bros. against J. T. Gwin. Plaintiffs had judgment, and defendant brings error. Affirmed.

W. R. Rankin, for plaintiff in error. O. N. Starr and R. J. & J. McCamy, for defendants in error.

SIMMONS, J. This was an action in a justice's court on a promissory note in the following words and figures: "Gordon County, State of Georgia, Aug. 7th, 1890. \$36.00. On or before the first day of August, 1891, I promise to pay L. Cahill & Co., or bearer, without offset, thirty-six dollars, at Nat. Bank of Dalton, value received. If paid at maturity, interest at six per cent. from August 1st, 1891; but if not paid when due interest at six per cent. per annum from date until paid. Homestead and all other exemption waived by the maker and each indorser. [Signed] J. T. Gwin." To this action the defendant filed a plea, in which he alleged that the note had been altered or changed since signed by the defendant, and without his knowledge, consent, or authority, in this: that, as signed, the note was payable generally, and not at any bank, whereas it is now, as altered or changed, made payable at the National Bank of Dalton; and that when signed it did not have on its face the figure 6 between the words "at" and "per," but that the same has been added since signed, without his

knowledge, consent, or authority, whereby his liability is increased, and, under the law, he ought not to be held liable for any sum. Upon demurrer this plea was stricken. The plaintiff proved the execution of the note, and then offered it in evidence. The introduction of the note was objected to by the defendant, and the objection was overruled. The justice rendered judgment for the plaintiff, and the defendant sued out a certiorari to the superior court, and on the trial of the case in that court the certiorari was overruled. The defendant excepted, and brought the case here for review.

1. It appears that this note, when executed, did not specify any place of payment, or any rate of interest from date. The place of payment, as well as the rate of interest from date, was afterwards inserted. This, in our opinion, was a material alteration. As originally executed, the note was payable generally, and not at any particular place; and, not containing, when executed, any rate of interest from date, it would not have borne any interest at all until after maturity. The fact that the body of the note was printed, and blank places left for expressing a place of payment and rate of interest, would not authorize the holder of the note to fill these blanks. There is some conflict in the decisions of different courts on this subject, but we think the sounder and better view is that the filling of these blanks, as above stated, was a material alteration of the note.

2. Section 2852 of the Code declares: "If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole contract, at the option of the other party. If the alteration be unintentional, or by mistake, or in an immaterial matter, or not with intent to defraud, if the contract, as originally executed, can be discovered, and is still capable of execution, it will be enforced by the court. If the alteration be made by a stranger, and not at the instance or by collusion of a party or privy, if the original words can still be restored, the contract will be enforced." When, therefore, a party sued upon a written contract seeks to avoid it entirely by setting up that it was altered in a material part, he must allege in his plea that the alteration was made by a person claiming a benefit under the contract, and with intent to defraud. If this allegation is made, and is sustained by proof, he will not be held liable for any amount on the contract. If the alteration is unintentional, or made by mistake, or in an immaterial matter, and without intent to defraud, the court will enforce it, if the original contract can be discovered, and is capable of execution. *Lowry v. McLain*, 75 Ga. 372, (3.) The plea above set out not alleging that the alterations were made by a person claiming a benefit under the contract, and with intent to defraud, and no proof being offered

to show these facts, the court did right in holding that the note was not void. The effect of the plea, as above set out, if sustained by evidence, would be to defeat the action as to interest from the date to the maturity of the note; but it was not insisted on as a partial defense, or as a defense to the amount of interest. The defense relied upon being that the defendant was not liable for any amount on the note, because of the material alterations therein, and the plea not containing the allegations required by the Code, the court did right in striking the plea.

3. In order to meet the plea of non est factum, the plaintiff proved by a witness that the defendant had admitted signing the note. When this was done, it was admissible in evidence without any explanation of its contents, which do not appear as alterations on the face of the note.

4. Inasmuch as the plea stricken was not a defense to the whole action, and was not pleaded or insisted upon as a partial defense only, the court did not err in overruling the certiorari. Judgment affirmed.

BAUGH v. ANDERSON et al.

(Supreme Court of Georgia. July 26, 1893.)

Error from superior court. Gordon county: T. W. Milner, Judge.

Action on a promissory note by Anderson & Bros. against one Baugh. Plaintiffs had judgment, and defendant brings error. Affirmed.

W. R. Rankin, for plaintiff in error. O. N. Starr and R. J. McCamy, for defendants in error.

PER CURIAM. This case is ruled by that of *Gwin v. Anderson*, 18 S. E. Rep. 43, (this day decided.) Judgment affirmed.

THOMAS v. STATE.

(Supreme Court of Georgia. July 26, 1893.)

CONSTITUTIONAL LAW — SPECIAL ACTS — FENCES — IMPOUNDING ANIMALS — HOMICIDE — SELF-DEFENSE — INSTRUCTIONS.

1. The act of November 26, 1890, amending the fence laws of the state, and repealing section 1449 of the Code, is a general law, and is constitutional. A part of its effect is to apply the prior laws on the subject of impounding stock to the new conditions established by the amending act in all counties in which those conditions prevailed when that act was passed. One of these being the county of Monroe, live stock running at large in that county on the premises of any person other than the owner in the month of October, 1891, could be lawfully taken up and impounded.

2. Inasmuch as the facts recited in the following instructions to the jury would not only negative the offense of murder on the part of David Thomas, the accused, but would equally negative the offense of manslaughter, it was error to enumerate these facts, and restrict them to the element of murder alone, without elsewhere in the charge informing the jury with equal explicitness that they were alike applicable to the element of manslaughter; in other words, that, if these facts were found to exist, the accused would be guilty of no crime whatever. The instructions referred to were as follows: "If you believe from the evidence

that the Thomases went to the house of Gossett to break the pound, and did nothing more, went there with the purpose of repossessing themselves of the property peaceably, to negotiate terms by which they could regain possession of the property without any violence, then if Gossett drew a gun, or if Gossett was manifestly intending or endeavoring to kill or to commit a felony upon the person of John Thomas, then John Thomas would have the right to defend himself by using such force as would prevent such an injury; and if a struggle ensued to prevent such an injury, and the gun was fired accidentally, or if it was discharged without any fault or intention on the part of any person engaged in the struggle to discharge the gun, then, although Dave Thomas may have joined in the struggle, you would not be authorized to convict him of the crime of murder." On account of this error alone the court erred in not granting a new trial, the other grounds of the motion for a new trial not embracing any cause for reversing the judgment.

(Syllabus by the Court.)

Error from superior court, Monroe county; James S. Boynton, Judge.

David Thomas having been convicted of a homicide, and his motion for a new trial having been overruled, he brings error. Reversed.

Berner & Bloodworth and Hall & Hammond, for plaintiff in error. James J. Hunt, Sol. Gen., and Stewart & Daniel, for the State.

SIMMONS, J. 1. The act approved November 26, 1890, amending the fence laws of the state, and repealing section 1449 of the Code, (Acts 1890-91, vol. 1, p. 69,) is a general law, and is constitutional. It operates generally throughout the whole state. Every county in the state may avail itself of the provisions of this act, and of the one of which it is amendatory. Whenever and wherever an election is held, and fences are abolished by a vote of the people, this act applies. No county or section of the state is excluded from its operation. All that is necessary to put it in force in any county is to comply with the requirements of the act of which it is amendatory. It is very similar in its provisions to the local option act, which has been held by this court to be a general law and constitutional. *Crabb v. State*, 88 Ga. 584, 15 S. E. Rep. 455. Being an amendment to the original act, it takes the place of the section in the Code repealed by it, and becomes a part of that act. Its provisions went into effect immediately in all those counties which had attempted to abolish fences, but had not succeeded on account of the want of legislative power to pass special acts for particular counties. The same provisions are likewise applied to other counties when they hold elections and abolish fences by popular vote. When this is done according to the requirements of the original act, the boundary lines of each lot or tract of land will be a lawful fence. In the same manner the act went into immediate operation in all those counties which had attempted to abolish fences

by special legislative enactment, and the provisions of the original act in regard to impounding stock were applied to the new condition established by the amending act in all those counties, and the same provision will apply in all counties which hereafter adopt the act by popular vote. Monroe county being one of those which had attempted to abolish fences by a special act, the amending act went into effect immediately in that county, and live stock running at large in the county on the premises of any person other than the owner in the month of October, 1891, could be lawfully taken up and impounded. There was, therefore, no error in refusing the request to charge on this subject made by counsel for the accused.

2. We think the court erred in the charge set out in the second headnote of this opinion. We are of the opinion that, if the jury should believe the facts recited in this charge, they would be authorized and required to find the defendant not guilty. This charge instructs them that they could not on the hypothesis therein stated find him guilty of murder. It should have gone further, and negatived the idea of manslaughter, as well as murder, and it was error to restrict the jury to the element of murder alone, as they might have inferred from this charge that the court intended to do. Limiting them to the element of murder might have been understood as equivalent to saying that they might find the defendant guilty of manslaughter upon the facts recited. The court ought to have instructed the jury that, if these facts were true, they should acquit the defendant. We think this error requires the grant of a new trial. Speaking for myself, I think the refusal of the court to continue the case on account of the sickness of the leading counsel for the accused was also error, but in this the other members of the court do not concur. I think when a party makes a motion for a continuance on account of the absence of his leading counsel, and makes the proof required by section 3525 of the Code, the judge has no discretion in the matter, no more than he has when proof is made that a party is providentially prevented from attending the trial of the cause. Section 3524 of the Code declares that, if either party shall be providentially prevented from attending at the trial of any cause, "such cause shall be continued," when the proper showing is made. Section 3525 provides that, where certain facts appear, the illness or absence of counsel from providential cause "shall be a sufficient ground for continuance." My brethren differ from me in this view, and think continuances should be controlled by section 3531, which declares that "all applications for continuances are addressed to the sound legal discretion of the court, and, if not expressly provided for, shall be granted or refused as the ends of justice may require," and that, under the

special facts of this case, the court did not abuse its discretion in refusing the continuance.

The other grounds of the motion for a new trial do not embrace any cause for reversing the judgment. Judgment reversed.

MILLER et ux. v. SMYTHE.

(Supreme Court of Georgia. June 5, 1893.)

TRUSTEE AS LANDLORD—FAILURE TO REPAIR—LIABILITIES—CONTRIBUTORY NEGLIGENCE.

1. Where a trustee legally and rightfully assumes, in his representative capacity, the relation of landlord, he is liable, in that capacity, to answer to the tenant for the violation of any duty which the general law attaches as an incident to that relation. Accordingly, where a trustee, duly authorized, rented a store belonging to the trust estate, and in the contract of rental agreed to keep the shelving in the store in thorough order and repair, the trust estate is liable for damages occasioned by his failure so to do.

2. Whether or not there was negligence on the part of the plaintiff, causing or contributing to the injury complained of, is a question for the jury; the declaration imputing negligence to the defendants, and not conceding, directly or by necessary implication, any on the part of the plaintiff.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Mary D. Smythe against L. J. Miller, trustee, and Mrs. Miller, for damages for failure to repair leased premises. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

The declaration of Mary D. Smythe against Miller, trustee, and Mrs. Miller, his cestui que trust, was demurred to by defendants, which demurrer was overruled, and to this ruling defendants excepted. The petition alleged: Petitioner rented from the trustee, and was in possession of, a store described, and the shelving against the walls therein, from October 1, 1890, to October 1, 1891, for carrying on the crockery business therein,—which was known to defendants,—for \$1,500 per year, the trustee agreeing to keep the store and shelving in thorough order and repair. Petitioner carried a large stock, and placed and displayed it upon the counters and shelving, and on November 12, 1890, had a large quantity of the goods upon the shelves placed against the western wall of the store, when, without cause or negligence on her part, the shelving broke, fell, and destroyed a large quantity of her stock, which had been placed thereon for safety and display in the usual course of business. At the time of the renting of the store to petitioner, the shelving was rented with it, and was, to all outward appearance, in good condition, and suited to the use intended, but, for some reason unknown to her, bulged out from the wall half an inch, in which condition the attention of her landlord was

called thereto by her as soon as it was discovered, and he agreed to fix it, but before doing so it fell. He agreed to make all repairs to keep the store in the condition in which it was rented. The notice mentioned was given him some time in the summer, after she had re-rented for the next year, to strengthen the shelving in the store; and a day or so before November 12, 1890, when the bulging was discovered, notice was again given to him, and he agreed to fix it, but did not do so at the very time it was necessary. In the contract of rental, he did not allow her to make the repairs for him. A short time prior to the fall, her agent in charge of the store inspected the shelving, and came to the opinion it was not strong enough, and called upon Miller, brought him to the store, and showed him the same. He (Miller) said it was secure, but that, in any event, he would have it repaired and strengthened, since it had been there some time. Petitioner relied upon this promise, but Miller never carried it out, and failed to keep the shelving in proper repair. Petitioner did not put upon the shelving any greater strain than had been put upon it many times before, but, after discovering the bulging, lightened the weight on the shelving; but notwithstanding this precaution the shelving fell, and broke other goods placed on tables in front of the shelving, by means whereof her business was interrupted, goods destroyed, etc., to her damage \$2,500. The declaration described the manner in which the trust estate was created, and alleged that the store and property of the estate were worth \$15,000, yielded a net income of about \$1,800, and an encroachment upon the corpus was necessary and proper in order to pay petitioner's damages; that the financial condition in life of the cestui que trust was of the best, and her wants not sufficient to absorb all of the income; that her husband was well off, and they had no children. The terms of the trust deed were set forth, and it was alleged that the trustee had authority under it to buy, sell, etc., the trust estate, privately or publicly, and otherwise manage and control it, at his discretion; that the trust estate and cestui que trust obtained the benefit of the contract of rental, and have received the rental from petitioner, including the year in which the loss occurred, and failed to keep the store and shelving in repair, as required by law and the contract of rental. The grounds of demurrer were: (1) Because the declaration set out no cause of action; (2) because, if the acts specified made a cause of action against the trustee, the trust estate was not liable for the acts of the trustee set out in the declaration; (3) because the trustee was individually liable for the acts complained of, if any one was so liable; (4) because the declaration showed plaintiff was guilty of such negligence she cannot recover.

J. R. Lamar, for plaintiffs in error. W. K. Miller, for defendant in error.

LUMPKIN, J. 1. The error complained of is the overruling of a demurrer to the plaintiff's declaration. The substance of the declaration, and of the demurrer thereto, will be found in the reporter's statement. The main contention of the plaintiff in error was that a trust estate could not be subjected to damages resulting from the negligence of the trustee, whether the same be regarded as a breach of contract, or as a breach of duty amounting to a tort. It was insisted that, under section 3377 of the Code, there could be no recovery against a trust estate except "for services rendered to said estate, or for articles, or property, or money, furnished for the use of said estate." The section declares that any person having against a trust estate a claim of the kind indicated by the words just quoted, "or where a court of equity would render said estate liable," may proceed at law for the collection of the debt. The words last quoted are of considerable importance, and the entire section simply means that any person having a valid claim against a trust estate may collect and enforce the payment of the same without resorting to a court of equity; and the section does not limit the liability of trust estates to the payment of such claims, only, as are indicated by the words first quoted. Besides, under the uniform procedure act of October 24, 1887, there can be no doubt of the right to proceed by a petition at law, with proper allegations, to enforce any kind of a just demand against a trust estate. The real question, therefore, is, can the trust estate, in the present case, be made liable for damages occasioned by the failure of the trustee to repair and put in safe condition the shelving in the store rented to the plaintiff. It will be observed that the declaration expressly alleges the trustee agreed to keep the store and shelving in thorough order and repair. Even without this distinct agreement, it would, under section 2284 of the Code, have been the duty of the trustee, as landlord, to keep the premises in proper repair. There can be no doubt that Mr. Miller, as trustee, had authority to rent the premises to the plaintiff. He therefore, legally and rightfully, in his capacity as trustee, assumed the relation of landlord; and, this being true, it is, to our minds, a plain proposition, both of law and of justice, that he was bound to perform the duty enjoined by statute upon all landlords, of keeping the premises in repair, and especially so when he expressly undertook, by agreement with his tenant, so to do. It follows, necessarily, that he is, in his representative capacity, liable to the plaintiff for a violation of this duty, and of the contract he made in pursuance thereof. And this is right, because the trust estate obtained the benefit of the contract

made by the trustee, and should, as to the tenant, bear whatever burden the law imposes upon landlords. As to the ultimate liability, if any, of the trustee to the cestui que trust, for his failure to perform his duty in the respect indicated, we are not now called upon to determine. We simply hold that, if the plaintiff supports by evidence the allegations of her declaration, she is entitled to a judgment subjecting the trust estate to whatever damages she may have sustained.

2. It was also contended that the plaintiff ought not to recover because her declaration sets forth facts which show that her own negligence either wholly caused, or very largely contributed to, the injury complained of. We do not think this a fair construction of the declaration. It expressly alleges that, "without cause or negligence on her part, the said shelving broke, fell down, and destroyed a large quantity of her stock," etc. In view of this allegation, and also of the fact that the declaration nowhere concedes, either directly or by necessary implication, that there was any fault or negligence on her part, it is, in our opinion, a question for the determination of a jury as to whether or not her conduct caused the injury, or contributed thereto, and, if so, to what extent. Judgment affirmed.

WOOD et al. v. HAYNES et al.

(Supreme Court of Georgia. June 26, 1893.)
ASSIGNMENT FOR BENEFIT OF CREDITORS—SCHEDULES—OMISSIONS—SETTING ASIDE ASSIGNMENT—INJUNCTION—RECEIVER.

1. Omissions from and inaccuracies in the schedule of assets and schedule of creditors which the law requires to be attached to a voluntary assignment by an insolvent debtor may or may not be sufficient to invalidate the assignment. It is impracticable to lay down any rule as to what may be safely omitted from such schedules. In each particular case the question should be determined with reference to the number, materiality, and importance of the omissions, and whether they were made by oversight and inadvertence, or deliberately, and with intention to defraud. In applications for injunction and receiver, the determination of this question is addressed to the sound discretion of the presiding judge. Intention to defraud in any material matter whatever will always vitiate the assignment.

2. In the present case there was no abuse of discretion in granting the injunction against the assignee as such, or in appointing the same person receiver to take charge of and hold the assets until the final hearing.

(a) At the final hearing, the jury, under proper instructions from the court, and in view of all the surrounding facts and circumstances, should decide whether or not the assignment should be set aside.

(Syllabus by the Court.)

Error from superior court, Cherokee county; G. F. Gober, Judge.

Action by Haynes, Henson & Co. and others against Wood & Lovingood to set aside an assignment for benefit of creditors, and for injunction and receiver. Injunction was

granted, and a receiver appointed pending final hearing. Defendants bring error. Affirmed.

The following is the official report:

On November 3, 1892, Wood & Lovingood filed an assignment executed by them for the benefit of creditors to William Galt. On January 14, 1893, Haynes, Henson & Co., Everett, Ridley, Ragan & Co., and the Beck & Gregg Hardware Company, creditors, brought their petition to set aside the assignment as null and void, and for injunction and receiver. The injunction was granted, and William Galt was appointed receiver to hold the assets of the defendants under order of the court until the final hearing. To this decision the defendants excepted. The assignment conveys all the goods, etc., specified in the attached schedule, in trust to sell, sue for, demand, receive, and recover all such sums of money as may be due and payable thereon, and after paying all reasonable and proper costs, charges, and expenses, including a reasonable fee for the services of P. P. Du Pre, attorney, for writing the deed and schedule, to pay to each and all of the assignor's creditors that may be due and owing to them from the schedule attached; and, if the proceeds of said goods, etc., be not sufficient to pay off all creditors, then to pay them pro rata, except \$126.60, to J. and Mrs. M. Galt and Mrs. M. Roberts, which is preferred, etc. The petition alleges that the assignment is absolutely null and void, for the following reasons: The assignment failed and neglected to make a full and complete schedule of their creditors. The schedule filed by them does not contain the names of the following creditors: E. A. Fincher, \$13.50; B. F. Perry, \$25.98; R. T. Jones & Co., \$32.64; H. H. Davis, \$2.10; J. D. Johnson, \$6; Lamar Rankin Drug Company, \$6.98; Jack Payne, \$4; J. H. Kilby, \$1.98; A. B. Coggins, \$6. The amounts due the creditors as stated in the schedule are incorrect, in this: The amount due Everett, Ridley, Ragan & Co. is stated to be \$936. In fact the assignors owed them \$990, besides interest. The amount due J. J. & J. E. Maddox is stated in the schedule to be \$360. In fact the assignors owed them only \$328.20. The amount due John Silvey & Co. appears in the schedule to be \$160.90. In fact the assignors owed them \$190, besides interest. The schedule of assets is incorrect and incomplete, and does not contain all the assets of the assignors. They operated two stores in Cherokee county, in which they carried on a general mercantile business,—one in the town of Canton, and the other at Pitts' old stand, about 10 miles away. When the assignment was made, no inventory of the goods and other assets in the storehouse at Pitts' old stand was made, but the assignors made what purported to be an inventory by guessing at the goods contained in that store, which purported in-

ventory is incorrect, incomplete, and utterly unreliable. It does not contain a full and complete inventory of the goods. It is impossible to specify in what respect it is incomplete, and to enumerate the particular goods that are not enumerated therein, for the reason that no complete and correct inventory of the goods was ever taken. The purported inventory, as filed, contains goods and assets of the value of \$696.42, when in fact the assignors did not have assets of any such amount, but only goods of the value of about \$400. They owned a large lot of peas, which were not measured, and the amount and value of which were not correctly stated in the inventory. The paper purporting to contain a list of their notes and accounts is incorrect and incomplete. W. C. Harralson was indebted to them \$5.23, besides interest, for which they had his note, which was not listed in the schedule. W. A. Davis owed them \$10.40, besides interest, for which they held his note, which also was not listed; and so as to an open account for \$4.50 due by A. B. Coggins. The petition also charges that the assignors, and each of them, are hopelessly insolvent, and that the assignee accepted the trust, took charge of the assets, disposed of the goods and merchandise to the amount of \$300 or other large sum, which he has in his possession, and that he has other assets undisposed of, of the value of \$500 or other large sum.

The defendants, in their answer, set up the following: The schedules were as full and complete as they were able to give at the time of the making of the assignment. They deny any intention or purpose to defeat or injure any of their creditors. The creditors that were not listed were very small, and were not on the books on which the names of their creditors were kept, except E. A. Fincher, whose name is found on the book with that of J. Allen, Smith & Co., and the account is so stated. When the book was inspected in getting up the list of creditors, the name of Fincher was overlooked. The amount due him is only \$8.10, as shown by said book and by the statement submitted by him to the assignee. The claim of H. H. Davis for \$2.10 on duebill was correct. The duebill was given for chickens bought of him with the understanding that the price was to be liquidated in trade at the store; and it was given by Lovingood, one of the firm, at the Canton store, in the absence of Wood, who had charge of the business in Canton generally, while Lovingood operated the store at Pitts' old stand. Lovingood failed to enter the duebill on any book. When the schedule of creditors was made out, Wood gave out the list of creditors for the business of Canton, and did not know of this duebill. According to the best of their knowledge, and according to their own books, the assignors owed nothing to the Lamar Rankin Drug Company. They owed A. B. Coggins nothing. Jack Payne owed them an account.

They were not indebted to him as charged, but there was due him on some barter \$1.77, which had not been credited on his account. The amount due B. F. Perry, as shown by their books, was a credit of \$11.23. He had done some advertising and job work for them, and the amount of his charges was not known to them; but, on investigation, they found that the amount due him is \$7.96, which they did not know was due at the time of making the assignment. It is not true that they owed R. T. Jones & Co. \$32.00. On the contrary, they owed them only 30 cents, taking the books of Jones & Co. for the facts, while the books of Wood & Lovingood showed that Jones & Co. were indebted to them \$6.59. At the time of making the assignment the books showed that J. D. Johnston was indebted to them, and the payment to them of some cotton seed, worth \$6, was forgotten. His account was not credited, as it should have been, through inadvertence of the clerk Wood, and, after allowing said credit, nothing is due him as charged. Defendants have no knowledge of being indebted to J. H. Kilby in any amount. The account presented by him has been settled. The amount set forth in the schedule as due John Silvey & Co. is correct, as shown by statement made them by Silvey & Co., which they followed in making the schedule. The amount due Everett, Ridley, Ragan & Co. was \$937.18, as shown by the books, which were mere transcripts of bill furnished by that firm from time to time. It is not true that the assets at Pitts' old stand were lumped together and inventoried by guess, but a complete and minute inventory of said assets was taken by Lovingood and one Forrester. It is true the peas were not measured bushel by bushel, but the boxes in which they were were gauged by one Wiley, and the amount of peas ascertained in that way. The inventory thus obtained was returned as a part of the assignment. Leaving out of the list of assets the notes against Harralson and Davis was a clear oversight. They were in a blank book by themselves, which was overlooked by the parties making the inventory. The notes were called out by one party, and the list made by another. It was mentioned at the time that these notes should be among the assets, but they were not found. However, they are of no value, and the makers thereof are utterly insolvent. The assignment was made in the utmost good faith. Defendants desired all of their creditors to share alike in their assets. If any were left out, it was a mere inadvertence or oversight. At the time it was made, they had not been sued by any person or firm; and, when they discovered their failing condition, they sought to do the best they could for all of their creditors.

At the hearing, there was evidence adduced tending to support the allegations on both sides. B. F. Perry, with a claim of \$7.96, and E. A. Fincher, with a claim of \$8.10,

were made parties plaintiff. The defendants said they would pay off these claims, which they could do by borrowing that amount of money; but no money was offered or presented, and this offer was not accepted. The hearing was on January 28th. On January 30th, before the decision was rendered, John Silvey & Co. were made parties plaintiff on application. The defendants contend that, at the time of the argument, Silvey & Co. were not complaining of any error in the amount of indebtedness to them in the schedule of the assignors, and that such alleged discrepancy should not have been considered by the court for that reason. They further say that the failure to include B. F. Perry and E. A. Fincher in the list of creditors is fully explained in the answer, and, when the assignors offered to pay said claims, the same ought not to have been considered by the court as a ground for granting the prayer of the plaintiffs. It is also insisted that the evidence shows that the assignment was made in good faith, and that the discrepancies in the lists of assets and of creditors were not material, and do not show fraud or any good reason for setting aside the assignment.

J. P. Brooke, for plaintiffs in error.
Brown & Hutcherson, for defendants in error.

LUMPKIN, J. Wood & Lovingood, an insolvent firm of traders, made a voluntary assignment for the benefit of their creditors to one William Galt. There were several omissions from and inaccuracies in the schedule of assets and schedule of creditors, the nature of which will appear from the reporter's statement. Because of these omissions and inaccuracies, certain creditors filed their petition to set the assignment aside, and for injunction and receiver. The court granted the injunction, and appointed Galt receiver to hold the assets of the defendants under order of the court until the final hearing. We are asked to reverse this action of the court below. To do this, it would be necessary to hold that there was an abuse of discretion. In our opinion, there was none. While it is true that every error or omission in the schedules which the law requires shall be attached to voluntary assignments by insolvent debtors would not be sufficient to invalidate an assignment, it is also true that such errors and omissions may, and usually will, produce this result. If the schedules are in the main complete and accurate, and, through mistake or mere inadvertence, something of no great importance is left out, and it is manifest there was no intention to defraud, the assignment may very properly be upheld. An intention to defraud or deceive in any material matter will, however, always vitiate the assignment; and, even when no such intention really exists, an assignment should be set

aside when there are omissions of important matters from the schedules attached to it, or when these schedules contain inaccuracies of a substantial nature. As ruled in *Turnipseed v. Schaefer*, 78 Ga. 109, it is impossible to lay down any positive and definite rule as to what may be safely omitted from such schedules when such omissions are occasioned by oversight or inadvertence, and without intention on the part of the assignor, or any purpose to mislead creditors by filing a false, deceptive, or incomplete schedule. The doctrine announced in the second headnote of that case very clearly and accurately states what the rule should be in such cases, and attention is also directed to the opinion of Mr. Justice Hall, which evidently was carefully prepared after thorough and mature consideration. The conclusion seems to be that, in each particular case, whether the assignment should stand or fall should be determined with reference to the number, materiality, and importance of the omissions and inaccuracies, and also with reference to the question whether they were made by mere oversight and inadvertence, or deliberately, and with intention to defraud. See, also, *Stultz v. Fleming*, 83 Ga. 14, 9 S. E. Rep. 1067. In the present case, the judge below, by appointing the assignee receiver, and granting the injunction prayed for, adopted a course which will preserve the rights of the contending parties until the jury, at the final hearing, shall have decided, in view of all the surrounding facts and circumstances, and under proper instructions from the court, whether the assignment should stand or be set aside. This was a wise and proper direction to give to the case. Judgment affirmed.

REDMOND v. PIPPEN et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

EXECUTOR OF SURETY ON SEALED NOTE—STATUTE OF LIMITATIONS.

Code Civil Proc. § 152, subd. 2, provides that an action may be brought on a sealed instrument "against the principal thereto" within 10 years. Section 153, subd. 2, provides that an action may be brought by any creditor of a deceased person against his personal or real representative within seven years next after the qualification of the administrator. Section 155 restricts within three years an action upon a contract, obligation, or liability arising out of a contract, express or implied, except on contracts under seal. Section 164 provides that, "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time and within one year after the issuing of letters testamentary," etc. *Held*, that section 153, subd. 2, does not apply to the ordinary obligations of a deceased person, and that the time within which an action may be brought against the representative of a deceased surety on a note under seal is governed by sections 155 and 164.

Appeal from superior court, Edgecombe county; W. A. Hoke, Judge.

Action by Claudia Redmond against F. L. Phippen, administrator of the estate of J. H. Phippen, deceased, and M. H. Phippen, executrix of the estate of W. M. Phippen, deceased, on a promissory note under seal, executed by J. H. Phippen as principal, and W. M. Phippen as surety. From a judgment in favor of defendant M. H. Phippen, executrix, plaintiff appeals. Affirmed.

Defendants admitted liability to plaintiff for the balance due on the note as to the defendant F. L. Phippen, administrator of J. H. Phippen, the principal thereto, but contended that as to the executrix of W. M. Phippen, the surety to the note, the cause of action was barred by the statute of limitations protecting sureties in three years. It was admitted that the note was executed much more than three years before commencement of this suit by J. H. Phippen as principal and W. M. Phippen as surety, and summons in the action was issued on April 5, 1892. It was also admitted that J. H. Phippen died in June, 1888, and defendant F. L. Phippen qualified as his administrator on October 15, 1891; that W. M. Phippen died June 6, 1889, and defendant, his executrix, was qualified as such on June 8, 1889. It was further proved that J. H. Phippen, the principal to the note, paid the interest thereon continuously as same became due, down to and including March 23, 1888, which was the last payment made by him, and such payments were duly entered as credits on the note. There was no evidence offered that claim had been presented to either administrator or executrix. The court, being of the opinion on the facts admitted that the cause was barred as to the surety by the statute of limitations, so instructed the jury, who returned a verdict on the evidence in favor of the defendant surety. Plaintiff excepted.

John L. Bridgers & Son, for appellant. Gilham & Son, for appellee.

MacRAE, J. Since *Welfare v. Thompson*, 83 N. C. 276, it has been firmly established that three years is a bar to actions upon sealed notes as against the sureties thereto. *Clark's Code*, § 152, subd. 2. As to the surety, W. M. Phippen, himself, there is no question but that the statute of limitations would bar an action against him in three years after the last payment. It is contended, however, that, as he died before the action was barred as to him, by virtue of section 153, subd. 2, the time is extended; or, as said in the plaintiff's argument, "that his death puts a stop to the running of the statute, and brings to an end all limitations in favor of the dead man's estate. Upon the qualification of the personal representative, a new and different statute of limitations begins to run, to wit, the statute governing the bringing of actions against the personal representatives of decedents, (*Code*,

§ 153, subd. 2;)" and that, notwithstanding the fact that the statute had begun to run during the life of the surety, and had been merely suspended upon his death until the qualification of his executor, after such qualification an action may be brought upon the note at any time within seven years. This is the first time, as far as we know, that this construction has been sought to be put upon the section last named. The statute of limitations (title 3, Code Civil Proc.) is comprised of several chapters and many sections, and in the interpretation of any one section thereof regard must be had to its harmony with the whole. While section 153, subd. 2, standing alone, would extend the time "by any creditor or of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator," etc., we must take it in connection with section 155, which restricts "within three years an action upon a contract, obligation, or liability arising out of a contract, express or implied, except those mentioned in the preceding sections," which especially referred to contracts under seal, (section 152, subd. 2; Joyner v. Massey, 97 N. C. 148, 1 S. E. Rep. 702;) and with section 164, which provides: "If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time and within one year after the issuing of letters testamentary," etc. The last section has been held to be an enabling, and not a disabling, statute, and to apply only in those cases where, but for its interposition, a claim would be barred in less than one year from the grant of letters. Benson v. Bennett, 112 N. C. 505, 17 S. E. Rep. 432. It will be found upon examination of the cases wherein the seven-years statute has been held to apply, that they were brought against the personal, and, where necessary, the real, representatives for the enforcement of some right of which the debt itself was but the foundation; as in Lawrence v. Norfleet, 90 N. C. 533, and Worthy v. McIntosh, Id. 536, which were brought by the administrator d. b. n. against the administrator of a former representative to recover the unadministered assets which were or ought to have been in his hands; or as in Cox v. Cox, 84 N. C. 138, which was an action for a legacy; or as in other instances which might be named, upon a devastavit, or to compel the sale of land to pay the debts of the decedent. This is the more reasonable, as the result of an action against the personal representative upon an ordinary obligation of the deceased is simply to ascertain the amount of the debt and fix it in a

judgment. It is impossible by any other construction to reconcile the provisions of the sections cited. This action, then, as it appears, was barred at the time of its commencement. No error.

STATE v. BROWN.

(Supreme Court of North Carolina. Oct. 10, 1893.)

HIGHWAY ROBBERY—SUFFICIENCY OF INDICTMENT—DESCRIPTION OF OFFENSE.

1. An indictment for highway robbery, charging the taking of "ten dollars in money," sufficiently alleges that money "of the value of ten dollars" was taken, and is not objectionable as failing to designate the value of the money taken.

2. An indictment is not bad for failure to state that defendant stole the money; the allegation that he "feloniously did take and carry away" the money being a sufficient allegation in that regard.

3. A charge in such indictment that defendant "did make an assault," and "put in bodily fear and danger of his life," and "then and there feloniously and violently did seize, take, and carry away" ten dollars from the prosecutor, sufficiently alleges the use of force.

Appeal from superior court, Edgecombe county; Hoke, Judge.

Preston Brown was convicted of highway robbery, and appeals. Affirmed.

The Attorney General, for the State.

CLARK, J. Upon inspection of the transcript, it appearing that though the "case on appeal" recited that there was a verdict of guilty and judgment, the record proper failed to show that there had been a trial by jury, and to set out the sentence of the court below, this court ex mero motu directed an instant certiorari to supply the defect, which has now been done.

The indictment sets out two counts,—one for highway robbery; second, for an attempt to commit the same. The verdict found the defendant guilty on the first count. It is therefore unnecessary to consider the exception made to the second count. But had the defendant been convicted of the attempt to commit highway robbery, the first count, if good, would have supported the verdict, since the act of 1891, (chapter 205, § 2,) provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime." This statute is a copy of that in force in England and in New York and other states. It extends to all crimes the provision which to a more limited extent was already in force in this state by virtue of chapter 68, Acts 1885, and, indeed, at common law. Whart. Crim. Pl. & Pr. (9th Ed.) §§ 246, 465. The joinder of a count for

¹ Code Civil Proc. § 152, subd. 2, provides that the period prescribed for the commencement of "an action upon a sealed instrument against the principal thereto" is 10 years.

a lesser offense or an attempt is now mere surplage.

The objections to the first count, raised by motion to quash, and renewed after verdict by a motion in arrest of judgment, were: (1) "For that there was no value of the money designated in the bill." In an indictment for this offense the value or description of the article taken, or attempted to be taken, is not material, for the gist of the offense is not the taking, but a taking by putting in fear or by force. *State v. Brown*, 73 N. C. 83, citing *Rex v. Bingley*, 5 Car. & P. 602. But in fact the charge of "ten dollars in money" is an allegation of "the value of ten dollars," since money is the measure of values. *McCarty v. State*, 127 Ind. 223, 26 N. E. Rep. 665. Indeed, the description would be sufficient, under our statute, even in an indictment for larceny, and would be sustained by proof of the theft of coin or bank or treasury notes. *State v. Freeman*, 89 N. C. 469; Code, § 1190. (2) "That the word 'steal,' nor any equivalent word, is charged in the bill." It is not necessary that it should be. The indictment is a copy of the form given in *Whart. Pl. & Pr.* § 410. Among the many definitions given of robbery probably the best is that by Lord Mansfield: "A felonious taking of property from the person of another by force," (*Rex v. Donolly*, 2 East, P. C. 715, 725;) or Blackstone's, (4 Bl. Comm. 242:) "The felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." To make it highway robbery it is only necessary further to charge and prove that it was committed "in or near a highway." It is true, a defendant acquitted of this offense because violence or putting in fear is not proved, may be convicted of larceny, (*State v. Cody*, 60 N. C. 197; *State v. Halford*, 104 N. C. 874, 10 S. E. Rep. 524;) but the word "steal" is not an indispensable word, like "feloniously," either in this or an indictment for larceny. As to either, the words "feloniously did take and carry away" are a sufficient allegation in this respect. The addition of the word "seize," i. e. "feloniously did seize, take, and carry away," is a peculiarly appropriate substitute in an indictment for this offense for the word "steal," which is tautology, and a mere repetition of the idea embraced in the words "feloniously take and carry away." (3) "That no force is charged therein." The charge that the defendant "did make an assault," and "put in bodily fear and danger of his life," and "then and there feloniously and violently did seize, take, and carry away" \$10 in money from the prosecutor, is a very explicit allegation of force. Indeed, the words "feloniously and violently" were of themselves sufficient. *State v. Cowan*, 29 N. C. 289, 250. But this indictment goes beyond that, and beyond the other words above quoted, and even adds, out of abundant cau-

tion, the express words "with force and arms," which have been held unnecessary in an indictment for any offense for three centuries and a half. *State v. Harris*, 106 N. C. 682, 687, 11 S. E. Rep. 377. No error.

LEWIS v. JOHN L. ROPER LUMBER CO.
(Supreme Court of North Carolina. Oct. 10, 1893.)

BOUNDARIES—ISLANDS—CHANGE OF WATER LINE.

1. Plaintiff testified that the land described in his title deeds as "Canary Island," included "the highland surrounded by the Dismal," and was marked by certain corners. It was in evidence that the water extended to some of the lines and corners, but had receded. Plaintiff testified that one V., deceased, pointed out to him the old lines marking the water line, and that these were the lines he showed the surveyor. Held good secondary evidence of the boundaries as including the original highlands.

2. Plaintiff's testimony that corner trees were marked on the boundaries of the original island, and that, when one marked tree had disappeared, plaintiff marked another to show where it had stood, was competent.

3. Declarations as to the boundaries, made by an adjacent landowner ante litem motam, are competent.

4. The law presumes that a grantee in possession claims up to the boundaries of the tract described in his grant.

Appeal from superior court, Washington county; Hoke, Judge.

Trespass by W. W. Lewis against the John L. Roper Lumber Company. Judgment for plaintiff. Defendant appeals. Affirmed.

W. D. Pruden, for appellant. A. O. Gaylord, for appellee.

AVERY, J. It is admitted that the title to the land in controversy has passed out of the state, and that the plaintiff, and those under whom he claims, have had an actual possession, including about 14 acres inclosed under fence, for about 50 years. In order to establish certain lines and corners claimed as the boundaries, and to show constructive possession up to them, the plaintiff, W. W. Lewis, offered the deed of his father, William Lewis, to himself, dated May 7, 1834, conveying a tract of land described as "Canary, containing 127 acres;" the deed of Clarissa Leggett to said William Lewis, dated the 20th of September, 1827, and conveying a tract of land described as "Canary Island, East Kendrick creek;" also, a deed from Henry Hardy to William Lewis, dated August 26, 1828, and conveying a tract of land described as "Canary Island, 100 acres, more or less." There were two older conveyances offered, also,—one describing the tract conveyed as "Canary;" the other, as the "East Lee Mill-Pond Canary tract, 100 acres, more or less." The plaintiff contended that he had offered testimony tending to show that the tract of land was known both as "Canary" and "Canary

Island," which were generally understood to mean the same tract; that it lay adjacent to Kendrick's creek, on East Lee mill pond, which two names described the same body of water, and tending also to designate the known boundaries of the island, and to point out corners, which, as points upon lines, would indicate the exact location of the boundary around the whole tract. The defendant admitted that the plaintiff had acquired title to his inclosure, but contended that he had not offered sufficient evidence to go to the jury upon the question of the location of the lines. The plaintiff testified that the description "Canary" or "Canary Island" was used to describe a tract of land which was more definitely designated in two ways: (1) By certain corners at different angles on the outside boundary; (2) by including "the highland surrounded by the Dismal." It was in evidence, also, that the water originally extended to some of these lines and corners, but had receded on account of more recent drainage. The witness testified that one Vollway pointed out the old lines that included the highlands bounded by the Dismal. Though there was conflicting evidence as to the extent of the highlands, still, there was testimony tending to show that the lines pointed out by Vollway, the owner of an adjacent tract, was the original highland, not covered by the water at its ordinary height, though it was in evidence that not more than $1\frac{1}{2}$ acres, including plaintiff's dwelling house, were above the high-water mark in great freshets. The plaintiff testified that the corners shown by himself to the surveyor were on the margin of the highland, as pointed out by Vollway, and marked the angles on the original water line. In the absence of any evidence as to corners, the court might have left the question of the location of the boundary lines claimed by the plaintiff upon the declaration of Vollway that it was governed by the original extent of the highlands, or land not covered by the Dismal.

When an island in an unnavigable stream or in a swamp is granted by one name by which it is generally known, it is not necessary to run or call for lines and corners. The low-water margin of the island is esteemed more durable, and preferable, as a certain description, to courses and distances. Tied. Real Prop. §§ 836, 838. The testimony of the plaintiff is clearly susceptible of the construction that the deceased declarant, Vollway, had pointed out the original low-water line, which is still indicated by corners marked at some of the angles along said marginal line, though subsequent drainage may have caused the water to recede, and leave a larger area uncovered, in the ordinary condition of the swamp. Such enlargement of the original island by artificial means was not an accretion that inured to the plaintiff's benefit; and, if not, it was competent, as in all such cases, to show

the original low-water line, as defining the limits of the island when granted. Tied. Real Prop. § 685 et seq.; Malone, Real Prop. Tr. 253. It is not necessary to cite authority to show that by the grant of an island, designated by the name by which it is generally known, all of the land surrounded by water at the low-water mark passes. When once it does so pass, sudden accretions are not added to it; and, when nature no longer marks the original line, man may prove by oral testimony of living witnesses, or competent declarations of persons deceased, where the land was located when the land was granted.

Without passing upon the sufficiency of the proof of course and distance offered, we think, therefore, that there was testimony upon which the jury might have located Canary or Canary Island by the original extent of the highlands. The question whether the greater weight of testimony was upon the one side or the other was not one addressed to the court below, and is not to be considered by us. However the boundaries of his deed may be ascertained, when located, the law presumes that the plaintiff claimed up to them. McLean v. Smith, 106 N. C. 177, 11 S. E. Rep. 184; Ruffin v. Overby, 105 N. C. 78, 11 S. E. Rep. 251. The plaintiff testified that the declarations of Vollway were made ante litem motam, and when Vollway was disinterested, and this was not denied. Though he was an adjacent landowner at the time, his declarations were nevertheless competent. Bethea v. Byrd, 95 N. C. 309; Dugger v. McKesson, 100 N. C. 1, 6 S. E. Rep. 746; Fry v. Currie, 103 N. C. 203, 9 S. E. Rep. 393.

For the reasons given, we think that there was no error in submitting the question of the extent of the plaintiff's boundary to the jury. The testimony as to the marking of corner trees was competent, if for no other purpose, as corroborative evidence to show that marks were made to indicate the margin of the original island, and, when one tree originally marked had disappeared, it was competent to show that another was marked to designate where it had stood. There was no error.

DAVIS et al. v. SMITH et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS — RESERVATIONS—FRAUD—EVIDENCE.

1. The fact that two partners assigning for the benefit of creditors reserve, under an agreement between themselves, such exemptions out of the partnership effects as the law permits, raises no presumption of fraud.

2. Nor is it presumptive evidence of fraud that the deed of assignment, after reciting the reservations of the homestead and personal property exemption "allowed by law," provides

that it "be set apart by the party of the second part," being evidence of nothing more than that the assignors were ignorant of the law, or misunderstood the procedure prescribed by statute.

Appeal from superior court, Craven county; W. A. Hoke, Judge.

Action by M. L. T. Davis and others against B. J. Smith & Co. to set aside an alleged fraudulent assignment for the benefit of creditors, made by defendants, and to recover money due plaintiffs. There was a judgment in favor of some of the plaintiffs, from which plaintiff Davis appeals. Affirmed.

W. D. McIver, for appellant. W. W. Clark, for appellees.

AVERY, J. The exceptions raise three questions: (1) Whether there was any evidence to support the finding upon the first issue, which alone was submitted to the jury; (2) whether the admitted facts shifted the burden of proof from the plaintiffs to the defendants by raising a presumption that the deed of assignment was fraudulent; (3) whether there was error in refusing the motion of the plaintiff for judgment upon the verdict. If it plainly appears upon the face of a deed of assignment that it was executed, not in good faith, but for the purpose of securing the ease and comfort of the debtor, the court is empowered to declare it void without the intervention of a jury. *Woodruff v. Bowles*, 104 N. C. 206, 10 S. E. Rep. 482; *Brown v. Mitchell*, 102 N. C. 368, 9 S. E. Rep. 702; *Hardy v. Simpson*, 13 Ired. 132. Is the reservation of personal property and homestead exemptions for both of the assignors conclusive evidence of a fraudulent intent on their part? We think not. The reservation of the right to the personal property exemption and the homestead "allowed by law" was neither conclusive nor presumptive evidence of a fraudulent purpose. *Barber v. Buffalo*, 111 N. C. 208, 16 S. E. Rep. 386; *Eigenbrun v. Smith*, 98 N. C. 207, 4 S. E. Rep. 122; *Bobbitt v. Rodwell*, 105 N. C. 244, 11 S. E. Rep. 245. While "it is well settled that each member of a partnership has a right to require the application of the joint effects to the joint debts before any portion of them can be directed to the satisfaction of the individual debts," it is a rule of law, as firmly established, that "with the assent of the partners any one of them is free to dispose of the company's effects for his individual use, and a creditor cannot interfere to prevent the application." *Allen v. Grissom*, 90 N. C. 92; *Clement v. Foster*, 3 Ired. Eq. 213; *Rankin v. Jones*, 2 Jones, Eq. 169. If there is no lien in favor of the creditors of the firm, we fail to see the force of the contention that the reservation

of the exemptions out of the partnership effects, as the law permitted them to do by agreement among themselves, raised a rebuttable, if not a conclusive, presumption of a fraudulent purpose on the part of the assignors. The late Chief Justice Smith, in *Allen v. Grissom*, conceding that there was conflicting authority as to the right of partners under an agreement among themselves to apply partnership funds, by assignment or otherwise, to the payment of individual debts, says: "This is the doctrine established by repeated recognitions in this court, from which, whatever may be the decisions elsewhere, we are not at liberty to depart, and it commends itself to our approval." Admitting, therefore, that the research of the industrious counsel for the plaintiff has enabled him to array much authority from text writers and courts which have adopted different views, we are not required to again renew the discussion of questions so long ago settled by our learned predecessors.

The admitted fact that the plaintiffs in the deed attempted to secure a larger amount of indebtedness to any of the preferred creditors than was actually due, while it fell as far short of presumptive proof, was evidence of a fraudulent purpose, which, as we understand the case, was submitted to the jury as bearing upon the first issue. The weight of the testimony, in view of all accompanying circumstances shown, was to be determined by them. After reserving the homestead and personal property exemption "allowed by law," the use of the subsequent language, "to be set apart by the party of the second part," constitutes neither conclusive nor presumptive evidence of fraud. Having reserved only such exemptions as the constitution and laws recognized, the designation of some irregular method of either setting apart the homestead or appraising personal property would not vitiate the instrument, or taint it with fraud. It would be simply evidence that the assignors were ignorant of the law, or misunderstood the method of proceeding prescribed by statute, while it was still permissible for any aggrieved creditor, who should obtain judgment, and sue out execution, to pursue the proper remedies to enforce his own judgment. We can see no error in the charge of the court that the burden still rested upon the plaintiffs to show the fraud which they alleged to the satisfaction of the jury. We find no testimony which in law would have shifted the burden of proof, but only circumstances bearing upon the inquiry involved in the issue submitted, the weight of which was properly submitted to the jury. There is no error.

GALLOP v. ALLEN et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

JUSTICES OF THE PEACE—SETTING ASIDE DEFAULT JUDGMENT.

A judgment rendered by a justice of the peace without due notice to defendant of the time and place of hearing cannot be set aside by suit in the superior court. The remedies are a motion before the justice, or a writ of recordari in the superior court.

Appeal from superior court, Currituck county: John Gray Bynum, Judge.

Action by J. C. Gallop against William F. Allen & Co. to set aside a judgment, and for injunction. Application dismissed. Plaintiff appeals. Affirmed.

This was a civil action commenced in the superior court of Currituck county to vacate and set aside as null and void a judgment rendered by a justice of the peace of said county in favor of the present defendants and against the plaintiff in this action. The complaint alleged that the summons in the action before the justice was served upon this plaintiff on the 5th of September, 1892, returnable on the next day at the courthouse in said county before the justice named; that this plaintiff, then defendant, was sick on the return day, and could not attend at the place of trial; that thereupon the cause was continued for his absence, and for further hearing, but that no notice was given him of the time or place for the further hearing, and that he heard nothing further of the matter until a few days before this action was begun, when he was notified by the sheriff of said county that said sheriff had an execution in his hands against said plaintiff, who was the defendant in said execution, upon a judgment rendered by said justice in said action on the 27th of September, 1892, at Shawboro, in said county, a place other than the courthouse. This plaintiff alleged in his complaint, used as an affidavit, that he had a meritorious defense to the said action. A restraining order was made returnable before his honor, Judge Bynum, at chambers, in Elizabeth City, on May 2, 1893, upon which return his honor dissolved the restraining order, and dismissed the application for an injunction, for want of jurisdiction, and the plaintiff appealed.

Grandy & Aydlett, for appellant.

MacRAE, J. Assuming the affidavit of the plaintiff to be true, the judgment rendered by the justice was irregular and voidable. The remedies open to the defendant in that action, (the plaintiff herein,) were a motion before the justice who rendered the judgment, or his successor in office, to set aside the judgment, or a writ of recordari in the nature of a writ of false judgment in the superior court. If it had been alleged that the judgment was obtained by fraud, an action to set it aside would have been the

proper procedure. The subject has been so recently discussed and explained that it will be unnecessary now to do more than refer to *King v. Railroad Co.*, 112 N. C. 318, 16 S. E. Rep. 929, and *Whitehurst v. Transportation Co.*, 109 N. C. 344, 13 S. E. Rep. 937. As an action did not lie to vacate the judgment, his honor properly dissolved the restraining order and denied the application for an injunction. Affirmed.

HARE v. BOARD OF EDUCATION OF GATES COUNTY.

(Supreme Court of North Carolina. Oct. 10, 1893.)

WHITE AND COLORED SCHOOLS—WHITE CHILDREN—OPINION EVIDENCE.

1. Code, § 1810, provides that "all marriages between a white person * * * and a person of negro or Indian descent to the third generation inclusive are void." Laws 1889, § 42, provides "that in determining the right of any child to attend the white or colored schools, the rules laid down in section 1810 of the Code, regulating marriages, shall be followed." *Held*, that the children of a white woman and a man whose mother was white, but whose father was a negro, were not entitled to attend the white schools.

2. A witness need not possess any peculiar scientific knowledge to render him competent to testify as to whether or not a certain person has African blood in his veins.

Appeal from superior court, Gates county: Bynum, Judge.

Action by James R. Hare against the board of education of Gates county for a writ of mandamus to compel defendant to admit plaintiff's children to the white school of his district, in such county. From a judgment entered on the verdict of a jury in favor of defendant, plaintiff appeals. Affirmed.

L. L. Smith, for appellee.

AVERY, J. But a single question was raised by the exception to the charge, and that is whether the court, in any aspect of the testimony, should have instructed the jury that the children of the plaintiff belonged to the white race, and had a right to insist upon admission into the district school provided for white children. The inference might have been drawn from the statement of one of the witnesses that the plaintiff's father was a mulatto, while others testified that he was a negro. "All marriages between a white person * * * and a person of negro or Indian descent to the third generation inclusive are void." Code, § 1810. The statute (Laws 1889, § 42) provides "that in determining the right of any child to attend the white or colored schools, the rule laid down in section 1810 of the Code, regulating marriages, shall be followed." It is manifest that the jury, acting under the instructions given them, must have found from the testimony that Charles Jones was the father of the plaintiff, and was a

full-blooded negro. There was no error in the charge of the court, of which the plaintiff could complain. Whether we concede or deny that for the purpose of establishing the right of a person of mixed blood to contract a marriage with a white person, or gain admission into school for white children, testimony tending to show that the reputed father of his father was only a negro of the half-blood is admissible, or that it is competent for either purpose to go behind the presumption that an admitted slave was a full-blooded negro, and attempt to show the exact proportions in which the Caucasian and negro blood were intermingled in his conception, in either event, if the plaintiff's father was in fact a full-blooded negro, as the jury must have determined that he was, his children would not be beyond the third generation. This court, in *State v. Chavers*, 5 Jones, (N. C.) 11, construed the language of the old statute, (Rev. Code, c. 107, § 79,) "all persons, descended from negro ancestors to the fourth generation inclusive," as classifying with the whites only persons who were removed beyond the fourth, or belonged to the fifth, generation. The words used in section 1810, "to the third generation inclusive," must therefore be construed to prohibit intermarriage of whites with persons who are not beyond the third or in the fourth generation from the pure negro ancestor. The statute in reference to schools is expressly required to be interpreted in the same way as section 1810 of the Code is construed, and it would follow that the plaintiff's children could not rightfully demand admission into the schools for white children without showing that the negro ancestor was more remote than the father of Charles Jones, and that they themselves belonged to the fourth succession from such ancestor. *McMillan v. School Committee*, 107 N. C. 609, 12 S. E. Rep. 330; *State v. Watters*, 3 Ired. 455. It will be observed that in the statute creating schools for the Croatan Indians the exclusion extends to the fourth generation, omitting the word "inclusive," which is synonymous with "the third generation inclusive." If it was material to know whether Charles Jones or a white man was the paternal grandfather of the children, and this was a question in dispute, it was competent to show that their grandmother was living with Jones about nine months before the birth of the plaintiff.

While, in doubtful cases, only an expert would be qualified to testify, from the appearance of a person, as to the exact extent to which white and negro blood are commingled in his veins, it does not require any peculiar scientific knowledge "to be able to detect the presence of African blood by the color or other physical qualities of the person." *Hopkins v. Bowers*, 111 N. C. 178, 16 S. E. Rep. 1; *State v. Jacobs*, 6 Jones, (N. C.) 288. There is no error.

ROOKER v. CRINKLEY et al., (two cases.)
(Supreme Court of North Carolina. Oct. 10, 1893.)

REMOVAL OF CAUSES—RESIDENT ALIEN.

An alien defendant, who is a resident, cannot remove the cause from the state to the federal court under Act Cong. March 3, 1887, which provides for removal of suits between citizens of different states, between citizens of a state and foreign states, citizens and subjects, and certain other suits, wherein defendants are nonresidents of the state in which they are brought.

Appeal from superior court, Warren county; Hoke, Judge.

Two actions,—one by George W. Rooker against W. B. Crinkley, and the other by same plaintiff against A. Crinkley and others. From orders denying defendants' petitions for removal of the causes to the federal court on the ground that they are aliens, defendants appeal. Affirmed.

W. H. Day and W. A. Montgomery, for appellants.

MacRAE, J. We concur with his honor that the affidavit and petition of defendants show no removable cause. The act of congress governing removals of causes from the state to the federal courts, and which is applicable to these cases, is that of March 3, 1887, and embraces (1) suits arising under the constitution and laws of the United States, and treaties made in pursuance thereof; (2) suits in which the United States are plaintiff; (3) suits between citizens of different states; (4) suits between citizens of the same state claiming lands under grants from different states; and (5) suits between citizens of a state and foreign states, citizens, and subjects. Section 2 provides, among other things: "Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought in any state court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being nonresidents of that state." *Cudahy v. McGeoch*, 37 Fed. Rep. 1; *Walker v. O'Neill*, 38 Fed. Rep. 374. These are suits between a citizen of this state and an alien resident in this state, and are not removable, under the act of congress. No error.

HINTON v. GREENLEAF et ux.
(Supreme Court of North Carolina. Oct. 10, 1893.)

MORTGAGE BY HUSBAND AND WIFE — PRINCIPAL AND SURETY—DISCHARGE OF SURETIES.

Where a husband and wife include in a trust deed as security for the debt of the husband not only property of the husband, but the separate property of the wife, her property occupies the position of a surety, and will be dis-

charged by a valid agreement by the creditor with the husband without the knowledge of the wife for a postponement for a definite period of the sale of the property included in the deed, there being no reservation in such agreement of the creditor's rights against the wife.

Appeal from superior court, Pasquotank county; John Gray Bynum, Judge.

Action by John L. Hinton against H. T. Greenleaf and wife. Judgment for plaintiff. Defendants appeal. Reversed.

Grandy & Aydlett and F. H. Busbee, for appellants. W. D. Pruden, for appellee.

SHEPHERD, C. J. It is settled by abundant authority that, "where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety, * * * and will be discharged by anything that would discharge a surety or guarantor who was personally liable." 1 Brandt, Sur. § 82; Cross v. Allen, 141 U. S. 528, 12 Sup. Ct. Rep. 67; Spear v. Ward, 20 Cal. 659; Gahn v. Niemcewicz, 11 Wend. 312; Bank v. Burns, 46 N. Y. 170; Bish. Mar. Wom. 604; Jones, Mortg. 114; Gore v. Townsend, 105 N. C. 228, 11 S. E. Rep. 160; Purvis v. Carstarphan, 73 N. C. 575. The deed in trust in the present case was made for the purpose of securing the payment of certain indebtedness of the husband, H. T. Greenleaf, evidenced by his notes executed to C. W. Grandy, Jr. The deed conveys certain property of the said Greenleaf, and also the real estate of the wife; the latter alone being the subject of this controversy. It plainly appears from the said instrument that the property of the wife was conveyed as additional security for the indebtedness of the husband, and there can be no question as to the trustee, the cestui que trust, Grandy, and his assignee, Hinton, being affected with notice thereof. There is evidence tending to show that Grandy, before assigning the notes, and after they were due, entered into a valid agreement with Greenleaf to postpone the sale of the property contained in the deed of trust for a definite period. There is also evidence tending to show a similar agreement on the part of Hinton, the assignee, under which a sale of the said property was to be postponed for four years. These contracts of forbearance were made without the knowledge or assent of Mrs. Greenleaf, and, in our opinion, resulted in a discharge of her property from all liability under the said deed of trust. This property occupied, as we have seen, the position of a surety, and it is common learning that "time or forbearance given by the creditor to the principal

debtor by a contract which binds him in law, and would bar his action against the debtor, will discharge the surety." Bank v. Lineberger, 83 N. C. 454; Carter v. Duncan, 84 N. C. 679; Forbes v. Sheppard, 98 N. C. 111, 3 S. E. Rep. 817; Scott v. Fisher, 110 N. C. 311, 14 S. E. Rep. 799. It is insisted, however, by the plaintiff's counsel that the above principle does not apply to the facts of this case, because in the contracts of forbearance the remedy against the property was reserved. It is undoubtedly true that the surety will not be discharged when, at the time of the agreement for indulgence, there is a reservation of the creditor's rights and remedies against the surety, but such reservation must be distinct, explicit, (2 Brandt, Sur. § 376,) and unqualified, (Bank v. Lineberger, supra.) We are unable to find in the record any evidence of such a reservation, as it is very clear that the testimony of Greenleaf that "Hinton did not agree to give up the mortgage" does not amount to such a reservation of the remedy against the surety property as is contemplated by the law. Had there been a valid agreement of that character, it would have amounted to an equitable discharge of the trust, in which event the creditor could not have reserved his right to proceed against the said property. Nicholson v. Revill, 4 Adol. & E. 675; Kearsley v. Cole, 16 Mees. & W. 136. The fact, therefore, that the "mortgage" was not given up or discharged, is entirely consistent with the principle invoked by Mrs. Greenleaf, which principle, indeed, would have nothing to operate upon but for the contemplated continuance of the liability. The agreement was in effect to postpone the sale of the entire property contained in the trust. This was an alteration of the original contract without the consent of Mrs. Greenleaf, and deprived her of her right to discharge the indebtedness at maturity, and to immediately proceed against the principal. In order to retain the security, there should have been a clear reservation of the right to sell her property, but, instead of doing this, the creditor, as we have said, entered into a binding contract with the principal to forbear the sale of any part of the property contained in the trust. We think his honor erred in directing a verdict against Mrs. Greenleaf; for, if her contention be true, the assignee, Hinton, who purchased at the sale made by the trustee, acquired only a naked legal title, and would not be entitled to recover. We will add that we have carefully perused the testimony, and have been unable to find any evidence that Greenleaf, in making the agreements above mentioned, was authorized to act as the agent of his wife. There must be a new trial.

EDWARDS et al. v. CHARLOTTE, C. & A. R. CO.

(Supreme Court of South Carolina. Sept. 29, 1893.)

SURFACE WATER—OBSTRUCTION.

The common-law rule as to the disposition of surface water prevails in South Carolina, and a landowner has a right to take any measures necessary to protect his property therefrom, even if, in so doing, he throws it back on adjacent land, to its damage.

Appeal from common pleas circuit court of Aiken county; I. D. Witherspoon, Judge.

Action by Elizabeth H. Edwards and another against the Charlotte, Columbia & Augusta Railroad Company. Defendant had judgment, and plaintiffs appeal. Affirmed.

Henderson Bros. and John R. Cloy, for appellants.

Cotheau & Abney and Croft & Chafee, for respondent.

If it was necessary for the railroad company to construct an embankment on its right of way in order to protect its roadbed from injury by the surface water, it is not liable for the damages to adjacent land by thus turning the water back onto it: Railroad Co. v. Hammer, 22 Kan. 763; Gibbs v. Williams, 25 Kan. 214; Angell, Water Courses, § 108; 1 Add. Torts, 105; Cooley, Torts, 574; Hil. Torts, 584; Taylor v. Flickar, 64 Ind. 167; Schlichter v. Phillippy, 67 Ind. 201; Gannon v. Hargodon, 10 Allen, 106; Hoyt v. City of Hudson, 27 Wis. 656; Pettigrew v. Village of Evansville, 25 Wis. 223; Fryer v. Warne, 29 Wis. 511; Sowers v. Shiff, 15 La. Ann. 300; Martin v. Jett, 12 La. 503; Walker v. Railway Co., 103 Mass. 10; Morrison v. Railway Co., 67 Me. 353; Moyer v. Railway Co., 88 N. Y. 351; Railway Co. v. Wicker, 74 N. C. 220.

McIVER, C. J. The plaintiff, who is a married woman, joining her husband with her as a coplaintiff, brings this action against the Charlotte, Columbia & Augusta Railroad Company to recover damages alleged to have been done to her property, as well as to her health, by reason of the obstruction, by the defendant company, of the natural flow of surface water over and across the right of way and railroad track of defendant. The allegations in the complaint, substantially, are that some time in the year 1867 the defendant company constructed its railway through the town of Graniteville, over and along Canal street of said town, running north and south, parallel with Horse creek, a natural water course, on the west of the railway; that plaintiff is the lessee of certain premises situate at the northeast corner of Canal street and Cottage, the latter being a street running perpendicular to the former; that on the eastern side of the town of Graniteville the land is hilly, and gradually slopes towards Horse creek; and

that the surface water which would accumulate on the eastern side was accustomed to flow, in part, down and along Cottage street, across Canal street, to said Horse creek, previous to the construction of defendant's road, and for some time afterwards, without injury to plaintiff's premises, but that some time in the year 1878 "the defendant negligently, unlawfully, and unnecessarily" erected a large sand bank, at the intersection of Canal and Cottage streets, whereby the surface water was forced back on plaintiff's premises, and has continued to maintain and increase said sand bank. The defendant claims that the sand bank complained of (which was constructed on defendant's right of way) was necessary to protect its roadbed and right of way from being undermined and washed away by the flow of the surface water, and therefore its construction was no invasion of the legal rights of the plaintiff, and the defendant is not liable for any damages which plaintiff may have sustained by reason of such obstruction of the flow of the surface water. The circuit judge, in effect, charged the jury that the first question for them to determine was whether the construction of the sand bank was necessary for the protection of defendant's roadbed and right of way, and, if so, then the defendant was not liable. The jury, under this instruction, found a verdict in favor of the defendant, and judgment being entered thereon, the plaintiff appeals upon the several grounds set out in the record. Under the view which we take we do not deem it necessary to repeat these grounds, for the whole case, in our judgment, turns upon the inquiry whether there was any error in the instruction thus given to the jury.

It is not, and cannot be, denied that the rule in regard to interference with the flow of surface water is wholly different from that which prevails in regard to the waters of a natural water course. We shall therefore confine our attention entirely to the rule as to surface water. What that rule is has been the subject of debate in numerous cases in the other states, many of which we have examined in preparing this opinion. Some of the states have adopted what is known as the "civil-law rule," while others seem to have adopted what is designated as the "intermediate rule," while others, again, (a majority of the states, as is said in a note to *Goddard v. Inhabitants of Harpswell*, [24 Atl. Rep. 958,] 30 Amer. St. Rep., at page 391,) adhere to the rule of the common law. In this state, so far as we are informed, there is no adjudication upon the subject, for what was said upon the subject by the late Chief Justice Simpson was "not intended as a final adjudication, and conclusive of said question in the future," as he himself expressly said in that opinion, but simply his own opinion as to the comparative merits of the several rules. But in view of the express declara-

tion of the lawmaking power, as embodied in section 2738 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute, or even authoritative decision to the contrary, that the common-law rule must still be recognized as controlling here, for that section expressly declares that "every part of the common law of England, not altered by this act, nor inconsistent with the constitution of this state, and the customs and laws thereof, is hereby continued in full force and virtue within this state in the same manner as before the passage of this act." Under the common-law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if, in doing so, he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action. This rule was applied in a case very much like the present,—*Rowe v. Railroad Co.*, 41 Minn. 384, 43 N. W. Rep. 76; also in *Railroad Co. v. Stevens*, 73 Ind. 278; *O'Connor v. Railroad Co.*, 52 Wis. 526, 9 N. W. Rep. 287; *Johnson v. Railroad Co.*, 80 Wis. 641, 50 N. W. Rep. 771. See, also, *Chadeayne v. Robinson*, 55 Conn. 345, 11 Atl. Rep. 592, and *Abbott v. Railroad Co.*, 83 Mo. 271, in which the case of *Shane v. Railroad Co.*, 71 Mo. 237, relied upon by appellant, as well as the case of *McCormick v. Railroad Co.*, 70 Mo. 359, are commented on and practically overruled, so far as the question now under consideration is concerned. These cases, as well as many others which might be referred to, together with those cited by respondent's counsel in his argument, abundantly show that there was no error on the part of the circuit judge in giving the instruction complained of to the jury. The case of *Staton v. Railroad Co.*, recently decided by the supreme court of North Carolina, and reported in 16 S. E. Rep. 181, seems to be much relied on by the counsel for appellant. But we do not think it in point. The question there was different from that presented here, and the discussion was principally devoted to an inquiry into the rights acquired by a railroad company from the exercise of its right to condemn lands under the power of eminent domain, with which we are not concerned here. Here we freely and fully concede the doctrine laid down in that case, that a railroad company has no higher rights in reference to the treatment of surface water than an individual land proprietor; and that is as far as that case is applicable to the present. Besides, as we understand, North Carolina is one of the states which recognizes the civil-law rule in reference to surface water, and hence the decisions in that state would afford no assistance where the common-law rule prevails. So, too, the cases of *Mills v. Railroad Co.*, 13 S. C. 97, and *Wallace v. Railroad Co.*, 34

S. C. 66, 12 S. E. Rep. 815, and again reported in 16 S. E. Rep. 36, being cases in reference to natural water courses, and not cases of surface water, have no application to the present case. Nor are we able to discover anything in the case of *Gregory v. Layton*, 36 S. C. 93, 15 S. E. Rep. 352, which throws any light upon our present inquiry. Under the view which we have taken, the other grounds of appeal become immaterial; for, even if the alleged errors there complained of were well founded, the result reached would not have been affected. Assuming, as we must do, that the jury found as matter of fact that the sand bank complained of was necessary for the protection of defendant's right of way and roadbed, we are unable to see how the instructions complained of could possibly have affected the result. We may add, however, that we see no error in any of the instructions complained of. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

THOMPSON et ux. v. RAY.

(Supreme Court of Georgia. July 17, 1893.)

PAROL GIFT OF LAND—LEADING QUESTIONS.

1. A parol gift of land, accompanied by possession, based upon a consideration meritorious, and to some extent valuable, is not of itself sufficient to pass title into the donee. Nor will the making of valuable and permanent improvements upon the property, after the death of the donor, complete the gift, although the materials for such improvements may have been ordered during the donor's lifetime, and with his knowledge.

2. An interrogatory which assumes the existence of a material and vitally important fact, and suggests an answer which will establish that fact, is leading, and for this reason there was no error in rejecting the answer to the same; it not appearing or being suggested that the objection was not in writing, or that it was not made at the proper time.

3. The evidence warranted the verdict, and there was no error in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Campbell county; S. W. Harris, Judge.

Action by L. R. Ray, as administrator, against J. E. Thompson and wife, to recover land. Judgment for plaintiff. Defendants bring error. Affirmed.

The following is the official report:

The action was on the demises of Ray, as administrator of Reid, against Thompson and his wife, to recover a certain tract of land in Fairburn. Mrs. Thompson pleaded, in brief, that her husband claimed no title or interest in the land; that she is now, and has been for from long before the death of Reid, the owner of the land; that Reid was a great friend to her father and mother, and, when she was born, had her christened into the Catholic Church, becoming her godfather; that he was closely attached to her,

and she was taught to look on him as a father and guide; that he was a bachelor, and before the death of her father made her father's house his home, and lived in the house as one of the family, and after her father's death boarded a great deal of his time there, and defendant and her mother and sisters waited on him as they would on their father, doing his washing, mending, etc.; that the work they did for him, and the trouble and expense they were at in caring for him, was worth a great deal of money, and he so recognized it; that he would tell defendant he was going to make liberal provision for her, and fix his property so she would get it; that, relying on these promises, she and her mother and sisters would not try to collect any money from him for their labor, but would let the matter stand, believing they would be amply paid by him in the distribution of his property, and her mother was perfectly willing that her labor should be compensated for by Reid's provision for defendant and her sisters; that, as part performance of his promise, Reid delivered to defendant the house and lot sued for before his death, putting her in possession, and from that date to his death relinquishing any right or title which he had to the premises to her, and ever afterwards recognizing the title as being in her; that she thought that he had either made a deed to the land to her, or was going to do so; that he told her distinctly the land was hers, and he gave it to her, and on the strength of this gift she made valuable improvements, (stating them,) and it would be against equity to allow plaintiff now to administer the property; that, if no deed can be found, plaintiff should be required to make her a deed, etc. Further, that in his lifetime Reid owed her \$1,000 for her services in waiting on him and caring for him, and, in order to settle the debt, or so much of it as the house and lot sued for would settle, said to her: "I owe you for your service \$1,000. If you will receive this house and lot for part compensation for said service, I will deliver the same to you, and sell it to you to pay as much of the debt as \$600 would settle;" that she then and there agreed to the proposition, and accepted the land as such part compensation, and no longer looked to Reid for any further pay, and the delivery by him of the property was made in accordance with the contract, and the contract was completed, etc. There was a verdict for plaintiff, and, defendants' motion for new trial being overruled, they excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, that the court erred in refusing to allow defendants to prove that Mrs. Thompson had made valuable improvements on the land in dispute, by having the house celled, at an expense to her of \$50; she offering to prove by competent witnesses that the improve-

ments which she had made on the land were permanent, and were made immediately after the death of Reid. Error in refusing to allow defendants to ask Mrs. McDonald, "What did Matthew Reid ever pay you or your daughters for boarding and waiting on him, except the houses and lots he gave your daughters?" and in refusing to allow her answer, as follows, to be read to the jury: "They have not paid me anything, nor has he paid me anything, but gave my daughters the two houses and lots in Fairburn for our trouble." The court held that the interrogatory was inadmissible, because leading and irrelevant, and that the answer could not be read, for the same reason. One Smith had already testified that Reid said he gave the land in dispute to Mrs. Thompson for what she had done for him.

Roan & Golightly, for plaintiffs in error.
Thos. W. Latham, for defendant in error.

LUMPKIN, J. 1. The facts appear in the reporter's statement. It will be observed that the evidence fails to show that Mrs. Thompson was entitled to the land in dispute under a contract of purchase with the deceased, Mr. Reid. At best, her claim of title rests solely upon a parol gift, accompanied by possession, based upon a consideration which was meritorious, and perhaps, to some extent, valuable. It is well-settled law that this, of itself, would not be sufficient to pass title into Mrs. Thompson. It was insisted, however, that, under the provisions of section 3189 of the Code, she was entitled to the premises, because of having made valuable improvements upon the faith of the gift. Although there is evidence to show that some of the materials for the making of these improvements were ordered during the lifetime of Mr. Reid, and that he knew of this fact, it is admitted that the improvements themselves were not made until after his death. In our opinion, therefore, the gift never became complete. It was within the power of the deceased to revoke it at any time before the improvements were actually made. He could have done this even after the materials for the improvements had been purchased. This being so, Mrs. Thompson could not complete the gift by making the improvements after his death. Inasmuch as it cannot be known that Mr. Reid would not have exercised his undoubted right of revocation before the improvements were made, his estate cannot be bound by anything done which he might have forbidden, had he lived. Moreover, it does not appear that, by ordering or procuring the materials in question, any injury resulted to Mrs. Thompson. In no event would her claim of title, under the facts stated, have any shadow of legal merit, unless it had been further shown that, with the knowledge and acquiescence of the deceased, she had

incurred some substantial loss because of the gift. We do not, however, confine the principle involved within these narrow lines, but we hold distinctly that the mere procuring of materials would not put Mrs. Thompson's claim on any better footing, even if she made it appear that, in case she had not used the materials in making improvements on the property in question, she would have been unable to dispose of them, except at a sacrifice. Mr. Reid could have revoked the gift even after she had bought the materials; and although, subsequently to his death, she used the same in making substantial improvements upon the property, she thereby gained no greater right than she had during his lifetime.

2. There was no error in rejecting the answer to the interrogatory referred to in the second headnote, and which is set out in full in the reporter's statement. It was plainly and manifestly leading. It assumed the existence of a collateral fact of vital importance to the issue then being tried, and suggested the answer desired; and the answer, as given, necessarily tended to establish incidentally the existence of this fact. Presumably, the objection to the interrogatory, as leading, was made in writing, and at the proper time, because, in endeavoring to sustain the admissibility of the answer, counsel did not make it affirmatively appear—nor, indeed, was it even suggested—that the objection was not made as required by the rule of court which prescribes that no exception to a written interrogatory, on the ground that it is a leading question, shall prevail, unless it be filed with the interrogatories before the issuing of the commission.

3. The verdict was sufficiently sustained by the evidence; no error of law was committed by the court, and the motion for a new trial was properly overruled. Judgment affirmed.

REEVES v. GAY.

(Supreme Court of Georgia. July 17, 1893.)

STATUTES—AMENDMENT—COUNTY ELECTION AS TO FENCES—IMPOUNDING ANIMALS.

1. Section 1455 of the Code, which was so amended by the act of September 5, 1883, (Acts 1882-83, p. 49,) as to require that elections upon the question of "fence or no fence" should be held on the first Wednesday in July following the filing of a petition with the ordinary, instead of "at such time as said ordinary shall appoint," was not affected, as to the time of holding such elections, by the act of November 12, 1889, (Acts 1889, p. 60,) which prescribed the qualifications of voters in such elections. After the passage of the latter act, the above-mentioned section stood, as to the time of holding elections, not as it did originally, but as it did after being amended by the act of 1883, and it also stood thus after the passage of the act of November 26, 1890, (Acts 1890-91, p. 69,) "to amend the fence laws of this state, and to repeal section 1449 of the Code." Consequently, an election upon the question of "fence or no fence" held in Webster county on the 12th day of August, 1891,

was unauthorized by law, and void, and no right to impound stock thereunder could arise, although such election was declared to be in favor of "no fence." The only day upon which the election could legally have been held was "the first Wednesday in July."

2. The stock of the plaintiff having been unlawfully impounded, and the magistrate before whom the case was tried having awarded him the custody thereof upon a possessory warrant, the superior court was right in upholding the magistrate's judgment, and in overruling the certiorari thereto.

(Syllabus by the Court.)

Error from superior court, Webster county; W. H. Fish, Judge.

Action by Frank Gay against Jephtha Reeves for the possession of animals alleged to be unlawfully impounded. Plaintiff had judgment, and defendant brings error. Affirmed.

S. R. Stevens and Hudson & Blalock, for plaintiff in error. J. Harrell, B. F. Harrell, Thornton & McMichael, and M. O. Edwards, for defendant in error.

LUMPKIN, J. 1. Section 1455 of the Code authorized elections upon "the fence question" to be held at such times as the ordinary might appoint. The act of September 5, 1883, so amended this section as to require that these elections should be held on the first Wednesday in July following the filing with the ordinary of a petition for an election. Then came the act of November 12, 1889, the title of which is as follows: "An act to alter and amend section 1455 of the Code of Georgia of 1882, so as to prescribe the qualifications of voters in the several militia districts of the counties of this state, at any elections held in said districts for the purpose of establishing a stock law for said district, and for other purposes." The only purpose of this act was to prescribe the qualifications of voters in elections upon the question of "fence or no fence." This was accomplished by enacting that after the words "in said district," in the forty-fifth line of the section, there should be inserted certain words prescribing what the qualifications of voters should be. The act then declares how, as a result of this amendment, the section shall read, and proceeds to copy the section, retaining the words declaring that the election shall take place "at such time as said ordinary shall appoint" just as they stood in the original section. Bearing in mind the amendment to the section made by the act of 1883, it is obvious that no such reading would result from the amendment really made by the act of 1889. The fact is the act of 1883 was simply overlooked. Nothing in the title of the act of 1889 indicates in any manner whatever an intention to repeal, modify, or amend the act of 1883, and nothing in the body of the act of 1889 directly or expressly indicates any such intention. The whole difficulty arises from the fact that, because of overlooking the act of 1883, the act of 1889 was made to declare

that the amendment it introduced into the section would produce a certain reading of the section which, in fact, it did not produce. We hold, without misgiving or doubt, that the act of 1883 was not thus repealed. In the first place, it is manifest that the legislature, by the act of 1889, did not intend to repeal it; and, secondly, if they had so intended, the intention was not constitutionally accomplished, because, in so far as the act of 1889 could be construed as having this effect, it most clearly contains matter different from what is expressed in its title. Accordingly, we rule that, even after the passage of the latter act, the section of the Code in question stood, as to the time of holding elections, not as it did originally, but as it did after being amended by the act of 1883. If the foregoing is sound, it follows, without argument, that the act of November 26, 1890, "to amend the fence laws of this state, and to repeal section 1449 of the Code," does not repeal the act of 1883, or affect section 1455 of the Code as thereby amended. The act of 1890 must be understood as referring to the section as it stood when the latter act was passed, and we have already shown that the section then had ingrafted upon it, unaffected by the act of 1889, the amendment made by the act of 1883. Under this section, therefore, the only day upon which an election of the kind therein provided for could be lawfully held was the first Wednesday in July. An election held on any other day was necessarily void. So held the justice of the peace before whom this case originated; so held the judge of the superior court; and so we hold. This settles the matter finally.

2. The hogs of the plaintiff, who sued out the possessory warrant, were unlawfully impounded, and the magistrate was right in awarding him the possession of them. Judgment affirmed.

GRESS LUMBER CO. v. LEITNER.

(Supreme Court of Georgia. July 24, 1893.)

VENDOR AND VENDEE — ADMINISTRATOR'S SALE —
BONA FIDE PURCHASER — SEPARATE SALE OF
STANDING TIMBER.

1. An administrator, having an order to sell at private sale the wild lands of his intestate, first sold and conveyed the timber upon the land, receiving pay therefor, and afterwards, to a different purchaser, the land itself; giving notice to the latter that the timber had been sold, but, so far as appears, making no exception or qualification in the deed to this purchaser. Held, that one deriving his claim of title from the latter would, if a bona fide purchaser without like notice, be protected, but if he was affected with notice he would hold the land subject in equity to the rights of the purchaser of the timber; and a petition in the nature of a bill for injunction, and also for the recovery of damages, would be maintainable to restrain him from appropriating the timber to his own use, and from interfering with the purchaser thereof in cutting and moving the same from the premises within a reasonable time, and for the recovery of damages for timber already cut and appropriated. Whether,

as matter of strict law, a separate sale of the timber was authorized by the order or not, yet, as the order was the basis of that sale, it was admissible in evidence, inasmuch as a mistaken execution of the order, together with the receipt of the purchase money, would operate to create an equity in favor of the purchaser of the timber, which he could enforce against a subsequent purchaser of the land, affected with notice of that equity.

2. An order of sale granted to an administrator, but not executed by him, remains operative after he has been succeeded by an administrator de bonis non, and may be executed by the latter.

(Syllabus by the Court.)

Error from superior court, Dodge county;
D. B. Roberts, Judge.

Action by the Gress Lumber Company against C. M. Leitner for an injunction and other relief. Defendant had judgment, and plaintiff brings error. Reversed.

De Lacy & Bishop, for plaintiff in error.
Martin & Smith, for defendant in error.

SIMMONS, J. 1. Kimball, the administrator of De Vaughn, applied to the ordinary for leave to sell certain wild lands belonging to the estate of his intestate, and leave was granted. Before the land was sold, he resigned, and Hall was appointed administrator in his place. Hall sold the standing sawmill timber on the land to the Gress Lumber Company, and received the purchase money therefor. Subsequently, he sold the land itself to Wilson, giving Wilson notice at the time of the sale that he had already disposed of the sawmill timber to the Gress Lumber Company; but so far as appears, no exception to the timber was made in the deed to Wilson. Wilson sold the land to Leitner, and Leitner entered upon it, and commenced cutting the timber, whereupon the Gress Lumber Company filed its petition to enjoin him from cutting the timber, and for the recovery of damages on account of timber already cut. Upon the trial of the case, it was admitted that both parties derived their title from Hall. The plaintiff offered in evidence a certified copy of the application for leave to sell the land, and of the order of the ordinary granting leave to sell at private sale. This was objected to by the defendant upon the ground that the order did not authorize the administrator to sell the timber on the land separately from the land itself. This objection was sustained, and the court ruled out the application and the order. The plaintiff also offered in evidence the contract of sale of the sawmill timber on the land in dispute, executed by Hall to the Gress Lumber Company in pursuance of the order granting leave to sell the land at private sale. The defendant objected upon the ground that no authority to the administrator to make such a sale of the timber was shown, and the court sustained the objection, and ruled out the contract in so far as it was a deed from Hall as administrator, but admitted it as his individual

deed. This testimony being ruled out, the court granted a nonsuit. To each of these rulings the plaintiff excepted. It appears, as we have already said, that Wilson, when he bought the land from Hall, had notice that the sawmill timber had been sold to the Gress Lumber Company; but it does not appear whether Leitner, when he purchased from Wilson, had notice of the sale of the timber, or not. If Leitner was a bona fide purchaser of the land, without notice of the sale of the timber to the Gress Lumber Company, he would be protected, and that company would have no right to enjoin him from cutting the timber, or to recover damages for that already cut. If, upon the other hand, Leitner had notice that the timber had been sold to that company, he would hold the land subject, in equity, to the company's rights, and the company would have a right to enjoin him from appropriating the timber to his own use, and from interfering with the cutting and moving the same by it from the premises within a reasonable time, and to recover damages for timber already cut and appropriated by him. Whether, as matter of strict law, a separate sale of the timber was authorized by the order, or not, yet, as the order was the basis of that sale, it was admissible in evidence, inasmuch as a mistaken execution of the order, together with the receipt of the purchase money, would operate to create an equity in favor of the purchaser of the timber, which he could enforce against a subsequent purchaser of the land, affected with notice of that equity.

2. We think the court erred, also, in holding that where an administrator procures leave from the ordinary to sell land, and resigns before executing the sale, an administrator de bonis non cannot execute it. We think the order granted to the first administrator remains operative, and can be executed by an administrator de bonis non without a new application to the ordinary for leave to sell the same land. Judgment reversed.

HILL et al. v. LEWIS.

(Supreme Court of Georgia. July 24, 1893.)

ADMINISTRATION—ALLOWANCE TO WIDOW HAVING LIFE ESTATE—RIGHTS OF REMAINDER—MEN.

1. A widow to whom the whole estate was devised and bequeathed for life, there being no minor children, and no debts except the expenses of the last illness and funeral expenses, was not entitled to more than one year's support out of the estate as a statutory right, although she kept the estate together for a longer time, she having so done by her own choice, being both executrix and tenant for life, and the will of her husband not containing any requirement or direction as to keeping the estate together. Whatever the statute may mean by the phrase "when an estate is to be kept together," the keeping of it together by the mere choice or election of the widow herself cannot be recognized as a basis for allowing her continued support from year to year.

2. The widow having, after the lapse of five years, procured an allowance of property in bulk for her support for that whole period, with no separation or specification for any one year, the proceeding before the ordinary resulting in this allowance was void as against a creditor of the person to whom the estate was given by the will in remainder.

(Syllabus by the Court.)

Error from superior court, Greene county; H. McWhorter, Judge.

To the execution levy of John M. Hill & Co. on certain land, as belonging to Charles Doherty, H. T. Lewis interposed a claim as trustee. From the judgment entered on the trial of the claim, Hill & Co. bring error. Reversed.

John O. Hart and Payne & Tye, for plaintiffs in error. H. T. Lewis and Jas. B. Park, Jr., for defendant in error.

SIMMONS, J. 1. John J. Doherty died in 1882, leaving a will by which he gave all his property, real and personal, to his wife, Charlotte, for and during her natural life, and, after her death, the whole of the property to his son Charles, who was then of age. The will appointed the wife as executrix. The testator left no debts except expenses of last sickness and funeral expenses. The wife went into possession of the property, and so remained until her death, in 1890. After she had been in possession for about five years, she applied to the ordinary of the county to set apart to her a support for each of the five years. Commissioners were appointed, and they set apart the whole property to her, and their action was approved by the ordinary. Shortly after this was done, she made a will by which she devised to Lewis, as trustee, all her property, with direction to pay annually to her son Charles, out of the income and profits of her estate, an amount sufficient for his comfortable support and maintenance during his life, the amount being left to the discretion of the trustee. Should the income and profits not be sufficient to supply her son with the necessaries of life and reasonable comforts, the trustee was authorized to encroach upon the corpus of the estate to such extent as might be necessary for the son's comfortable support. In case the son should die without children, the trustee was to pay over the money to another person. In a codicil to the will, she assigned as her reason for appointing a trustee for her son that he was "a person of such character and habits as section 2306 of the Code of Georgia authorizes a trust to be created for." Hill & Co. had obtained an execution against Charles Doherty before the death of his mother, and, after her death, had it levied on a house and lot. Lewis, the trustee, claimed the property under the will of Mrs. Doherty. The question is whether the property was subject as the property of Charles under the will of his father. Under that will, as we have seen, Mrs. Doherty had only a life

estate, the remainder interest being in her son Charles. It is insisted on the part of the trustee that, by virtue of the judgment of the ordinary granting her a five-years' support out of the property, she became the absolute owner thereof. It is true that this court has held in several cases that, where a year's support is set apart to a widow, the title vests in her absolutely, and she can dispose of it as she sees fit; but this court has never held that where the whole property is left to a widow for life, with remainder to her children, she can take possession of it, and keep it together; and after the expiration of five years apply for, and have set apart to her, a five years' support in bulk, and thereby acquire the absolute title to the whole of it, thus setting aside the will of the testator, and depriving the remainder-men of their inheritance. There being no minor children; and no expenses except those of the funeral and last sickness, the widow in this case, if entitled to a year's support at all, was entitled only to one year's support. Although she may have kept the estate together for a longer time, she did so of her own choice, because she was both executrix and tenant for life, and the will contained no directions to her to keep the estate together. She was entitled to the whole of it as long as she lived. She could manage it as she pleased, and could dispose of her life interest, if necessary. What necessity was there for her to keep the estate together as the estate of the testator? If there were no debts and no minor children, and no direction in the will to keep the estate together, the property became hers as soon as she took possession of it, as life tenant, and was no longer the estate of her husband. Conceding, however, that it was the estate of the husband, and that she so treated it, we do not think that a widow, of her mere choice, can keep an estate together for several years, and then apply to the ordinary to set apart to her a support for those years in bulk. Whatever section 2572 of the Code may mean by the phrase "when an estate is to be kept together," it certainly does not mean this. It looks to us, under the facts in this case, that the application was made by the widow more for the purpose of getting the title into herself, so that she could dispose of it absolutely, than to obtain the year's support. To allow a widow, under these circumstances, to take possession of the bequest of her husband, live on the property, enjoy the income for a number of years, and then to apply to the ordinary, and have the whole property set apart to her as a support for all the years she has lived on it, would be to allow her to set aside her husband's will of her own volition, and to deprive the remainder-men of the provision left for them by their father. We are sure the law will not authorize such a proceeding. As no amount was specified for a first year's support, the support for that

year must fail, together with the support for the subsequent four years.

2. Having shown that the widow, after the lapse of five years, cannot procure an allowance of property in bulk for her support for that whole period, with no separation or specification for any one year, the proceeding before the ordinary resulting in this allowance was void as against a creditor of the person to whom the estate was given by the will in remainder, and as against his creditors. The court therefore erred in not granting a new trial. Judgment reversed.

BALL v. MABRY.

(Supreme Court of Georgia. July 24, 1893.)

RECEIVERS—ACTIONS AGAINST WITHOUT LEAVE OF COURT—VENUE—CARRIERS—INJURIES TO PASSENGERS—EVIDENCE.

1. As receivers of railroads, operating the same under legal authority, exercise the charter franchises of the company, they are subject to suit in any county in which the railroad corporation itself may be sued for a like cause of action. While their personal residence is unaffected, their official residence coincides with that of the company they represent; the action being brought to enforce official, and not personal, liability. In order to sue a receiver appointed by a court of the United States, no permission of that court is requisite, there being an act of congress dispensing therewith.

2. The degree of diligence due from a common carrier to a passenger is extraordinary, no matter what means of conveyance may be employed; but what is extraordinary diligence by a freight train is different, in many respects, from that which is such diligence by a passenger train. In this case the jury would so understand from the charge of the court.

3. In a proper case, it is not error to charge that the plaintiff is entitled to recover for the pain and suffering he will probably endure in the future.

4. A passenger by a freight train takes the risk of the usual and ordinary jolts properly incident to handling and running such trains, and, when the nature and degree of the jolt complained of are material, a witness who was present, and had experience in such matters on the same railway, should be allowed to testify in behalf of the company that the car was not going faster than usual; that the jolt was not more than ordinary, and the shake was not sufficient to throw a man, unless he was standing. This evidence would serve to communicate to the jury, in appropriate language, some idea of the nature and violence of the jolt by which the plaintiff was injured.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Jones, Judge.

Action for personal injuries by H. W. Mabry against Charles P. Ball, receiver of the East & West Railroad. Plaintiff had judgment, and defendant brings error. Reversed.

A. T. Loudon, I. F. Thompson, and J. P. Ramsand, for plaintiff in error. Irwin & Bunn and Broyles & Son, for defendant in error.

SIMMONS, J. 1. Mabry brought an action for damages in the superior court of

Polk county against Ball, as receiver of the East & West Railroad of Alabama, under appointment of the circuit court of the United States, alleging that he was injured by the negligence of the defendant's agents and servants while a passenger on a train on that road. Ball filed a plea in which he alleged that "he is now, and was at the time of the bringing of this action, a resident of Cartersville, in the county of Bartow, in the state of Georgia, and is not now, nor has he ever been, a resident of said county of Polk." On demurrer this plea was stricken. The receiver of a railroad, who operates the same under legal authority, is not liable personally for his official acts. His official liability relates to the fund or property which the court is administering by the machinery of receivership. The receiver does not operate the railroad as an individual, but exercises the charter rights and franchises of the company of which he is receiver. As receiver, he resides in each county through which the railroad passes. Exercising the franchises of the company, he becomes a common carrier, and stands in the shoes of the company, and is liable to be sued in the county where the cause of action originated, as the company would have been, under section 3406 of the Code, before he was placed in charge as receiver. Nor is it necessary, where a receiver has been appointed by a court of the United States, to obtain permission of that court before bringing the suit. The act of congress of March 3, 1887, (24 Stat. 554,) dispenses with the necessity of obtaining that permission from the court. See *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 40 Fed. Rep. 426; *Eddy v. Lafayette*, 49 Fed. Rep. 807.

2. Whenever a common carrier undertakes to carry passengers for hire, he is bound to extraordinary diligence, no matter what means of conveyance may be employed to carry the passenger. This standard of diligence applies as well where the passenger is carried upon a freight train as it does where he is carried upon a passenger train. But what may amount to extraordinary diligence with respect to one class of trains may not amount to it with respect to another class. The standard of diligence is the same, but the manner of its exercise must depend upon the circumstances of the case, taking into consideration the character of the train, and the manner in which it is usually made up and run, and in which the cars are usually coupled to one another. It is well known that jolts and jars are usual and necessary in the running of a freight train,—much more so than in the running of passenger trains; and a passenger who voluntarily takes passage on a freight train takes the risk of the usual and necessary jolts and jars which happen in the making up and running of such trains. A jolt or jar which would be unusual and unnecessary in a passenger train might be usual and nec-

essary in a freight train. But, where a common carrier takes a passenger on a freight train, he must use extraordinary care in preventing unusual and unnecessary jolts and jars, so as to protect the passenger, just as he is required to do to prevent any jolts or jars on a passenger train which would be likely to injure the passenger. See *Orine v. Railway Co.*, 84 Ga. 651, 11 S. E. Rep. 555; *Railroad Co. v. Huggins*, 89 Ga. 495, (5) 15 S. E. Rep. 848.

3. Where a passenger on a railroad has been injured by the negligence of the company's servants, he is entitled to recover for the pain and suffering caused by the injury, and it is not error for the court to so instruct the jury.

4. The injury on account of which this action is brought was alleged to have been caused by the negligence of the defendant's agents and servants in allowing the freight cars to run together so rapidly as to produce an unusual and unnecessary jolt, which threw the plaintiff down from his seat, and injured him. The defendant offered to prove by a witness who was present, and who had had experience in such matters on the same railroad, "that the car was not going faster than usual, the jolt was not more than ordinary, and the shock was not sufficient to throw a man, unless he was standing." On objection of the plaintiff's counsel to this evidence, the court excluded it. We think this was error. As before remarked, a passenger on a freight train takes the risk of the usual and ordinary jolts incident to handling and running such trains. If he is injured by reason of such jolts, the nature and degree of the jolt complained of are material. It is material for the plaintiff to show that it is unusual and unnecessary. It is material for the defendant to show that it was a usual and necessary jolt. There is no machine or instrument by which the violence of the concussion may be determined. It can only be determined by its effect upon the cars and the passengers, and by the opinion of witnesses who have had long experience and training in the management of trains of this character, and who have seen or felt the jolt or jar in question, and who are thus qualified to give an opinion as to whether it was unusual, or usual and ordinary. We think the evidence offered would serve to communicate to the jury some idea of the nature and violence of the jolt by which the plaintiff was injured. Judgment reversed.

McCRORY v. GRANDY et al.

(Supreme Court of Georgia. July 24, 1893.)
WIFE'S POWER TO CONTRACT—SURETY FOR OTHER THAN HUSBAND—NEW TRIAL—EVIDENCE—HARMLESS ERROR.

1. A married woman may borrow money for the exclusive benefit of any person other than her husband, and bind her separate property for its payment. The knowledge of the

lender of her object in borrowing, and of the use intended to be made of the money, will not affect the validity of the transaction. If, however, the relation of debtor and creditor is established between the lender and the third person, the form given to the writings executed touching the loan and the security for the same being a mere device to cover up a real case of suretyship on the part of the married woman, her contract will not be obligatory.

2. That a case of suretyship was contemplated when the loan was first applied for and assented to will not vitiate the final transaction if, on discovering that the first design conflicted with the law, it was abandoned, and an actual lending to the married woman herself was substituted therefor.

3. Due diligence on the part of counsel conducting the trial of a cause requires that if a written instrument purporting to be signed by their client is offered in evidence, and counsel do not know it to be genuine, they should object, and require proof of its execution. If they fail in this, and the paper be admitted without objection, the subsequent discovery that it is not genuine will not be cause for a new trial, unless it appear that the party who introduced it or his counsel knew or had reason to believe that it was spurious.

4. While the court seems to have committed error in admitting certain letters in evidence, the error was harmless in view of the controlling facts, and is no cause for a new trial. All the answers to certain interrogatories being objected to as inadmissible because the witness derived his information from correspondence, overruling the objection is not cause for reversing the judgment denying a new trial, where it appears from the answers that some of the witness' information pertinent to the case was not so derived, but was matter of personal knowledge. More especially is this true where none of the evidence of the witness is set out in the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Talbot county; A. L. Miller, Judge.

Action on a promissory note by C. W. Grandy and another against Jane McCrory. Plaintiffs had judgment, and, from an order overruling a motion for a new trial, defendant brings error. Affirmed.

The following is the official report:

Grandy sued Mrs. Jane McCrory upon a promissory note for \$1,200, principal, dated March 30, 1888, upon which there were certain credits. In addition to the plea of not indebted, defendant pleaded that the note was given to secure a debt for advances made to Ellis & McCrory, a firm composed of J. C. Ellis and J. C. McCrory, and at the time it was given and the contract made she was a married woman, her husband being L. M. McCrory; that Ellis & McCrory applied to plaintiffs for a loan, and asked her to stand their security; that the money was loaned to them, and she did not receive any part of it or any benefit from it, nor did it go to the benefit of her separate estate, but was for the benefit exclusively of Ellis & McCrory, and she was their security, at the time owning a separate estate, which facts were all known to plaintiffs. There was a verdict for plaintiffs, and defendant's motion for new trial being overruled, she excepted.

The motion contained the general grounds

that the verdict was contrary to law, evidence, etc., and to a certain portion of the charge.

Also, because the court erred in permitting plaintiffs to read to the jury, over objection of defendant, interrogatories of A. H. and C. W. Grandy, defendant having objected to the same upon the grounds: Because the answers to the interrogatories showed that the negotiations for the loan were by letter, and there was no letter attached or produced from defendant offering to borrow the money, and they do not undertake to show that they received a letter from her which was lost or destroyed; and because the answers show that all the information Grandy & Son, who were the witnesses, had touching the matter was by correspondence, which correspondence would be the highest evidence of what took place between the parties. No particular part of these answers is set out in the motion as objectionable, nor are all the answers set out. It seems from an examination of the answers as set out in the brief of evidence that the answers certainly covered some matters a knowledge of which was not derived from correspondence.

Because the court erred in not sustaining the motion made by defendant to rule out the two letters written by J. J. Bull to plaintiffs, the motion being upon the ground that the letters showed that Bull was not representing defendant in this transaction, and Bull having also stated in open court that he was not employed to defend in this transaction. These letters are set out in the brief of evidence. One of them was dated May 21, 1889, and stated that in the spring of 1888 the writer's client, Mrs. McCrory, borrowed from plaintiffs \$1,200, and loaned the same to Ellis & McCrory; that she was trying to make her money she borrowed from plaintiffs and loaned the firm, and the writer wrote to ask if plaintiffs could give him any information touching the matter,—whether or not they gave any bond to Ellis & McCrory, and could give him a statement as to the condition of Ellis & McCrory. The other letter was dated May 31, 1889, and stated that the information the writer's client, Mrs. McCrory, sought of plaintiffs could not be furnished by their attorneys unless they had plaintiffs' books or a transcript of them; that the statement made in regard to McDowell & Ellis was to show plaintiffs why the information was sought; that it would be a surprise to the writer's client to know that plaintiffs had employed attorneys to collect the money out of her when no payment had been demanded, and, if this was the stand they took in the matter, it was their lookout; that the writer desired to say he was not employed by Mrs. McCrory to defeat or defend, hinder or delay, the collection of the money she was due plaintiffs.

Error in permitting plaintiffs to read to the jury the two letters mentioned, defendant objecting to the introduction of the same,

because the relation of attorney and client existed at the time; whereupon Mr. Bull stated, in reply to the question propounded by the court, "I will hear from you whether the relation of attorney and client existed between Bull and Mrs. McCrory," "It was written for the purpose of trying to get an affidavit from these parties to show that McDowell & Ellis had assumed the debt that Ellis & McCrory had made. This suit had not been brought, and I had nothing to do with it, and in fact I did not know that it would be." Because the court, after he had ruled out, over defendant's objection, this portion of letter written by Bull to plaintiffs, "On the contrary, I have heard her (and her husband) say they should pay it this fall, whether she made it out of McDowell & Ellis or not," erred in examining Bull, while on the stand and in the presence of the jury, as follows: "The Court: I do not understand your letters. In this letter you said you had not conferred with Mrs. Jane Y. McCrory? Answer. No, sir; I never had conferred with her. Question. This expression you say, 'I have heard her say they would pay it this fall, whether she made the money out of McDowell & Ellis or not?' A. Well, I will just explain that. I was trying to get them— Q. All I want to know,—you did not hear her say it? A. I did not hear her say it. Never saw her. It was a catch letter."

Error in refusing to give in charge the following written requests of defendant: "If Grandy & Son was on notice that this money to be borrowed was for the exclusive benefit of Ellis & McCrory, and the note and deed made by Mrs. J. Y. McCrory was to secure this money loaned to Ellis & McCrory, and she secured no benefit from said loan, then she is not bound by said contract, and they could not recover. If the correspondence in negotiating the loan was carried on by Ellis & McCrory with Grandy & Son, and Ellis & McCrory paid the lawyers their fees at Norfolk and in Talbotton, and Mrs. McCrory employed no lawyers and paid no fees for drawing the papers upon which the loan was obtained, then this is a strong circumstance to look to in determining whether Mrs. McCrory borrowed the money in her own right or for Ellis & McCrory, and was only security for Ellis & McCrory. If Ellis & McCrory induced Mrs. McCrory to borrow this money from Grandy & Sons for their use and benefit, and Grandy & Sons knew it was for the use and benefit of Ellis & McCrory, and, knowing this, loaned the money, and for that purpose, then they could not recover, and the taking of the deed and note in the individual name of Jane Y. McCrory would be only a device to evade the law. Should you find that Ellis & McCrory opened negotiations with the plaintiffs, for the loan of money for their use upon the security of Mrs. Jane Y. Mc-

Crory, and that she was a married woman, and that the plaintiffs knew that she was a married woman, then the plaintiffs could not change the operation by loaning them the money for the same purpose, receiving in lieu of Ellis & McCrory's note, with Mrs. McCrory as security, the individual note of Mrs. McCrory. Was the money actually loaned and intended as an accommodation to Ellis & McCrory, with full knowledge on the part of the plaintiffs and Mrs. McCrory that it was intended to be used for the benefit of Ellis & McCrory, and not for the benefit of Jane Y. McCrory, and that the change was made in manner before stated, as a substitute in lieu of the original note first offered? Then you should find for the defendant. The law will not countenance any artifice or contrivance to evade the provisions of the law to protect married women from incumbering their estates by being security for others. If Ellis & McCrory opened negotiations with Grandy & Sons to borrow money, and tendered Jane Y. McCrory as security, and she signed a mortgage on certain lands, and specified in said mortgage that it was to secure a debt of Ellis & McCrory, and signed a note jointly with J. C. Ellis and James T. McCrory, partners, composing the firm of Ellis & McCrory, and the plaintiffs declined to loan money on that paper, and so notified them, and sent the mortgage and the note to Willis & Persons, attorneys selected by Grandy & Sons, and they drew a deed and note, and Mrs. McCrory signed it individually, and the same identical lands were embraced in the deed that were embraced in the mortgage, then this is notice to Grandy & Sons that Mrs. McCrory was security, and they could not recover, and that it was a continuous contract between Grandy & Sons and Ellis & McCrory, the one to loan the money on Mrs. McCrory's security, and the other to borrow the same way."

Error in charging: "If a negotiation had been going on between the plaintiffs and Ellis & McCrory to borrow money, and the plaintiffs had declined to loan to them on the security offered, and afterwards the defendant, Mrs. McCrory, borrowed from plaintiffs the money sued for, and loaned it to Ellis & McCrory, the plaintiffs would be entitled to recover, although they may have known she was going to let Ellis & McCrory have the money. Now, furthermore, upon that, she would be authorized to do that through an agent. If, in fact, she intended to bind herself, she might not see the men or the bank from whom she desired to borrow. She could go to some relative or to some stranger, or to any person that she might select to go and negotiate the loan for her, or to buy goods for her. She might send word by some agent that the purchase was not for herself, nor to be of any benefit to her; that the money

borrowed was to be for somebody else; but if the contract, whether made by herself or by the agent, was either to borrow the money or to buy the goods upon her own responsibility, she would be bound. It would also be true that, although she might arrange with the person who did furnish the goods or the money that they might pay the debt of another, that would not alter her liability, if her original contract was to create the debt, binding upon herself and for herself. Now, in this case the plaintiffs' theory of it is this: That they undertook to negotiate with Ellis & McCrory to loan them some money upon Mrs. McCrory becoming their security; that they found out, under the law of Georgia, that that could not be done,—she could not legally bind herself; that they abandoned that negotiation, and did find that she could bind herself on her own responsibility; that they made a new trade, letting Ellis & McCrory stand aside; and that they loaned her the money, knowing that it was to be used by Ellis & McCrory; and that they made with her an independent contract, by which they gave up the claim on Ellis & McCrory; didn't look to them, but looked to Mrs. McCrory, taking her note, and taking a deed to her land to secure that indebtedness; that the money was loaned to her. That is their theory of this case. Now, if you believe this transaction, that that is the truth of the case, she is bound; she ought to pay the money, and you ought to find against her, and in favor of Grandy & Sons, if you believe that this is the truth of this case under the evidence. As I said in stating the general principles in the case, it was entirely competent for Grandy & Son to make a trade with Mrs. McCrory through Ellis & McCrory as her agent. They were not obliged to have actual interviews with her or actual correspondence with her. If she knew what was going on, or if she acted through them, being moved by reason of her affection to contract this debt, why she would be bound just as though she had gone in person to Grandy & Son and made the loan."

Because of newly-discovered testimony. In support of this ground defendant produced the affidavit of Mrs. McCrory. She has examined the original order, of which the following is a copy: "Talbotton P. O., Talbot County, Ga. March 31st, 1888. Mess. Grandy & Sons: Will please let Ellis & McCrory have the money by draft as they order it, and this will be your receipt for the same. Jane Y. McCrory." She never saw this order until exhibited to her on March 31, 1892, (after the verdict.) She never signed it, nor authorized any one to sign it for her. Neither the signature nor the body of the paper is in her handwriting. She was never called on by plaintiffs or any one for them to give this order. She was not aware until the trial of the case that

such a paper was in existence, or that plaintiffs claimed to hold an order of any kind signed by herself, and the fact that plaintiffs had the order and that her name appeared on it only came to her knowledge since the trial. She was not at the trial, as she testified by interrogatories. She used due diligence to discover evidence and prepare for trial, and it was impossible for her to anticipate that the order would be used, as it is a forgery, and she had no reason to believe that such paper would be used. Its use was a great damage to her. Also the affidavits of her attorneys as to their diligence in preparing for trial; and that they never saw the order until during the trial, when it was tendered in evidence, nor had they heard of it, but, when it was tendered, thought it was the act of their client, she not being present, until after the trial, when she informed them she had not signed it, nor had ever authorized any one to do so for her; and that the order was material.

J. J. Bull and J. H. Worrill, for plaintiff in error. Willis & Persons, for defendants in error.

SIMMONS, J. The firm of Ellis & McCrory, desiring to borrow money, wrote to Grandy & Son, of Norfolk, Va., for that purpose, and proposed to give as their security for the loan Mrs. James Y. McCrory, the mother of one of the firm. Grandy & Son agreed to make the loan on this security; but, upon advising with attorneys in this state, they were informed that Mrs. McCrory, being a married woman, could not bind herself as security; and it was then arranged that Mrs. McCrory should borrow the money from Grandy & Son in her own name, she giving her note for the amount borrowed, and making the lenders a deed to certain land, her separate estate, to secure the payment of the note. Grandy & Son knew that she intended to lend the money to Ellis & McCrory, she having given an order to Grandy & Son to let Ellis & McCrory have the money on their draft. Ellis & McCrory drew on the fund thus borrowed by Mrs. McCrory until it was exhausted. When the note fell due, Mrs. McCrory refused to pay it, and suit was brought thereon by Grandy & Son. To this suit she pleaded that the debt for which the note was given was not her own, but was the debt of Ellis & McCrory, and that she was simply a security, and, being a married woman, was not liable thereon. On this state of facts several requests to charge were made by her counsel, which are set out in the report prefixed to this opinion. She made a motion for a new trial, on the several grounds set out therein, which was overruled by the court, and she excepted.

1, 2. Under our Code (section 1783) there are three things which a married woman having

a separate estate cannot lawfully do,—she cannot bind her separate estate by any contract of suretyship, nor can she assume the debts of her husband, nor sell her separate estate to a creditor of the husband to extinguish his debts. If she should do any of these things, the transaction would be absolutely void. These are the only restrictions put upon her in dealing with her separate estate, and, outside of them, she stands upon the same footing as a man or a feme sole. She can borrow money, and pledge her separate estate for the payment thereof, and can lend the same money to her son, or to a firm of which he is a member, and the knowledge of the lender that she is borrowing the money for this purpose will not affect the validity of the transaction. *White v. Stocker*, 85 Ga. 200, 11 S. E. Rep. 604. Of course, all this must be done in good faith. She must be the real debtor to the lender. If the relation of debtor and creditor exists between the lender and a third person, and a married woman is made the ostensible debtor, she would be nothing but a security, and the note would be void, although the writings executed by her to secure the debt are signed only by her. This would be a device to cover up a real cause of suretyship on her part. See the reasoning in the case of *Scofield v. Jones*, 85 Ga. 820, 11 S. E. Rep. 1032. If the original negotiations contemplated that a married woman should be security simply, and the lender, upon ascertaining that she could not lawfully bind herself as security, declines to lend the money, she could renew the negotiations, either by herself or her agent, and borrow the money in her own name, with the purpose of lending it to the original applicant for the loan; and if the money is lent to her, and she becomes the real debtor to the lender, she will be liable therefor just as if she had commenced the original negotiations for herself. Where she is the principal debtor, she is upon the same plane as a man with regard to her separate estate, and is equally bound upon her contracts. These views cover the requests to charge on this subject and the exceptions to the charge as given.

3. Pending the trial the plaintiffs introduced in evidence an order to them, purporting to be signed by Mrs. McCrory, authorizing them to let Ellis & McCrory have the money which she had borrowed upon their drafts. This paper was not objected to by the defendant's counsel, nor was proof required of its execution. After the trial, when the order was shown to the defendant, she denied its genuineness, and made an affidavit that she had not signed it or authorized any one to sign it for her, and this is made a ground of the motion for a new trial, upon the theory of newly-discovered evidence, it appearing from this ground and the affidavit in connection with it that Mrs. McCrory was not present at the trial. We think, where counsel is con-

ducting the trial of a case, and a paper is offered in evidence by the other side, and counsel does not know whether it is genuine, due diligence requires that he shall demand proof of its execution. If he fails to do this, and allows the paper to go in evidence without objection, and after the trial it is discovered that the paper is a forgery, this discovery will not be cause for a new trial, unless it also appears that the opposite party or his counsel knew or had reason to believe that the paper was not genuine.

4. The other grounds of the motion are sufficiently covered by the fourth headnote. Judgment affirmed.

STATE v. LEWIS.

(Supreme Court of North Carolina. Oct. 17, 1893.)

ESCAPE—LIABILITY OF JAILER FOR ACTS OF ASSISTANT.

Code, § 1022, relating to the charge against an officer of allowing a prisoner to escape, provides that it shall be sufficient in support of the indictment to prove that the prisoner "was committed to his custody, and it shall be upon defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same and acted with proper care and diligence." Held that, where the prisoner was allowed to escape by an assistant employed during defendant's sickness, the only question under the indictment against defendant was whether he had exercised due care in the selection of his assistant.

Appeal from superior court, Vance county; Shuford, Judge.

William Lewis was convicted of negligently allowing a prisoner to escape from the jail of which he was keeper, and appeals. Affirmed.

This was an indictment tried by Shuford, J., and a jury at May term, 1893, of Vance superior court. The offense charged was against the defendant, as jailer of said county, for negligently permitting the escape of a prisoner from the county jail. It appeared from the evidence that the defendant was sick, and intrusted the keys, or some of the keys, of the jail to one Jim Green, a man whom he had hired to assist him in attending to the jail,—cleaning it, heating it, and in carrying the prisoners food and water; that before he hired him he had made inquiry as to the character of the said Green, and was informed that he was all right, and a reliable man, except that he was a big liar. There was conflicting evidence as to whether the defendant intrusted Green with all of the keys of the jail or only some of them, and there was evidence tending to prove that some of the inner keys were furnished by some one else, a former jailer, they being duplicates which had never come into the hands of defendant; and that said Green permitted the escape. His honor held, and recalled the jury twice to tell them, that it made no difference whether the jailer

intrusted the keys of the cells to James Green or not, but the question for them was whether he had used due care in employing a trustworthy assistant. He had instructed them that the jailer had a right to employ an assistant, and to intrust him with all the keys, but that he must be careful to employ one who was trustworthy, and if he did not use such care he would be guilty; that defendant admitted being informed that said Green was a big liar, and that they had seen Green on the witness stand, and heard him admit that he had made contradictory statements about the escape.

A. A. Hicks, A. J. Harris, and T. T. Hicks, for appellant. The Attorney General, for the State.

MacRAE, J. Section 1022 of the Code, in relation to the offense above referred to, provides that "In all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that such person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence." The defendant undertook the burden of showing that the escape was not by his consent or negligence. The rule is laid down in *State v. Johnson*, 94 N. C. 924: "It is not necessary to prove negligence in one who has the lawful custody of the prisoner, for it is implied, and is excusable only when occasioned by the act of God, or from irresistible adverse force." The defendant set up his sickness, which, if believed by the jury, was a sufficient excuse for his personal failure to prevent the escape, and the only question, as stated by his honor, was whether he had exercised due care in the employment of his assistant. It was properly left to the jury, accompanied with the repeated instructions of his honor. There is no error.

LE DUC v. MOORE et al.

(Supreme Court of North Carolina. Oct. 17, 1893.)

STIPULATION OF COUNSEL—CASE ON APPEAL.

Where there is no case on appeal, and appellant moves for a certiorari, filing affidavits of counsel that there was an agreement to extend the time of serving the case, and the opposite party files affidavits denying such agreement, the motion will be denied, under supreme court rule 39, (12 S. E. Rep. ix., 104 N. C. 927,) providing that agreements of counsel shall be in writing.

Action by W. G. Le Duc, receiver, against E. F. Moore and others. Judgment for plaintiff. Defendants apply for writ of certiorari. Denied.

N. Y. Gulley, for petitioners. Thos. H. Sutton, for defendant.

BURWELL, J. The petitioner bases his application for a writ of certiorari upon the allegation that in the court below plaintiff's counsel orally accepted notice of his appeal, and extended the time for stating the case. It is conceded that the record in that court does not show that an appeal was asked at the trial, or that any notice of an appeal was waived or accepted, or that the time for stating the case was extended. The plaintiff's counsel denies that he made any such agreement. His denial puts an end to the matter, for we cannot undertake to decide between them, but must adhere strictly to the rule of this court, (No. 39,) and follow the decisions heretofore made in like cases, the latest of which is *Sondley v. City of Asheville*, 112 N. C. 494, 17 S. E. Rep. 534. Motion denied.

PILAND v. TAYLOR et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

DEPUTY CLERKS OF COURT—PROBATE OF DEEDS—CERTIFICATE.

1. Under the provisions of Rev. Code, c. 37, § 2, allowing the deputy clerk to take the probate of a deed, such probate is valid, though the clerk be the grantee in the deed.

2. A certificate of a deputy clerk to the probate of a deed is sufficient prima facie evidence of his appointment and qualification.

Appeal from superior court, Gates county; Bynum, Judge.

Action by Mary W. Piland against Jesse Taylor and others. Judgment for plaintiff. Defendants appeal. Reversed.

L. L. Smith, for appellants. W. D. Pruden, for appellee.

SHEPHERD, C. J. The question presented for our consideration is whether there was error on the part of the court in excluding the deed which was offered in evidence by the defendants. This deed purports to have been executed in August, 1852, by one Elisha Umphlett to Henry L. Eure, and was registered on the 18th of January, 1861. It appears from the certificate of probate that it was proved upon the oath of one of the subscribing witnesses, before R. B. G. Cowper, deputy clerk, and it is insisted that as the clerk, Henry L. Eure, was the grantee in the said deed, his deputy could not, by reason of the interest of his principal, take the probate thereof. A "deputy" is usually defined to be one who by appointment exercises an office in another's right. He is regarded as an agent or servant of his principal, and must as a general rule do all things "in his principal's name, and for whose misconduct the principal is responsible." *Willis v. Melvin*, 8 Jones, (N. C.) 62; *Holding v. Holding*, 2 Car. Law Repos. 440; *Martin v. Mackonochie*, 3 Q. B. Div. 741. "The authority given by law to a ministerial officer is given to the incumbent of the office. The authority is

not given to the deputy, but to the principal, and is exercised by the principal, either by himself or his deputy." 5 Amer. & Eng. Enc. Law, 624. Had Mr. Cowper been authorized, as is held in some of the states, to take the probate of deeds by virtue simply of his position as deputy, he would, it seems, have been acting only as an agent or servant of the clerk, and, his act being necessarily that of the clerk, and deriving its efficacy entirely through him, the probate would have been void. This result would follow, not because of any statutory inhibition at that time, similar to the provisions of the existing law, (Code, § 104,) which forbids the clerk to take the probate of any deed to which he is a party, but for the reason that in so acting he would be offending a fundamental rule in the administration of justice, which is embodied in the maxim "*Nemo debet esse iudex in propria sua causa.*" Mr. Cowper, however, had no authority, merely as deputy, to take the probate of a deed, as such an act has been decided in this state to be judicial in its character, (*Shepherd v. Lane*, 2 Dev. 148; *Suddereth v. Smyth*, 13 Ired. 452; *Tatom v. White*, 95 N. C. 453;) and it is well settled that an officer, clothed with judicial functions, cannot delegate the discharge of those functions to another, (*Broom, Leg. Max.* 808.) The Act 1777, c. 115, (Rev. Code, c. 19, § 15,) providing for the qualification of deputy clerks, did not change in any respect the principle of the common law that the clerk could only delegate to another the performance of the ministerial functions of his office, (*Jackson v. Buchanan*, 89 N. C. 74,) and in respect to this very matter of the probate of deeds it was held in the *Suddereth Case*, supra, that, but for the express provisions of the act of 1829 the deputy could not exercise such a function. It is there explicitly held that such a power cannot be delegated by the clerk, but is conferred upon the deputy by force of the statute alone. This being so, the conclusion would seem to be irresistible that in taking the probate of a deed the deputy is not acting merely as an agent or servant of the clerk, but is performing an independent judicial function, which is vested in him by law so long as he occupies such an official position. We are therefore of the opinion that the authority of the deputy in this instance was in no way affected by reason of the interest of the clerk.

There is some conflict of authority in other jurisdictions as to whether the deputy should sign the certificate in his own name or in that of the clerk; but, as the decisions chiefly relate to cases in which the taking of a probate is held to be a ministerial act, they can have but little practical bearing upon the present question. According to the views we have indicated, the deputy, Cowper, had the authority, under the provisions of the Revised Code, to take this probate; and as it plainly appears from the certificate that he,

and not the clerk, performed this duty, the insertion of the clerk's name before the words "*Per R. B. G. Cowper, D. C.,*" cannot invalidate his act.

It is further contended that the signature of Cowper in the capacity of deputy clerk was not in itself sufficient evidence of his official character, and for this reason the deed was properly excluded. When the deed was proven and registered in 1859, the deputy of the clerk of the county court was, as we have seen, expressly authorized to take the acknowledgment and proof of deeds, etc., (Rev. Code, c. 37, § 2;) and the official character of such deputy was so far recognized that it was provided, as a prerequisite to the validity of his acts, that he should take an oath "to support the constitution of the United States and of the state, and an oath of office," (Id. c. 19, § 15; *Shepherd v. Lane*, supra.) It is also provided in the same section that the clerks of the superior and county courts "shall keep their offices at the courthouse in their respective county, where, by themselves or their lawful deputies, they shall give due attendance, * * * and that, in case of death of the clerk of any court in the vacation, his deputy shall hold the office of clerk until another shall be appointed," etc. The office of deputy clerk being thus recognized by the law, as well as the authority of such officer to take the probate of deeds, we are unable to see why he should be excluded from the presumption which generally obtains respecting the due appointment of persons purporting to discharge the duties of public official positions. Accordingly, it has been held that, "if the person taking an acknowledgment styles himself an officer before whom an acknowledgment may be taken, his certificate is prima facie evidence of the fact that he is such officer. 1 Devl. Deeds, § 500; *Tuten v. Gazan*, 18 Fla. 751. "The practice is to take a certificate which appears on its face to be in conformity with the statutes as proof of its own genuineness. * * * Accordingly, where the certificate describes the proper officer, acting in the proper place, it is taken as proof both of his character and local jurisdiction." 1 Devl. Deeds, supra, § 500. In *Lawson's Presumptive Evidence* (page 56) it is said: "To entitle deeds to be read in evidence, they are required to be acknowledged and recorded in a certain manner. A deed is produced purporting to have been acknowledged before a justice of the peace. The presumption is that the registrar of deeds who made the record had sufficient evidence of the official character of the magistrate to entitle the deed to be recorded." *Forsalith v. Clark*, 21 N. H. 409. To the same effect is the case of *Livingston v. Kettelle*, 41 Amer. Dec. 166, in a note to which Judge Freeman says that "proof of official character of the officer taking an acknowledgment is not necessary to give it validity, in the absence of any statute requiring such proof, if

the certificate purports to have been made by an officer authorized by law to take acknowledgments, and is in due form; but the certificate itself is prima facie evidence of that fact. *Carpenter v. Dexter*, 8 Wall. 513; *Willink v. Miles*, 1 Pet. C. C. 429; *Thompson v. Morgan*, 6 Minn. 292, (Gil. 199); *Harding v. Curtis*, 45 Ill. 252; *Thurman v. Cameron*, 24 Wend. 87." These authorities, as well as considerations of public policy, abundantly sustain the position that the certificate of the deputy clerk was at least prima facie evidence of his appointment and qualification. We are of the opinion that the deed should have been admitted in evidence, and that there should be a new trial.

MIZELL et al. v. RUFFIN.

(Supreme Court of North Carolina. Oct. 10, 1893.)

DEED—VALIDITY—INDEFINITENESS OF DESCRIPTION.

A deed conveying "a portion of the cypress timber on Ahoskie and Loosing swamps," and providing that the grantor "may retain from the timber enough for his farm and building purposes," is void for indefiniteness.

Appeal from superior court, Bertie county; Hoke, Judge.

Action by Josiah Mizell and John C. Britton against Joseph B. Ruffin to recover damages for breach of warranty. Judgment for defendant. Plaintiffs appeal. Reversed.

W. D. Pruden, for appellants. F. D. Winston, for appellee.

CLARK, J. The deed from Burden to Ruffin conveyed "a portion of his cypress timber on Ahoskie and Loosing swamps." This is void for uncertainty, for it does not appear what portion is conveyed. *Harrison v. Hahn*, 95 N. C. 28; *Blakely v. Patrick*, (the "Buggy Case,") 67 N. C. 40; *Atkinson v. Graves*, 91 N. C. 99; *McDaniel v. Allen*, 99 N. C. 135, 5 S. E. Rep. 737. Nor is this helped out or rendered more certain by the condition which immediately follows, that the grantor and his heirs "may retain from this timber enough for his farm and building purposes." The relative pronoun "this" refers to its antecedent, which is the "portion" which is attempted to be conveyed. But, if the reservation was out of the whole body of the timber, the "portion" conveyed would still remain indefinite. It may or may not be that the grantor intended to convey all his timber except that reserved, but it is clear that such is not the plain meaning of the words used, and the rules of legal construction will not admit of a surmise of the probable intent of the grantor contrary to the purport of his words. The subsequent deed given by Burden to Wyner is admitted to be sufficient in form. There has been a breach of the warranty given by Ruffin to the plaintiffs for which they can

maintain their action. Whether the defendant is protected by the statute of limitations, or has other adequate matter of defense, is not now before us. Error.

OUTLAND et al. v. OUTLAND et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

PLEADING—COMPLAINT—MISJOINDER OF CAUSES OF ACTION.

A testator devised certain land to two sons, charged with the support of another son, who was insane. A complaint in an action against one of the devisees, and the heirs and grantees of the other devisee, alleged that such insane son had lived and been supported by plaintiffs under an arrangement between them and such devisees that the latter should pay for his support and maintenance, and asked judgment for the amount due for such support, and that all the land be subjected to payment thereof. *Held*, that there was no misjoinder of causes of action.

Appeal from superior court, Northampton county; John Gray Bynum, Judge.

Action by Thomas P. Outland, by Aaron A. Parker, his next friend, and Aaron A. Parker and Judith A. Parker, husband and wife, against Elijah Outland, and C. W. Harrall and others, grantees of Cornelius Outland, deceased, and John Outland and others, children of deceased and executor of his estate, to recover for the support of plaintiff Outland, an insane person, and to subject certain land to the payment of the judgment. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

R. O. Burton, for appellants.

CLARK, J. This action was brought upon the allegation that Thomas Outland devised certain lands to his sons Elijah and Cornelius, charged with the support of another son, Thomas, who was non compos mentis; that "said Thomas has lived with and been supported by the plaintiffs, under an arrangement entered into between said Cornelius and Elijah and these plaintiffs that said Cornelius and Elijah should pay for his support and maintenance." Payment not having been made, the plaintiffs ask for judgment for the amount, and to subject the land of Elijah, and also of Cornelius, now partly in hands of heirs and partly in the hands of purchasers, (who are made defendants,) to the payment thereof. The only question presented by the appeal is whether this is a misjoinder of causes of action. We think not. Code, § 267, subd. 1; *Hamlin v. Tucker*, 72 N. C. 502; *Glenn v. Bank*, Id. 626; *McMillan v. Edwards*, 75 N. C. 81; *Young v. Young*, 81 N. C. 91; *Bank v. Harris*, 84 N. C. 206; *King v. Farmer*, 88 N. C. 22; *Heggie v. Hill*, 95 N. C. 303. Whether the devise is a charge upon the land, and, if so, whether the plaintiffs are subrogated to the right to enforce it, are interesting questions,

but are not now before us. In ruling that there was a misjoinder of causes of action, there was error.

LENOIR et al. v. VALLEY RIVER MIN. CO.

(Supreme Court of North Carolina. Oct. 10, 1893.)

EJECTMENT—TENANCY IN COMMON—CONSTRUCTION OF WRITTEN AGREEMENT—ADVERSE POSSESSION.

1. Where, in ejectment, defendant claims an undivided one-third of the land as tenant in common with plaintiffs, and plaintiffs show title to an undivided two-thirds only, they are only entitled to a judgment letting them into possession with defendant to the extent of the interest shown, since a recovery for the whole tract could only be warranted by a showing that the same evidence of title or possession that established their own title demonstrated the fact that others than defendant held the other one-third as cotenants with plaintiffs, and that such action would inure to the benefit of such cotenants. *Allen v. Salinger*, 8 S. E. Rep. 913, 103 N. C. 14, followed.

2. An agreement between tenants in common for a division of the proceeds of sales of their lands, thereafter to be made, and an authority to one of them to take entire control and management of certain sales of lands for the parties, is not a conveyance of land, nor contract to convey, nor lease of land, within Acts 1885, c. 147, § 1, providing that no conveyance of land, nor contract to convey, nor lease of land for more than three years shall pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, unless registered before January 1, 1886.

3. A tenant in common is not estopped by declarations of a cotenant against his interest without evidence of any authority of the cotenant to bind him.

4. Where plaintiffs claim an undivided two-thirds interest in certain lands under a deed, as tenants in common with others, and are in possession under such claim, they cannot claim the whole tract by adverse possession for seven years.

Appeal from superior court, Cherokee county; W. A. Hoke, Judge.

Ejectment by B. B. Lenoir and others against the Valley River Mining Company. From a judgment giving plaintiffs possession of two-thirds of the land sued for, they appeal. Affirmed.

W. W. Jones and T. F. Davidson, for appellants. Edward McCrady and J. W. Cooper, for appellee.

MacRAE, J. This case was here on appeal, and was held over for a reargument at September term, 1889, (104 N. C. 490, 10 S. E. Rep. 525,) and at February term, 1890, a new trial was granted, on the ground that his honor had improperly excluded evidence offered by defendant tending to show color of title to an undivided one-third of the land in controversy, and possession thereunder for seven years. It comes up now upon the plaintiffs' appeal from a judgment that the plaintiffs are owners of only an undivided two-thirds of said land, and that they be let into possession of the same with the defendant, and that plaintiffs pay the costs.

On account, we presume, of delay in making up the case on appeal, and the loss of the judge's notes, we regret to say that the interesting questions discussed on the argument are not very clearly presented in the case. According to the pleadings, the plaintiffs, about 40 in number, aver that they are the owners and entitled to the possession of the land described in the complaint, and that defendant Jordan is in the wrongful possession thereof, and withholds the same from plaintiffs. The defendant the mining company in answer admits that defendant Jordan is in possession of said land as tenant of said mining company, but avers that his possession is not adverse to the plaintiffs. It avers that plaintiffs are the owners of an undivided share or part of said land, and that it, the said mining company, is the owner of an undivided one-third of the same, and that it was in possession as owner of said undivided interest for years before the plaintiffs acquired title to the other part thereof, and that for 17 years there has been a joint possession of said land by plaintiffs and defendant as tenants in common, and that defendant's possession has been in no way exclusive of plaintiffs. It alleges further, in substance, that the plaintiffs, who had always admitted and recognized defendant's title to the undivided one-third of said land, have purchased a pretended title to the whole tract, and have taken a deed for the same to plaintiffs. The defendant demands judgment that it is entitled to sixteen forty-eighths, or one undivided third part, of the premises described in the complaint, and to the joint possession of the same as cotenant with plaintiffs, and to the benefit of any deed or deeds, quitclaims, release or releases of any outstanding claims against said property, which may have been made to the plaintiffs, or to any one or more of them since their cotenancy with this defendant. The issues submitted by his honor were: (1) Are the plaintiffs the owners of the land sued for? (2) Are the defendants in the wrongful possession of such land?

The plaintiffs offered in evidence (1) a grant from the state to S. W. Hyatt for the land in controversy, dated May 20, 1853. (2) A deed from R. H. Hyatt, the only heir at law, and Nancy A. Hyatt, the widow, of S. W. Hyatt, to B. Y. McAden, March 15, 1873, by which they "bargained, sold, transferred, and quitclaimed unto the said Bartlett Y. McAden all their interest, right, claim, and demand of and into" the land described in the complaint. (3) A deed of the same character from B. Y. McAden to J. T. Lenoir, William Lenoir, Dr. B. B. Lenoir, and Israel P. Lenoir, 14th April, 1873. "And the plaintiffs then introduced evidence to show that they had been in the actual occupation of the land in controversy, claiming the same adversely against the world, since the 14th day of April, 1873." The defendant offered in evidence two deeds, by which it was made to appear that long

prior to the execution of the deed from the widow and heir of S. W. Hyatt the said S. W. Hyatt had conveyed to one A. J. Patton an undivided one-third of said land on June 6, 1855, and that in September, 1856, the coroner of Cherokee county had sold and conveyed under execution against said S. W. Hyatt, who was himself sheriff of Cherokee county, all of his interest in said land to A. J. Patton, and that in December, 1857, the sheriff of Cherokee, H. H. Davidson, had again sold and conveyed all the interest of said Hyatt in said land to Drury Weeks and John A. Robinson, thus showing that said heir at law and widow had no interest in said land at the time of the execution of their deed to McAden. The defendant then offered in evidence many deeds showing conveyances through different parties and in different moieties from said Patton, Weeks, and Robinson to the above-named Lenoirs. The connection of the other plaintiffs of record with the controversy is nowhere made to appear. We presume they are the heirs at law of the said Lenoirs. The defendant offered in support of its own title to an undivided third of said land a deed from W. N. Bilbo to the Valley River Mining Company, the defendant purporting to convey said interest, dated 6th January, 1867. The defendant then offered in evidence an agreement dated January 28, 1863, between W. N. Bilbo, A. O. Lyon, and Drury Weeks, which was objected to by plaintiffs "for the reason that the same had been registered after the time allowed by law," which objection was overruled by his honor, and plaintiffs excepted. The reason given by his honor for overruling the objection is: "The defendants, according to the evidence, being tenants in common, and no interfering interest having arisen."

We do not clearly apprehend the reasons above stated, but on examination of the act of 1885, chapter 147,¹ and of the "agreement" objected to, we hold that the instrument was neither a conveyance of land, nor contract to convey, nor lease of land, which, by the terms of the aforesaid act, was required to be registered before January 1, 1886. It is an agreement between the parties for a division of the proceeds of sales thereafter to be made, and an authority or power to said Bilbo to take entire control and management of certain sales of lands and minerals for the parties. It is long and very obscurely expressed, and not necessary to be set forth in this opinion. Two paper writings attached to the above agreement, and described as "receipts," were also offered in evidence by defendant, and objected to by plaintiffs upon the same ground as that of

the objection to the said agreement; but we are of the opinion that they were not such instruments as were required by the act of 1885 to be registered. Besides, the said agreement, with the two indorsements thereon, was not offered as a deed of conveyance constituting a link in defendant's chain of title to one-third of said land, but as a declaration of said Patton, Weeks, and Robinson to the effect that they were cotenants of said land. Such declarations might have been competent for the purpose of working an estoppel upon the persons making said declarations while in possession, and upon their privies; and it was the contention of defendant that plaintiffs derived their title to two-thirds of said land through Patton, and were bound by the said declarations; but, in the view which we take of the case, as will be seen hereafter, we think they were immaterial, and had no effect upon the event of the controversy. The defendant offered certain letters, purporting to have been written by I. T. Lenoir in 1871, 1872, and 1873, for the purpose of showing the character of plaintiffs' possession. The other plaintiffs would not be estopped by declarations against interest of one of their cotenants without evidence of any power or authority in the person making such declarations to bind the others; but his honor, after admitting the same, in effect ruled them out, when he declared them "immaterial, because plaintiffs failed to show possession sufficiently extensive or continuous to show ouster of defendants." The reason is not clear to us, because it is stated in the case that "there was no evidence of any possession on the part of defendants until 1888, when Gus Jordan entered." But, as we shall show, it cannot affect the case to the prejudice of plaintiffs. "After the case was closed the court intimated and decided that the defendants had by their deeds, and the recitals in them, connected themselves with the common source of title, and that he would direct the jury on the evidence, if believed, to answer the first issue, 'Yes, two undivided thirds,' and to the second issue, 'No,' to which instruction the plaintiffs excepted." We think that the response of the jury to the issues was right, although we do not clearly see from the evidence reported in the statement of the case the foundation of the reason given by his honor for his instructions. Plaintiffs must recover upon the strength of their own title, and not upon the weakness of defendant's. Conceding for the time that the deed from McAden to the Lenoirs for the whole tract would constitute color of title, (though we are not unmindful of the able argument of defendant's counsel to the contrary,) the evidence offered by defendant clearly showed that at the time of the execution of the McAden deed the plaintiffs were claiming title to an undivided two-thirds of said land by other deeds, as tenants in common with other parties, and

¹ Acts 1885, c. 147, § 1, provides that no conveyance of land nor contract to convey nor lease of land for more than three years shall pass any property, as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, unless registered before January 1, 1886.

were in possession under such claim. Can they then recover the whole tract of defendant by seven years' adverse possession under the McAden deed? A claim of title by adverse possession under color negatives the idea of a rightful title. Plaintiffs, being in possession as tenants in common with others, could not acquire title as to the interest of the other tenants in common by seven years' adverse possession. It requires 20 years of such possession to amount to an ouster of the cotenant. It makes no difference whether the defendant was the rightful cotenant or not, for the plaintiffs are to show this title against the world, before they can recover the disputed one-third. Their title to the two-thirds is admitted.

The late Chief Justice Merrimon, in the opinion delivered by him in this case, 106 N. C. 473, 10 S. E. Rep. 525, says: "It was admitted by the defendant that the plaintiffs were part owners of the land. But this did not entitle them to be let into possession of the whole thereof as sole owners, or for themselves and others who might claim to be part owners as against the defendant. As to the undivided one-third part claimed by it, the burden was on the plaintiffs to show title thereto in themselves, and, failing in this, the defendant, having possession, had the right to remain so, as tenant in common with the plaintiffs as part owners only." In our opinion, that is the present status of the case. In discussing the rights of tenants in common among themselves, he further said: "The recovery of one such tenant is not generally a recovery of all of them, nor does such recovery entitle him to take possession for all." In the case of *Foster v. Hackett*, 112 N. C. 546, 17 S. E. Rep. 426, Mr. Justice Avery examined and discussed the question when one tenant in common can recover the whole tract for himself and his cotenants, and very clearly lays down the rule, citing many authorities: "It is obvious, therefore, that one of several cotenants, when he brings an action against a trespasser on the common property, and proves the title of the other tenants in establishing his own, may, under the common-law practice in ejectment applied to actions for the possession of land, recover the whole, though he claim sole seisin in his complaint in himself, just as he can do under the procedure prescribed in the Code, by alleging that the action is brought in behalf of himself and others having a common interest, though it has never been determined in this state how far, if at all, in the action under the provisions of the statute, the cotenants not actual parties would be concluded by the judgment." This is in accord with the opinion delivered by the same member of this court in *Allen v. Salinger*, 103 N. C. 14, 8 S. E. Rep. 913: "A plaintiff showing title only to an undivided interest may have judgment, without qualification, for the whole against one who has no title. * * * But the plain-

tiff who has proven title to one undivided seventh, must, if he would have judgment for the whole, have shown on trial that the same evidence of title or possession that established his own title demonstrated the fact that others than defendant held, as cotenants, the other interest, and this action would inure to their benefit. But the burden is always on the plaintiff in such actions, and he must establish his right clearly to the judgment demanded, just as he is required to show title good against the world." *Overcash v. Kitchie*, 89 N. C. 384; *Yancey v. Greenlee*, 90 N. C. 317. Applying these principles to the case as it is now before us, the verdict and judgment only establish that the plaintiffs are the owners and entitled to the possession of an undivided two-thirds of the land in controversy, and that the defendants do not wrongfully withhold possession thereof from plaintiffs. The plaintiffs have failed to establish that they are the owners of the whole tract. They have not shown who are the owners of the other one-third claimed by defendant, so as to entitle them to a judgment in behalf of their cotenant if he be some one other than defendant, and therefore they are only entitled to the judgment they had below, and which was not contested, but admitted, by defendant,—that plaintiffs were entitled to that which they already have, a two-third undivided interest in the land. In this view of the case, any errors, if such there were, as pointed out in the plaintiffs' exceptions, are harmless. The judgment is affirmed.

AVERY, J., did not sit on the hearing of this appeal.

MARKS et al. v. BALLANCE.

(Supreme Court of North Carolina. Oct. 10, 1893.)

SPLITTING CAUSE OF ACTION—JURISDICTION OF JUSTICE'S COURT.

Where separate accounts have been consolidated, and a statement rendered showing a balance due on the whole, to which the debtor does not object, the accounts cannot afterwards be separated so as to bring each within the jurisdiction of the justice's court.

Appeal from superior court, Hyde county; Bynum, Judge.

Two actions by O. Marks & Son against D. B. Ballance for goods sold and delivered. From the judgment rendered, defendant appeals. Reversed.

In May, 1891, the defendant purchased of plaintiffs, on 60 days' time, a bill of goods to the amount of \$95.98, and in October, 1891, he purchased on 60 days' time a second bill of goods to the amount of \$210.67, on which was credited a payment of \$68, leaving a balance of \$142.67. After both bills became due, to wit, on January 3, 1893, the plaintiffs rendered a statement to

defendant showing a balance of \$288.65 to be due them, to which the defendant made no objection. Payment having been refused, the plaintiffs brought two actions, one on each of the above-mentioned bills. The defendant pleaded to the jurisdiction of the justice of the peace, and asked that the actions be dismissed. Upon the above statement of facts it was agreed, on appeal to the superior court, that if the judge should be of opinion that the justice of the peace had jurisdiction, then the judgments of the justice of the peace should be affirmed; otherwise, that the two actions be dismissed. The court, being of opinion that the plaintiffs had the right to sue on each separately, and that the justice of the peace had jurisdiction, rendered judgment accordingly, and the defendant appealed from the judgment rendered in each case.

Thos. G. Skinner, for appellant. J. E. Mann, for appellees.

BURWELL, J. We think that the matter involved in this appeal is determined by the case of *Hawkins v. Long*, 74 N. C. 781.

The plaintiffs having seen fit to consolidate the items of their account against the defendant and to deduct therefrom the items of credit, and having rendered to the defendant a statement in which they struck a balance, and claimed that round sum as a debt, are bound thereby unless the defendant has objected to such statement; and this he has not done. On the contrary, he has assented to the rendered account, impliedly by his failure to object thereto, and expressly by his pleas in the two actions brought against him, thus making himself bound with the plaintiffs by this account stated. Upon the facts agreed, the two actions should have been dismissed, and it is so ordered. Error. Reversed.

WOOL v. TOWN OF EDENTON.

(Supreme Court of North Carolina. Oct. 10, 1893.)

NAVIGABLE WATERS — RIPARIAN RIGHTS — DEEP-WATER LINE—LOCATION BY TOWN.

Under Code, § 2751, authorizing owners of land on navigable waters, for the purpose of erecting wharves, to make entries of land covered by water, adjacent to their own, as far as deep water, and providing that, on the making of such an entry in front of an incorporated town, the town shall regulate the line "on deep water," to which entries may be made, where the town attempts to regulate the line, but locates a line which does not extend to deep water, an action will lie to compel the town to properly regulate the line.

Appeal from superior court, Chowan county; John Gray Bynum, Judge.

Action by Jacob Wool against the town of Edenton to compel the regulation of deep-water line. A demurrer to the complaint was overruled, and defendant appeals. Affirmed.

W. M. Bond and W. D. Pruden, for appellant. F. H. Busbee and Grandy & Aydlott, for appellee.

SHEPHERD, C. J. It is provided by the Code (section 2751) that persons owning lands on any navigable sound, river, etc., for the purpose of erecting wharves on the side of the deep waters thereof next to their lands, may make entries of the lands covered by water, adjacent to their own, as far as the deep water of such sound, river, etc., and obtain title as in other cases; and, when any such entry shall be made in front of the lands in any incorporated town, the town corporation shall regulate the line on deep water, to which entries may be made. The performance of the duty thus imposed upon the town corporation may be compelled by the courts, (*Wool v. Saunders*, 108 N. C. 729, 13 S. E. Rep. 294;) and it is for this purpose that the present action is brought. The complaint alleges that the defendant did "undertake to locate the said line of deep water in front of the property of the plaintiff, * * * but that in fact the line so located does not extend to the deep water of Edenton bay, nor does it regulate the deep-water line, as required by law." It is further alleged that the plaintiff has demanded that the defendant "extend and regulate the said line to the deep water of the said bay," and that the defendant has refused to take any further action. It is insisted, upon demurrer, that it appears from the complaint that the defendant has fully performed its duties in the premises, and that the action should be dismissed. We cannot assent to such a conclusion, and are of the opinion that his honor was correct in overruling the demurrer. The law requires that the town shall "regulate the line on deep water;" and it is explicitly alleged that this duty has not been performed, and that in fact the line does not extend to the deep water. We are aware of no principle which authorizes us to presume that the defendant has performed a plain statutory duty in the face of such admissions as are contained in these pleadings. As to the joinder of unnecessary parties, it has frequently been decided that it is not a ground of demurrer. *Burns v. Ashworth*, 72 N. C. 496. Affirmed.

CHERRY v. LILLY.

(Supreme Court of North Carolina. Oct. 10, 1893.)

JUSTICE'S SUMMONS—RETURN TO ANOTHER JUSTICE.

Though a summons issued by one justice of the peace cannot be made returnable before another justice, except as is specially provided by statute in certain cases, where the defendant answers to such summons, and proceeds to trial without objection, the justice before whom it is made returnable acquires jurisdiction. *Williams v. Bowling*, 16 S. E. Rep. 176, 111 N. C. 295, distinguished.

Appeal from superior court, Beaufort county; John Gray Bynum, Judge.

Action by R. C. Cherry against Mack Lilly. Defendant had judgment, and plaintiff appeals. Reversed.

This was a civil action, tried at the May term, 1893, before his honor, John Gray Bynum, judge presiding, upon an appeal by the plaintiff from a justice of the peace. As appears, both the plaintiff and the defendant appeared in person and by attorney before the justice of the peace. In the superior court the defendant, for the first time, moved to dismiss the action because the summons was issued by A. Mayo, a justice of the peace, and made returnable before O. H. P. Tankard, another justice of the peace of the same township. The latter justice tried the action below, and the defendant did not there move to dismiss. The court granted the motion to dismiss. Exception by plaintiff. The court signed the judgment herewith sent, to which the plaintiff also excepted. The plaintiff gave notice of appeal to the supreme court, in open court, and assigned the following ground of error: "(1) The granting of the motion of defendant to dismiss the action."

W. B. Rodman, for appellant. C. F. Warren, for appellee.

MacRAE, J. There is this distinction between the present case and that of *Williams v. Bowling*, 111 N. C. 295, 16 S. E. Rep. 176, wherein it was held that a summons issued by one justice of the peace cannot be made returnable before another, except in cases provided by statute to that effect. In the former, the defendant appeared and answered, submitting to the jurisdiction of the justice before whom the summons was returned; in the latter, the defendant appeared and moved to dismiss, and the justice properly dismissed the action. Here, both justices had jurisdiction of the subject-matter of the action, but the defendant was brought into court by irregular process. He could have moved to dismiss, but he chose to submit to the jurisdiction of the justice, entered his pleas, and went into the trial, and made no objection to the jurisdiction of the justice until after the case had been brought by appeal into the superior court. It is somewhat like the case of *West v. Kittrell*, 1 Hawks, 493, where a suit was carried from the county to the superior court by consent of parties, and not by appeal, and it appeared that it was a case in which the superior court had concurrent jurisdiction with the county court of the subject-matter of the proceeding; and, the petition and plea being entered in the superior court, that court had jurisdiction, as if the suit had never been in the county court. In the case before us, the action was entered upon the docket, the defendant appeared, the pleadings were noted, and, without objection, the trial proceeded. The justice who tried the

action acquired jurisdiction, not by the irregular process issued by another justice, but by the appearance and plea of the defendant. As in the case of *McMinn v. Hamilton*, 77 N. C. 300, where the court had jurisdiction of the subject-matter of the action, but the venue was wrong, it was held that the objection must be taken in apt time; if the defendant pleads to the merits of the action, he will be taken to have waived the objection. See, also, *Morgan v. Bank*, 93 N. C. 352. An entirely analogous case is *Moore v. Railroad Co.*, 67 N. C. 209, where it was held that the clerk of the superior court of one county has no right to issue a summons returnable to the superior court of another county, but irregularity of service is waived by an appearance and answer in bar. Error. Judgment reversed.

BOND v. WOOL.

(Supreme Court of North Carolina. Oct. 10, 1893.)

ACTION — TERMINATION — AFFIRMANCE OF JUDGMENT ON APPEAL — NECESSITY FOR SUBSEQUENT JUDGMENT.

1. Where the trial court, after affirmance of its judgment on appeal, enters on the docket, "Judgment as per transcript filed from the supreme court," it is sufficient to terminate the action, though there is no written judgment signed by the judge, if any entry is necessary after such affirmance.

2. Since, under Acts 1887, c. 192, a judgment is not vacated by appeal, but merely suspended, and the suspension is ended by affirmance, a judgment by the trial court after affirmance can add no validity to the prior judgment or to the judgment of the supreme court.

Appeal from superior court, Chowan county; Bynum, Judge.

Action by H. A. Bond, Jr., against Jacob Wool for an injunction, in which a judgment dissolving the injunction was affirmed on appeal. 12 S. E. Rep. 281. From a judgment dismissing defendant's motion to assess damages on the injunction bond, he appeals. Affirmed.

The following are the facts in the case: At spring term, 1890, of the superior court of Chowan county there was a judgment dissolving the injunction. From this judgment there was an appeal by the plaintiff to the supreme court. Judgment was affirmed in the supreme court. The certificate of the supreme court was sent down to the superior court to spring term, 1891, and at that term there was entered on the minute docket the following: "Judgment as per transcript filed from the supreme court." There was no judgment written and signed by the presiding judge at said spring term, 1891. The case was dropped from the docket, and never placed upon the docket again until spring term, 1892, when, in consequence of the notice of March 14, 1892, the clerk placed it on the civil issue docket for said spring term, 1892. The motion was continued until the

spring term, 1893, when it was heard, as above stated. The plaintiff moved to dismiss upon the ground that there was no cause pending in which the motion of the defendant could be made.

F. H. Busbee and Grandy & Aydlett, for appellant. W. D. Pruden, for appellee.

CLARK, J. While it is more regular, and for many reasons the better course, that judgments should always be signed by the judge, it has been repeatedly held that this is not mandatory. *Matthews v. Joyce*, 85 N. C. 258; *Rollins v. Henry*, 78 N. C. 342; *Keener v. Goodson*, 89 N. C. 273; *Spencer v. Credle*, 102 N. C. 68, 8 S. E. Rep. 901. The entry on the docket, "Judgment as per transcript filed from the supreme court," was sufficient, and a termination of the action. Besides, under the provisions of chapter 192, Acts 1887, the former judgment of the superior court was not vacated by the appeal,—merely suspended; and the suspension was ended by the affirmation of the judgment by the supreme court. The subsequent judgment in the superior court added no validity to the former judgment of that court, nor to the judgment in the supreme court. Its office was simply formal,—to direct the execution to proceed, and to carry the costs subsequently accrued. No error.

DAVENPORT v. GRISSOM.

(Supreme Court of North Carolina. Oct. 10, 1893.)

APPEAL FROM JUSTICE — DOCKETING JUDGMENT — NONSUIT.

1. Under Code, §§ 565, 876, 877, 880, requiring that where a judgment is rendered in a justice's court 10 days before the next ensuing term of the superior court an appeal therefrom shall be docketed at that term, a docketing at a subsequent term is a nullity, and does not entitle the plaintiff appellant to take a nonsuit.

2. The court has no discretion to allow the appeal to be docketed at a later term.

Appeal from superior court, Beaufort county; John Gray Bynum, Judge.

Action by Mollie Davenport against W. L. Grissom, executor of the estate of Elizabeth Hyatt, deceased. Judgment for defendant. Plaintiff appeals. Affirmed.

J. H. Small and W. B. Rodman, for appellant. Chas. F. Warren, for appellee.

CLARK, J. The judgment by the justice having been rendered more than 10 days before the next ensuing term of the superior court, the appeal should have been docketed at that term. Code, §§ 876, 877, 880, 565; *Ballard v. Gay*, 108 N. C. 544, 13 S. E. Rep. 207. The attempted docketing at a subsequent term was a nullity, and the judge properly held that the case was not in the superior court, and that the plaintiff appellant could not take a nonsuit. To permit such course would have been to allow the

appellant to avoid the effect of her delay in bringing up the appeal in proper time, and to institute a new action. The policy of the law, as said by Avery, J., in *Ballard v. Gay*, 108 N. C. 544, 13 S. E. Rep. 207, is to "require litigants to be diligent in prosecuting appeals from justices of the peace, and to prevent parties from using such as a means of causing useless delay." This is cited and approved in *State v. Johnson*, 109 N. C. 852, 13 S. E. Rep. 843. Nor did the judge err in holding that he had no discretion to permit the appeal to be docketed at a subsequent term to the one to which it should have been returned. The appellant had her remedy (if in no default) by an application for a recordari at the first ensuing term of the superior court after appeal taken. *Boling v. Railroad Co.*, 88 N. C. 62. It is true that when proper notice of appeal is not given in a case tried before a justice of the peace, if the appeal is regularly docketed in due time in the superior court, the judge may permit notice of appeal to be then given, though the exercise of the discretion is not encouraged. *State v. Johnson*, 109 N. C. 852, 13 S. E. Rep. 843; *Sondley v. City of Asheville*, 112 N. C. 694, 17 S. E. Rep. 534. But that is where the case is on docket, and the appellee has not been delayed. It does not recognize the right to revive an appeal lost by delay, and to permit the same to be docketed at a subsequent term of the superior court. The act of 1889, (chapter 443,) permitting the appellee to docket the case at the first term of the superior court if the appellant does not, and have the judgment below affirmed, merely extends to that court the provisions of rule 17 in the supreme court. (12 S. E. Rep. vi.) It is a privilege to the appellee, and the appellant can draw no argument against appellee from his failure to use it. *Ballard v. Gay*, supra; *Wilson v. Seagle*, 84 N. C. 110. No error.

MURRAY et al. v. BERRY et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

CONTEMPT—DISCRETION OF COURT.

In proceedings for the alleged contempt of respondents in instituting an action to recover land in violation of an order restraining their ancestor and all persons holding under him from claiming any interest in such land, the exercise of discretion in discharging the rule on the ground that the effect of the restraining order, and the rights of the parties thereunder, can best be determined in the action by respondents, will not be disturbed on appeal.

Appeal from superior court, Hyde county; John Gray Bynum, Judge.

Proceedings by Samuel Windley against William Swindell and others for an order declaring respondents guilty of contempt of court in violating a restraining order entered in the suit of Daniel Murray against Hosea Berry and others. At the hearing the pre-

liminary rule was discharged, and plaintiff appeals. Affirmed.

W. B. Rodman and Chas. F. Warren, for appellant. W. W. Clark, for appellees.

BURWELL, J. The law of contempt is regulated in this state by statute. Code, c. 14. Among the acts for which persons may be punished in this summary manner is "the willful disobedience of any process or order lawfully issued by any court." His honor, upon consideration of the affidavit filed by the complainants, and the answer of the respondents, adjudged that they had "purged themselves of and from any contempt" of that court, and discharged the rule, and taxed the complainants with costs. The errors assigned are that the judge erred (1) "in holding that the defendants had purged themselves from the contempt in the disobedience of the restraining order made in the original cause," and (2) "in not holding that the restraining order was disobeyed, and in not finding the facts relative to the same." In *Rapalje on Contempt* (section 9) it is said: "The right of a party aggrieved by the act of the contemnor to have process issue against him is not absolute. On the contrary, whenever the law affords any other adequate remedy by which such party can enforce his rights, the proceeding by attachment for a contempt is always within the discretion of the court, and a refusal to exercise it cannot be reviewed on appeal or writ of error." In *Wyatt v. Magee*, 3 Ala. 94, the court dismissed an appeal from an order discharging a rule for an alleged contempt in disobeying an injunction, and pointed out the distinction between those cases where, as in decrees for specific performance, the surrender of title deeds, etc., the party has no method to enforce his rights, ascertained by the decree, except by the summary process of attachment in contempt, (in which class of cases it is hardly to be supposed that any court would ever refuse to enforce obedience to its decree,) and those cases where, the party having another means of redress, the principal object is the maintenance of proper respect for the tribunal. In this latter class of cases it is there said that it is certainly to be "permitted to the chancellor to hesitate whether he ought not to refuse to commit for a contempt, and leave the parties to their remedies at law." It was charged against the respondents that they had disobeyed an imperative order of the court of equity of Hyde county, made in 1830, in a cause to which their ancestor, Hosea Berry, then an infant, was respondent, by which order it was alleged the said Berry, and all persons claiming under him, "were enjoined from setting up any claim" to certain land which the complainant there averred had been conveyed to him by the mother of Hosea Berry by proper deed, which deed, as well as the book in which it had been registered, had been de-

stroyed; and the act of disobedience specially charged was that the heirs of Hosea Berry, respondents here, had, in 1889, instituted an action to recover a portion of said land, and in 1890 had begun proceedings to have partition made of another portion, they asserting title only as heirs of Hosea Berry both in the action and the proceeding for partition. The respondents insist in their answer that they have done nothing that in any way violates any order of court that is binding on them, and that there is no decree or order of the court of equity that prevents them from asserting by proper action their title to the land in question. They disavow any intention to defy the authority of the court, and set out with fullness and particularity the reasons that induce them to believe that there is no injunction order that has the force claimed for it by complainants. Now, it seems very clear that, if there is any record that is so binding on the respondents that it enjoins them, under pain of being liable for contempt, from bringing suit to recover the land, that same order or decree will be effective, if pleaded, to prevent them from recovering the land, and will surely protect the complainants in their rights. His honor, in the exercise of his discretion, refused to attach the respondents for contempt. His refusal to exercise that power cannot be reviewed here. He has only determined that the very complicated controversy, the particulars of which are set out in the affidavit of complainants and the reply of the respondents, should not be determined in this summary manner, and that the issue between the parties can be more properly tried in the action brought by respondents than in a proceeding such as this. Let the appeal be dismissed.

SAWYER v. GRANDY et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT—DECEASED'S HANDWRITING—EVIDENCE—DECLARATIONS OF DECEDENT.

1. Code, § 590, declares that on the trial of an action a party interested shall not be examined as a witness in his own behalf against the administrator of a deceased person, concerning a personal transaction with deceased. *Held*, that plaintiff in an action against an administrator may testify that a contract on which plaintiff relies, and the signature of deceased thereto, are in deceased's handwriting, but not that he saw deceased sign the contract.

2. Where the contract is claimed to be one of partnership, the declarations of deceased made after its date, tending to show either that plaintiff was or was not his partner, are not admissible in evidence.

Appeal from superior court, Camden county; John Gray Bynum, Judge.

Action by Alfred Sawyer against C. W. Grandy and A. H. Grandy, partners as Grandy & Son, and O. G. Pritchard, as ad-

ministrator of the estate of T. S. Berry, deceased, to recover certain money due from such firm to T. S. Berry at the time of his death, on the ground that plaintiff was the surviving partner of deceased, and that the money was owing to the firm. Defendants Grandy paid the money into court, and the case proceeded against defendant Pritchard. From a judgment for plaintiff, defendant Pritchard appeals. Reversed.

This was a civil action, tried before Bynum, J., and a jury, at spring term, 1893, of Camden superior court. The plaintiff brought his action as surviving partner, alleging that at the time named the plaintiff and T. S. Berry were copartners doing business under the firm name of T. S. Berry: that said firm had large dealings with the defendants Grandy & Son, commission merchants, and that said Grandy & Son now have in their possession the sum of \$1,025 which is due and owing to the plaintiff as surviving partner of the said firm; that T. S. Berry is dead, and plaintiff is winding up the business of the firm, and has made demand upon said defendants for the payment of the said sum, and that said defendants have refused to pay the same to plaintiff. The defendants Grandy & Son answer, denying all knowledge of the alleged copartnership, admitting the dealings between them and T. S. Berry, and that they have for the credit of T. S. Berry the sum of \$1,100.63, and averring their readiness to pay over the same to the persons entitled thereto. They allege further that the fund in their hands is claimed by one O. G. Pritchard as administrator of T. S. Berry, deceased, and that they are advised that said Pritchard should be made a party to this action. They admit demand and refusal. Said Pritchard was permitted to make himself a party defendant, and the defendants Grandy & Son were allowed to pay into court the fund in their hands to the credit of T. S. Berry. Pritchard filed his answer, alleging that he is the administrator upon the estate of T. S. Berry, deceased, denying the alleged partnership, and claiming the fund. So it appears that the contention is now between the plaintiff and O. G. Pritchard, administrator of T. S. Berry, deceased, and the question is whether plaintiff is the surviving partner of the alleged partnership; in other words, whether plaintiff and Berry were partners, as alleged in the complaint. The plaintiff offered in evidence the following paper writing: "North Carolina, Camden county. Agreement is this entered into between T. S. Berry, of the one part, and Alfred Sawyer, Jr., of the other part, both of the county of Camden, and state of North Carolina, as follows, to wit: The said T. S. Berry is now selling goods at Belcross, and has employed the said Alfred Sawyer, Jr., as a clerk to superintend the said store as long as the said Berry chooses to employ

him, and the said Sawyer is to have for his services one-half ($\frac{1}{2}$) of all the profits the said store makes after paying all expenses of the said store; and, further, the said Sawyer is to-day one-half ($\frac{1}{2}$) owner of all the goods, moneys, accounts, notes, etc., that belong to the store; and, further, the said Berry is not to make any charges as rent for said store, warehouse, or dwelling house where the said Sawyer now lives, for this and his daily service is his compensation is equal division of profits with the said Berry. Witness our hands and seals this May 30, 1891. [Signed] T. S. Berry. [Seal.] [Signed] A. Sawyer. [Seal.]" The plaintiff, being then offered as a witness in his own behalf, was permitted to testify that he was acquainted with the handwriting of T. S. Berry, and that both the body of the paper and the signature referred to were in the handwriting of T. S. Berry, and to this the defendant objected and excepted. Witness was then asked who signed the name of A. Sawyer to the paper, and answered that he himself signed it. This question and answer was objected to by the defendant. The plaintiff offered several witnesses who testified without objection to the declarations made by T. S. Berry, tending to show that he and plaintiff were partners. The defendant Pritchard introduced as a witness one Wright, and offered to show by him declarations made by T. S. Berry after the date of the paper, denying the partnership, and tending to show his individual ownership, and that the plaintiff was only his clerk. The plaintiff objected, the objection was sustained, and defendant excepted.

J. Heywood Sawyer, for appellant. Grandy & Aydlett, for appellee.

MacRAE, J. The Code, § 590, declares that upon the trial of an action a party interested in the event shall not be examined as a witness in his own behalf against the administrator of a deceased person, concerning a personal transaction or communication between the witness and the deceased person. The paper offered as evidence of the contract of partnership purported to be the memorial of a transaction, or the transaction itself, between the plaintiff and the deceased person against whose administrator this action is now being pressed. It has often been held that, while under this section the plaintiff is incompetent to testify to the actual execution of the paper by the deceased, he may testify to the handwriting of deceased if he can. In *Rush v. Steed*, 91 N. C. 226, the court, while adhering to this construction of the statute, calls the distinction a very fine-spun one, but the reason of the act, as stated by Mr. Justice Reade in *Halyburton v. Dobson*, 65 N. C. 88, seems to justify it: "There could never be a recovery against an unscrupulous party if he were permitted to testify, where it would be im-

possible to contradict him; the statute ought to be construed in view of this mischief." If plaintiff had been permitted to testify that he saw Berry sign this paper, it might have been impossible to contradict him; but he simply swears to the handwriting of deceased, and the matter is entirely open to contradiction, if defendant can do so, by others who are acquainted with the handwriting of deceased. We are unable to make the distinction between the testimony of the plaintiff as witness to the actual signing of the instrument by deceased and by himself, for the deceased might be the only person who could have testified to the contrary if plaintiff had been permitted to testify to the fact of the signing; and we think, upon the authorities cited, that his honor erred in admitting this testimony. The plaintiff relying upon the paper writing as the contract of partnership, evidence of declarations of deceased seems to have been incompetent and immaterial on either side, as tending to contradict or to explain a written instrument the construction of which is a question of law for the court. Error. New trial.

KELLY v. FLEMING et al.

(Supreme Court of North Carolina. Oct. 24, 1893.)

HUSBAND AND WIFE—CONVEYANCE OF HOUSEHOLD FURNITURE BY HUSBAND — BILL OF SALE — DESCRIPTION—CONVEYANCE BY PARENT TO CHILD—PRESUMPTION—INSTRUCTIONS.

1. Act 1891, c. 91, § 1, providing that, whenever household or kitchen furniture is conveyed by chattel mortgage or otherwise as allowed by law in North Carolina, the privy examination of married women shall be as prescribed in conveyances of land, does not apply to an absolute sale by the husband of such property.

2. A bill of sale describing the property conveyed as all the household and kitchen furniture, and all other property of every description, belonging to the grantor at a certain house, sufficiently describes the property conveyed.

3. A conveyance from a parent to a child 21 years old is not, in law, presumptively fraudulent, unless it be shown to be a voluntary conveyance, or one upon insufficient consideration, while the parent is in embarrassed circumstances.

4. Instructions, though correct as propositions of law, are properly refused, in the absence of evidence on which such instructions could be based.

Appeal from superior court, Vance county: George A. Shuford, Judge.

Action in attachment by J. A. Kelly against E. L. Fleming, Sr. E. L. Fleming, Jr., interpleaded, setting up the title to the property attached by plaintiff as the property of E. L. Fleming, Sr. There was judgment for E. L. Fleming, Jr., and plaintiff appeals. Affirmed.

In support of his claim to the property attached, E. L. Fleming, Jr., offered in evi-

dence a paper writing purporting to be a bill of sale, as follows: "In consideration of \$500 in cash to me paid by E. L. Fleming, Jr., I hereby bargain, sell, convey, and deliver to E. L. Fleming, Jr., all the household and kitchen furniture, and all other property of every description, belonging to me, and at the house and lot in Henderson, N. C., owned by W. D. Horner, and occupied by my family. Witness my hand and seal this 13th July, 1892. E. L. Fleming. [Seal.]"

A. C. Zollicoffer and Pittman & Shaw, for appellant. T. T. Hicks, for appellees.

MacRAE, J. His honor instructed the jury to respond to the first and second issues, "No;" and to this instruction, and the finding of the jury in response thereto, there was no exception. This eliminates from the case any question which might have arisen if a part of the property conveyed by the husband had been found to belong to the wife. The first exception brings before us for construction the act of 1891, c. 91, entitled "An act regarding chattel mortgages:" "Section 1. That whenever household or kitchen furniture is conveyed by chattel mortgage or otherwise as allowed by law in this state, the privy examination of married women shall be taken as is now prescribed by law in conveyance of real estate; provided that all such conveyances of household and kitchen furniture, except as herein provided, shall be ineffectual to convey a title to the same." The question presented is whether, upon a true construction of the statute above cited, it is necessary for the wife to join the husband in a conveyance and sale of his household and kitchen furniture, and be privily examined touching her free execution of said conveyance, in order to make the same effectual in law. The act is not drawn with that precision and clearness which will enable us to reach without difficulty a conception of the will of the legislature. The words "household and kitchen furniture" may comprise, not only that species of property which is in actual use, but also that which is on sale in shops. Yet no one will contend that this statute should be construed so literally as to embrace articles of this kind of the latter class. The word "convey," in its broadest significance, might embrace any transmission of possession; but we are restrained to its legal meaning which, ordinarily speaking, is the transfer of property from one person to another by means of a written instrument and other formalities. Rap. & L. Law Dict. "Convey, Conveyance." According to Webster, a conveyance is "an instrument in writing by which property, or the title to property, is conveyed or transmitted from one person to another." The meaning of this word being well understood at common law, it must be understood in the same sense when used in a statute. *Smith-deal v. Wilkerson*, 100 N. C. 52, 6 S. E. Rep.

71. The statute refers to the manner of conveyance, i. e. by chattel mortgage, and proceeds, "or otherwise as allowed by law." It is a very familiar principle in the construction of statutes that, when there are general words following particular and specific words, the former must be confined to things of the same kind. *Suth. St. Const. § 268*. To aid us in reaching the meaning of the words of a statute, we may, when necessary, now resort to the preamble, or even the caption or title of the act. *Suth. St. Const. § 210*; *Randall v. Railroad Co.*, 107 N. C. 748, 12 S. E. Rep. 605; *Blue v. McDuffie*, *Busb. 131*. And this we find to be "An act regarding chattel mortgages." The law as it was before the passage of this act permitted the wife to convey her real and personal property with the written assent of her husband, (*Const. art. 10, § 6*), but as to her personal property no privy examination was necessary. The evident mischief sought to be overcome by this act is the facility with which these necessary articles for the comfort and convenience of every household, however humble,—the household and kitchen furniture,—may be conveyed away, notwithstanding the protection which the law throws around them by the personal property exemption, at least during the life of the husband, by the chattel mortgage, or other lien now almost the only basis of credit for the poor man. The remedy proposed was to protect the wife, as in case of lands which were hers, or in which she had an inchoate interest such as dower, from force or compulsion, by requiring her privy examination to be taken before the law would recognize the validity of such conveyance. The act could not apply to those methods of conveyance of personal property by sale and delivery where no writing was used, for then the privy examination of the wife would have been impracticable, nor to the sale by the husband of the personal property of which he was the sole owner, because in this instance it was not necessary that the wife should join. But it was intended to prevent the conveyance by chattel mortgage, or in any other way by which a lien could be fixed thereon, of the property named, as by deed of trust or conditional sale, without a writing signed by husband and wife, and the privy examination of the wife, as in sales of real estate; and this may be applicable to such property, whether it belong to the husband or to the wife. We do not think it was made to appear by the evidence—though the defendant so contends—that the property in controversy had belonged to the husband before the passage of this act. Indeed, it will not affect our conclusion, as we have held the act not to apply to an absolute sale by the husband, such as is evidenced by the bill of sale offered in evidence.

In case of a chattel mortgage or other like conveyance of his own household and kitchen furniture by the husband, the serious question would arise as to whether the provisions of the act could be made to apply; how far the legislature may restrain the *jus disponendi* of private property, where no rights of others are to be preserved, or whether it may do so at all, (*Bruce v. Strickland*, 81 N. C. 267; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. Rep. 437;) or, at any rate, whether it might be made to apply to such property as was owned by the husband before the passage of the act in question, (*Sutton v. Askew*, 66 N. C. 172.)

We see no force in the exception that the description of the property in the instrument is not sufficient. It was intended to, and did, cover all of the personal property of the grantor which was then in the house or upon the lot described. There was no difficulty as to the identification thereof, which might be done by parol. *Goff v. Pope*, 83 N. C. 123.

The plaintiff excepted to the refusal of his honor to instruct the jury that "conveyances from a parent to a child are in law presumptively fraudulent, although the child is 21 years of age; and the transaction must be shown by E. L. Fleming, Jr., to have been in good faith, and without any fraudulent purpose." We think that this prayer was too broad and sweeping in its terms, and that the instruction could not have been given. It was said in *Jenkins v. Peace*, 1 Jones, (N. C.) 413: "Nor is a parent forbidden to sell to his child. The only difference would be that the latter would be held to fuller and stricter proof of the fairness of the transaction." In case of a voluntary conveyance, or one upon insufficient consideration, by parent to child,—the parent being in embarrassed circumstances,—such presumption would arise. The evidence in this case would not have warranted the instruction. *McCanless v. Flinchum*, 89 N. C. 373.

The second prayer for instruction was a correct proposition of law, but there was no evidence to support it. The evidence, if believed, was all to the contrary.

We have already disposed of the third prayer and exception, and we agree with his honor in his refusal to instruct the jury. If the bill of sale was made, as alleged, on the 13th of July, 1892, but there was no delivery of the property until after the levy of the attachment, then the same would be invalid as to creditors. 1 *Benj. Sales*, § 330.

We think that the response to the third issue was properly understood by his honor. If the jury had found the interpleader to be the owner of part, only, of the property, it would have been necessary to qualify the answer, but its only meaning must be that he was the owner of it all. There is no error.

WILLIAMS et al. v. HODGES et al.
(Supreme Court of North Carolina. Oct. 10, 1893.)

SALE—CONSTRUCTIVE DELIVERY—STOPPAGE IN TRANSITU.

Where goods are held in storage by the carrier under an agreement between it and the vendee's assignee, there is a constructive delivery, and the vendor's right of stoppage in transitu is lost.

Appeal from superior court, Beaufort county; John Gray Bynum, Judge.

Action of claim and delivery by H. G. Williams and W. P. Ives, trading as H. G. Williams & Co., against John S. Hodges and J. G. Chauncey, Hodges' assignee, to recover possession or the value of certain goods sold and shipped by plaintiffs to defendant Hodges, on the ground that the vendee was insolvent at the time of the sale, that such fact was unknown to plaintiffs, and that the goods had not been delivered. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. B. Rodman, for appellees.

SHEPHERD, C. J. The principles governing this case are fully discussed in *Farell v. Railroad Co.*, 102 N. C. 390, 9 S. E. Rep. 302, and it is well established that, if there be an actual or constructive delivery of the goods to the purchaser before the demand of the vendor, the right of stoppage in transitu is at an end. In this case there was no actual delivery, but, according to the statement of facts agreed, there was an express agreement between the carrier and the assignee of the vendee that the former should hold the goods on storage as the agent of the latter. The goods were no longer in transitu, and the rights of the plaintiffs were therefore defeated. "The doctrine that the goods must come to the 'corporal touch' of the vendee, as was once said by Lord Kenyon, has long been exploded. *Wright v. Lawes*, 4 Esp. 82. * * * If the carrier, by reason of an arrangement with the consignee, or for any cause, remains in possession, but holds the goods only as the agent of the consignee, and subject to his order, this is the possession of the consignee." 1 Pars. Cont. 603; 2 Benj. Sales, § 1117; 2 Add. Cont. § 600; *Whitehead v. Anderson*, 9 Mees. & W. 518. The judgment must be affirmed.

BONNER v. STYRON.

(Supreme Court of North Carolina. Oct. 10, 1893.)

APPLICATION OF PAYMENTS—ESTOPPEL.

Defendant and his two sons gave plaintiff a chattel mortgage to secure a debt. Defendant afterwards delivered enough of the joint property of the mortgagors to plaintiff to satisfy the debt, but agreed that the plaintiff could apply it to another debt owing him.

Held, that defendant was estopped to question the validity of the application, and as to him and his property the appropriation to other debts was valid.

Appeal from superior court, Beaufort county; Bynum, Judge.

Action by John B. Bonner against D. C. Styron to obtain possession of certain personal property secured under chattel mortgages. Judgment for defendant. Plaintiff appeals. Reversed.

W. B. Rodman, for appellant. Chas. F. Warren, for appellee.

BURWELL, J. The personal property in controversy in this action belonged, it seems, to the defendant, D. C. Styron, and was assigned to the plaintiff by two separate mortgages,—one given in 1889, to secure a debt of about \$116; and one given in 1890, to secure a debt of \$75. The first mortgage or lien was signed by the defendant and his two sons, and gave to the plaintiff, to secure the debt therein mentioned, a lien not only on the defendant's property here in dispute, but also on certain cotton which was the joint property of the three mortgagors or lienors. The second mortgage executed by the defendant alone, as stated above, assigned to plaintiff his crop of cotton, as well as the property described in the complaint. The defendant, in his answer, averred that both of the debts had been paid, and upon the trial introduced evidence that tended to show that there had been delivered to plaintiff, on account of these secured debts, cotton of sufficient value to extinguish them if the proceeds had been applied to their satisfaction, and that the cotton so delivered was the cotton covered by the mortgage or lien. The plaintiff, admitting that he had received some cotton from the defendant, testified that with the consent of the defendant, and, indeed, at his request, he had applied a portion of the proceeds of the cotton delivered to him as aforesaid on debts due to him from the defendant other than those secured by the two mortgages above mentioned, but there was no evidence that the sons of the defendant, who were jointly liable with him for the debt of \$116, had in any way assented to or ratified such application of the proceeds of the cotton. The plaintiff, among other instructions, asked his honor to charge the jury "that, though the plaintiff received enough of the joint property of the obligor to extinguish the debt, yet he could, by the request or consent of defendant, apply the proceeds of this joint property to other purposes than the payment of this bond; and, while it might extinguish the security and debt as to S. W. and H. S. Styron and their property, it would leave it operative as to D. C. Styron and his separate property." This instruction was refused, and the jury was told that if they found the fact to be that defendant and his two sons raised the cotton of 1889, and the cotton was carried

to plaintiff by any one of them, and plaintiff knew it was the cotton of the three, and that it was the cotton covered by his mortgage, then, although defendant assented to the application to another debt of a part of the proceeds thereof, unless they found the fact to be further that the two sons assented to the application of the proceeds to another debt, they should find that the first debt was paid. We think that there was error in refusing the instruction for which the plaintiff asked. While it is true that a mortgagee who receives the proceeds of any part of the mortgaged property must apply such proceeds on the mortgage debt if the mortgagor instructs him so to do, or if no instructions are given him, and he is not at liberty of his own accord to apply such proceeds on another debt, yet if the mortgagor consents or directs that such application shall be made, and it is so made, he will not be allowed to say that an application of his money, made at his request or on his demand, was a misapplication. This being conceded, it seems to us to follow that, if the defendant agreed that the proceeds of a part of the mortgaged cotton, the property of himself and his sons, should be diverted from the mortgage debt, and used to extinguish other liabilities of his, he will not be permitted thereafter to deny his authority to do what he has seen fit to do, nor to question the validity of an act done by another at his instance. As to him and his property, this appropriation to other debts must be sustained. Error. New trial.

YOUNG v. ALFORD.

(Supreme Court of North Carolina. Oct. 17, 1893.)

LIMITATION OF ACTIONS—PARTIAL PAYMENTS.

Plaintiff, some years after certain bonds in suit, to the amount of \$1,000, were barred by the statute of limitations, got a quart of brandy of defendant. On offering payment for the same defendant refused to accept it, saying he now owed more than he could pay. Held, that plaintiff could not estimate the brandy as worth 75 cents, and apply 25 cents on each of the bonds to toll the statute.

Appeal from superior court, Franklin county; Shuford, Judge.

Action by Mrs. Winnie Young against John R. Alford on certain bonds made by defendant. Judgment for plaintiff. Defendant appeals. Reversed.

F. S. Spruill, for appellant. E. W. Timberlake, for appellee.

CLARK, J. The evidence adduced by plaintiff to prove a payment was not sufficient to go to the jury, and it was error to refuse the defendant's ninth prayer for instruction to that effect. According to that evidence,—putting out of view the defendant's testimony,—the plaintiff, some years after the bonds were barred by the lapse of time, got a quart of brandy of the defend-

ant's intestate, and offered to pay him for it, but he said: "No; he owed her. Let that go on, as he already owed her more than he could ever pay." There was no price named for the brandy, no request to apply its value to any indebtedness, and no specific indebtedness mentioned. This was either a refusal to accept any payment for the brandy under the circumstances, or at most a sale on credit. There was nothing to indicate that the brandy was to be credited as a payment on the three bonds, nor to authorize the plaintiff to estimate the value of the brandy herself, and, dividing it into three parts, to credit the bonds with 25 cents each, with the view of bringing them back into date. This was solely the act of the plaintiff, while payment, if made at all, could only have been made by the debtor. There is no evidence of any kind that he directed or assented to this crediting the three several bonds, aggregating over \$1,000, or any one of them. Nor was there any evidence allunde the credits themselves that they were put on the bonds the day they purported to have been, nor was there any evidence as to the handwriting of such entries. "It is not the mere indorsement of a credit upon the note, even when supported by a counterclaim by the holder, which will have the effect of reviving the liability, but an actual payment, made and received as such." *Bank v. Harris*, 96 N. C. 118, 1 S. E. Rep. 459, citing *Woodhouse v. Simmons*, 73 N. C. 30; 2 Greenl. Ev. § 444. A case exactly in point is *Locke v. Andres*, 29 N. C. 159, in which it is held by Ruffin, C. J., that to make specific articles a payment they must be received as payments, or by subsequent agreement applied as payments; and that the court below properly refused to submit to the jury the question of payment when the evidence was simply that the debtor had at several times let the creditor have small quantities of bacon. The plaintiff cited several authorities to the effect that if the debtor make no application of a payment, the creditor can make it. But that is when there is a payment. A set-off or counterclaim is not a payment. *White v. Beaman*, 96 N. C. 122, 1 S. E. Rep. 789, relied on by plaintiff, differs from this case. There the creditor asked for a payment. The debtor offered to make a payment in whisky, which was accepted. The creditor thereupon stated that he would enter it as a credit on the note, and did so enter it. Error.

MOORE v. BOARD OF COMRS OF PITT COUNTY.

(Supreme Court of North Carolina. Oct. 17, 1893.)

JUSTICES OF THE PEACE—SPECIAL MEETING—WHEN VALID.

Under Code, § 717, which provides that the justices of the peace shall meet annually with the board of commissioners on the first Monday of June, "unless they shall be oftener

convened by the board of commissioners, which is empowered to call together the justices of the peace not oftener than once in three months," a special meeting of such justices, not called by such board, is unauthorized and void.

Appeal from superior court, Pitt county; W. A. Hoke, Judge.

Petition by D. C. Moore for writ of mandamus directed to the board of commissioners of Pitt county to compel them to consider and accept his bond as clerk of the inferior court of such county, to which office he was elected by the justices of the peace of the county at a special meeting thereof, called by the chairman of the board of justices, and to otherwise recognize the acts of such justices at such special meeting. From a judgment denying the writ, petitioner appeals. Affirmed.

Gilliam & Son, for appellant. T. J. Jarvis, for appellees.

BURWELL, J. Whatever may have been the provision of law in regard to the meetings of the justices of a county before the adoption of the Code, it seems very clear that since it was enacted they can lawfully meet, organize, and act only at the time of their regular annual meeting, which is fixed by statute on the first Monday in June, and on such days as the board of commissioners may appoint for special meetings, such meetings not, however, being allowed to take place more than once in three months. Code, § 717.¹ If the justices come together at any other time than the first Monday of June, except at the call of the commissioners, it is not a lawful meeting, and the proceedings of such an assembly can have no force. The legislature has committed to the justices of the several counties most important functions, but it has seen fit to allow them to meet in special session only when called together by the commissioners. What is said above disposes of the matter of this appeal, and renders it unnecessary that we should determine what number of justices would have made a quorum if the meeting had been called according to law. Affirmed.

SHEPHERD, C. J., did not participate in the decision of this case.

BROUGHTON et al. v. LANE et al.
(Supreme Court of North Carolina. Oct. 10, 1893.)

MARRIED WOMEN—SETTLEMENT—CONVEYANCE OF SETTLED PROPERTY.

Under the provisions of a deed that the grantee shall hold the land conveyed in trust

¹ Code, § 717, provides as follows: "For the proper discharge of their duties, the justices of the peace shall meet annually with the board of commissioners on the first Monday in June, unless they shall be oftener convened by the board of commissioners, which is empowered to call together the justices of the peace not oftener than once in three months. * * *

for a married woman during coverture, and will, if requested by her in writing during coverture, convey the same as she shall direct, and shall on the death of the married woman or her husband convey it to the survivor, the property can during coverture be conveyed only as provided by the deed, and a deed of the property executed by the married woman and her husband alone is of no effect.

Appeal from superior court, Pamlico county; Bynum, Judge.

Action by Thomas A. Broughton and others against S. B. Lane and others for the possession of land. Judgment for plaintiffs. Defendants appeal. Affirmed.

The case agreed was as follows: "(1) In consideration of the money received from the sale of land to Sarah Williams, mentioned in the deed, James Norcom, on the 1st day of November, 1856, conveyed to J. S. Jones, trustee, the lands described in the complaint, a copy of which deed is hereto attached, marked 'Schedule A,' and made a part hereof, and the recitals of which are to be taken as further facts agreed in this case. That afterwards, to wit, on the 25th day of October, 1859, the said Levi D. Broughton and wife, Eliza Broughton, executed a deed for a valuable consideration for said land to one Luther Babbitt, a copy of which said deed is hereto annexed, marked 'B.' That the said Joseph S. Jones, trustee, named in the said deed marked 'A,' did not execute or join in the execution of any deed for said land to any person. That, on the — day of —, the said Luther Babbitt did execute a deed in fee simple for said land to — Venters. That, on the — day —, the said — Venters executed a deed in fee simple for a part of said land to Stephen B. and George H. Lane, and that there after the said George H. Lane conveyed his interest in said land to Stephen B. Lane, one of the defendants in this action. That the residue of said land which was not conveyed by said Venters as above descended to the defendant Martha J. McCotter. That Levi D. Broughton survived his wife, Eliza Broughton, who died in 1861, and died June 18, 1888. That the plaintiffs Thomas A. Broughton, Josephine Linton, and E. A. Broughton are the children of Levi D. and Eliza Broughton. That the plaintiffs, Doras, Hattie, and Bailey Edwards are the grandchildren of the said Levi D. and Eliza Broughton, their mother, Sarah E. Edwards, a daughter of the said Levi D. and Eliza Broughton, having died since the death of both the said Levi D. and Eliza Broughton. (2) That this action was instituted on the 27th day of February, 1891. (3) That Eliza Broughton purchased from John Godett the tract of land on Trent and Thomas creek, (see deed, marked 'Exhibit C,' dated October 27, 1857,) and went into possession thereof, and plaintiffs are now in possession of the same as heirs at law of Eliza Broughton, aforesaid. (4) The defendants were in possession of the said lands at the beginning of

this action, and are still in possession of the same."

The material portions of the deed of Norcom to J. S. Jones, trustee for Eliza Broughton, were as follows:

"The conditions of the foregoing deed are such that whereas, Mrs. Eliza Broughton, wife of Levi D. Broughton, has conveyed a tract of land to which she was entitled as feme sole in fee simple to Sarah Williams, upon condition that the purchase money received for her land should be invested in other lands to be held to the same trusts and purposes as the lands heretofore held by her as aforesaid; and whereas, the said Levi D. Broughton, husband of said Eliza, has consented thereto, and has requested James Norcom, the grantor of the before-described tract of land, so to convey, and, for the purposes of carrying the said agreement into execution, the said tract has been granted to the said Joseph S. Jones, as trustee for the purposes aforesaid: Now, it is covenanted and agreed by and between the parties to this indenture that the said Joseph S. Jones should hold the same to the separate use of the said Eliza, wife of said Levi D., Broughton, as if she were a feme sole, and will permit her to have the use of the same and the profits deriving therefrom to her sole and separate use during her coverture with the said Levi D. Broughton, and will, if requested by her in writing during the coverture, convey the same, and invest the purchase money in such other property as she may designate, to be held to the same purposes and trusts as set forth in this indenture; and, if the coverture should be dissolved by the death of said Levi, that then the said Joseph S. Jones, trustee herein, will convey said tract of land to the said Eliza Broughton, now the wife of said Levi, in fee simple; and if the coverture should be determined by the death of the said Eliza, wife of said Levi D. Broughton, that then the said Joseph S. Jones, trustee as aforesaid, will convey the same to the said Levi Broughton, her now husband, for life, with remainder to the children of the marriage, if there be any children, in fee simple; and if there be no children living at the time of the death of said Eliza Broughton, wife of said Levi, then the said trustee shall convey to said Levi D. Broughton in fee simple. In testimony whereof, the said James Norcom, trustee, etc., aforesaid, and the said Levi D. Broughton, have hereunto set their hands and seals, the day and year first above written. Jas. Norcom. [Seal.] L. D. Broughton. [Seal.] Joseph S. Jones. [Seal.] Signed, sealed, and delivered in the presence of: A. H. Britte."

"Schedule B.

"This indenture, made and executed this 25th day of October, one thousand eight hundred and fifty-nine, between Levi D. Broughton and wife, Elizabeth Broughton, of the county of Craven and state of North Caro-

lina, of the first part, and Luther Babbitt, of the county of Lenoir and state aforesaid, of the second part, witnesseth, that for and in consideration of the sum of twelve hundred dollars, the receipt of which is hereby acknowledged before the signing and sealing of these presents, have granted, bargained, sold, and by these presents do grant, bargain, and sell, all of a certain tract or parcel of land situated in the county of Craven and state aforesaid, lying on the north side of Neuse river, and at the head of Orchard creek, and bounded as follows: Beginning at Orchard Creek bridge on the main road, running S., 18 W., 21 poles, to a stake; thence, with the division line between L. D. Broughton and wife and the Bemberry heirs, to the back line; thence N., 29 W., with the Delamar patent line, to a division between L. D. Broughton and wife and Thomas T. Gooding; thence, with the said division line, to the Thomas Clayton back line; thence, with said Thomas Clayton back line, to a division ditch between L. D. Broughton and wife and Thomas T. Gooding; then, with a division line, to the main road; thence, with the various courses of a marked line, to Nurcy branch; then, with the branch, to Orchard creek; thence, with the various courses of said creek, to the beginning,—containing four hundred acres, more or less. To have and to hold the above-mentioned tract or parcel of land, with all the appurtenances thereunto belonging, to the said Luther Babbitt, his heirs and assigns, forever. And we, Levi D. Broughton and wife, Elizabeth Broughton, do covenant to warrant and defend the above-described land and premises against the right, title, or claims of any and all persons whatsoever unto the said Luther Babbitt, his heirs and assigns, forever. In witness, we hereunto set our hands and seals, on the day and year above written. L. D. Broughton. [Seal.] Eliza Broughton. [Seal.]

"On this, the 25th day of October, A. D. 1859, personally appeared before me, R. W. Saunders, one of the judges of the superior court of law and equity for the state aforesaid, Levi D. Broughton, and wife, Elizabeth, and acknowledged the due execution by them of the foregoing deed; and thereupon, the said Elizabeth being by me privately examined, separately and apart from her husband, touching her free consent in the execution of the said deed of conveyance, she, on such her examination, declares that she had executed the same freely, of her own will and accord, and without any force, fear, or undue influence of her said husband or any other person, and did still voluntarily assent thereto. Therefore let the said deed and this certificate be registered. R. W. Saunders, J. S. C."

"Exhibit C.

"This indenture, made this the 27th day of October, A. D. 1857, between John Godett, of the county of Craven and state of North

Carolina, of the first part, and Eliza Broughton, the wife of Levi D. Broughton, of the second part, witnesseth, that the said John Godett, for and in consideration of the sum of eight hundred and fifty dollars in hand paid by the said Eliza Broughton, the wife of Levi D. Broughton, the receipt whereof he doth hereby acknowledge, hath bargained and sold and conveyed, and by these presents do bargain, sell, and convey, unto the said Eliza Broughton, the wife of Levi D. Broughton, and her heirs, a certain piece of land lying in the county aforesaid, on or near Trent creek, to wit: Beginning at a pline, his own corner, on the north side, near the mouth of Thomas creek; then along his own line south, 50 east, 100 poles; then north, 75 east, 160 poles, to a bay tree, Wharton corner; then along his line south, 38 east, 68 poles; thence north, 55 east, 20 poles; thence 545 east, 62 poles; then south, 64 west, 155 poles, to Humes' corner, along his line north, 8 west, 195 poles, to Trent creek; thence down the same, and up Thomas creek, to the beginning,—containing 200 acres, more or less. To have and to hold the said land and premises to her, the said Eliza Broughton, her heirs and assigns, forever, against all person or persons; and the said John Godett do warrant and defend the right and title to the said to Eliza Broughton, the wife of Levi D. Broughton, in fee simple. And I, the said John Godett, do hereunto set his hand and seal, the date above written. John Godett. [Seal.]”

There were no other grantors in the deed to Luther Babbitt except L. D. Broughton and wife, Eliza. The defendants appealed from the judgment rendered.

W. T. Caho and W. D. McIver, for appellants. O. H. Gulon and W. W. Clark, for appellees.

AVERY, J. The question presented by this appeal is whether the land conveyed to Jones, as trustee for the sole and separate use of Eliza Broughton, passed by the deed executed by her husband and herself, in which the trustee, Jones, did not join. That the power of a married woman to dispose of land held by her under a deed of settlement is “not absolute, but limited to the mode and manner pointed out in the instrument,” seems to be the settled law of this state, whatever may be the rulings of other courts. *Hardy v. Holly*, 84 N. C. 661; *Kemp v. Kemp*, 85 N. C. 491; *Mayo v. Farrar*, 112 N. C. 66, 16 S. E. Rep. 910; *Munroe v. Trenholm*, 112 N. C. 634, 17 S. E. Rep. 439. In *Hardy v. Holly* the feme covert was clothed with express authority to compel the trustee to sell and reinvest, and to remove the trustee when she deemed fit, and the fund was to be held subject to her control, or as if she were a feme sole. But her power, as to the disposition of the property in which the trust fund should be invested, was in writing to direct the trustee to sell,

etc. In the case at bar it was agreed that the trustee should hold the land to the separate use of Eliza Broughton during coverture, and would, “if requested by her in writing during the coverture, convey the same,” etc. The feme covert, Eliza Broughton, was “not only subject to the express restrictions” of the settlement “as to the manner of exercising such power as was granted to her, but she was dependent upon a strict construction of its terms for authority to make any disposition whatever of the property embraced in it.” *Mayo v. Farrar and Hardy v. Holly*, supra. As the trustee did not join in the deed to Babbitt, and there is no evidence that he executed any separate conveyance by the request of the cestui que trust, we simply adhere to the repeated rulings of this court in holding that the interest conveyed to Jones in trust for the separate use of Eliza Broughton did not pass by the deed of conveyance, in which her husband joined, to Luther Babbitt, and was not transmitted by the subsequent conveyances to the defendants. Judgment affirmed.

GRIMES v. BROWN et al.

(Supreme Court of North Carolina. Oct. 17, 1893.)

ARBITRATION—NOTICE OF HEARING.

Where by consent of parties a case is ordered by the court to be referred to a person named, whose award is to be binding, all parties are entitled to notice of the time and place of the hearing by such person; and if it is contended that such notice was given, it is the duty of the judge below to decide such question with the aid, if he so desire, of a jury.

Appeal from superior court, Martin county; George A. Shuford, Judge.

Action by W. T. Grimes against G. E. Brown and H. Brown, trustee. Said H. Brown was appointed referee to state an account of the partnership dealings between plaintiff and defendant G. E. Brown. From an order setting aside the report and account, said G. E. Brown appeals. Reversed.

It will only be necessary to set out the consent decree in the cause made at chambers to reach a proper understanding of the questions involved. There was an account stated by the referee, and a report. “This cause coming on to be heard on motion of plaintiff for the appointment of a receiver of the property described in the complaint, and for an order restraining the defendant H. Brown from selling the property embraced in the mortgage made to him by the plaintiff and wife, all parties consenting hereto, it is adjudged and considered that H. Brown be, and he is hereby, appointed receiver herein to take charge and possession of all the property, real and personal, belonging to the late firm of Brown & Grimes, including all money or local accounts due the said copartnership, and assets of every description, and hold

the same according to the terms of this order. It is further ordered that the said receiver proceed at once to collect all the notes and accounts due said firm, and that on the 6th of March, 1893, at the courthouse door in Williamston, Martin county, the said receiver will sell all the property, both real and personal, belonging to said copartnership, upon the following terms, to wit, the purchase price to be paid in cash, less an amount equal to the sum due on the mortgage of Ward and Grimes to the Company of Baltimore, Md., which sum shall be secured by note to be approved by the receiver, and payable according to the terms of said mortgage. The said receiver is authorized to operate said mill if in his opinion the best interests of said firm will be promoted thereby. It is further ordered that H. Brown be appointed referee to state the account and determine all matters between said G. E. Brown and the plaintiff growing out of their copartnership dealings, and to pay out the proceeds of said property and collections according to the rights of the parties as determined by the said referee. The receiver shall execute deeds to the purchasers for the property sold by him upon the payment of the purchase money. The receiver and referee shall report his action in the premises to the next term of the superior court of Martin county, to be entered as the judgment of the court in the action. The receiver is required to file bond in the sum of two thousand dollars to be approved by the clerk of the superior court of Martin county. The receiver shall advertise said sale at the courthouse door and three other public places in Martin county. Geo. A. Shuford, Judge Superior Court."

Don. Gilliam, for appellant. Jas. E. Moore, for appellee.

MacRAE, J. It will be noted that the order appointing a receiver and referee has all of the elements of a submission to arbitration under order of court. The referee is to determine all matters between said G. E. Brown and the plaintiff growing out of their copartnership dealings. In the same order he is required, as receiver, to sell the property, collect the assets, and pay out the proceeds according to the rights of the parties, as determined by himself as referee. He is to report his action to the next term of the court, to be entered as the judgment of the court. The order is by consent of parties, and provides for a final determination and judgment accordingly. It is not unlike the reference in *Gudger v. Baird*, 68 N. C. 438, in which the order is in these words: "This case is referred to W. M. Cocke, who shall summon the parties before him, and hear the case, and his award shall be a rule of court." This was held to be a reference to arbitration, instead of a reference under the Code, the essential difference between which proceedings is pointed out in *Keener*

v. Goodson, 89 N. C. 273, citing several other authorities. Whether it were a reference by consent under the Code or a reference to arbitration, the findings of fact would be final under the terms of this order. But in either case all parties are entitled to notice of the time and place of the hearing. *Morse, Arb.* 116 et seq. It is contended on the one side that notice was duly given, and that both parties appeared and were present at the hearing, and this is strenuously denied on the other, and many affidavits are filed pro and con. This is a matter for the decision of the judge below, in which he may, if he choose, have the aid of a jury. There is no finding of fact by his honor upon this question. He treats the reference as under the Code, and sets aside the report and account, refusing to remove the referee. We think that in this there was error. The case must be remanded, in order that the judge below may find the facts whether the parties were duly notified of the time and place of hearing, or whether they appeared and the case was duly heard before the report of the arbitrator was filed, for upon this question it depends whether the award shall stand or be set aside. Remanded.

SELBY *v.* WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. Oct. 17, 1893.)

CARRIERS—DAMAGE TO LIVE STOCK—CONTRACT—
VALIDITY—NEGLIGENCE—STRENGTH OF CARS.

1. A shipper of live stock agreed with the railroad company that in consideration of the reduced rates granted, as a condition precedent to his right to recover any damage for loss or injury to the stock, he would give written notice of his claim to some officer of the company or its nearest station agent before such stock was removed from the place of destination, or from the place of delivery to him, and before it was mingled with other stock. *Held*, that such stipulation is not unreasonable or contrary to sound legal policy, and is valid.

2. A railroad company is not bound to provide cars strong enough to safely transport animals that are "vicious" and unruly, but only such as are ordinarily unruly.

Appeal from superior court, Wilson county; George A. Shuford, Judge.

Action by John Selby against the Wilmington & Weldon Railroad Company to recover damages to live stock while being transported over defendant's railroad. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

Aycock & Daniels, for appellant. S. A. Woodard, for appellee.

BURWELL, J. The relation between the parties to this action is not that of a common carrier towards a shipper of freight who had chosen to pay the usual tariff charges, and stand upon his rights, and hold the carrier to the performance of its duty under all the strict requirements of the common law. It was his privilege to demand of the

carrier the shipment of his stock under those somewhat stringent, but not unjust, conditions. He has chosen not to avail himself of this privilege, and thus put his animals under the safeguard established by the law for the protection of those whose property comes to the possession of a common carrier for transportation, but rather, for a valuable consideration, to waive this right or privilege, and to allow the defendant to assume simply the relation of a carrier of stock under a special contract which, no fraud or imposition being alleged, must be interpreted according to the ordinary rules of construction, and its provisions enforced unless they are unreasonable and unjust, "if they are not in conflict with sound legal policy." *Express Co. v. Caldwell*, 21 Wall. 264. Among other stipulations contained in the contract was one by which the plaintiff agreed, in consideration of the reduced rates granted, "as a condition precedent to his right to recover any damage for loss or injury to said stock," that he would "give notice in writing of his claim thereof to some officer of said company or its nearest station agent before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock." It seems to us that this condition, imposed upon the plaintiff by a contract of his own making, founded upon a valuable consideration moving to him, contravenes no sound legal policy, and is not unreasonable. It is not in any sense a stipulation that the defendant carrier shall be exempted from the effects of its negligence or the negligence of its servants in the performance of those duties towards the plaintiff assumed in the contract; nor is it a requirement that any injury that has been done to plaintiff's stock while in defendant's care under the terms of the bill of lading shall be adjusted in the presence of an officer of the defendant company before the property is removed from the station; and hence the case of *Capehart v. Railroad Co.*, 81 N. C. 438, has no application here. We have no stipulation at all as to the fixing of the amount of damage done to plaintiff's property, but simply an agreement that he will, when about to take his animals from the cars or yard of the defendant, notify the company in writing if, upon a reasonable examination, he is able to detect any damage done them. Owing to the nature of the property intrusted to the carrier, the difficulty of identifying each animal, and the terms of the contract as regards such damage as might be inflicted by the animals on one another, or might come to them without any fault on the part of the defendant, it seems to us indeed very reasonable that the defendant's agents should have an opportunity then and there to examine the stock and ascertain, if they can, the cause and the extent of the damage. We

have been cited to no authority which upon examination seems to hold that such a requirement, under the circumstances, is unreasonable. *Rice v. Railroad Co.*, 63 Mo. 314. *Goggin v. Railroad Co.*, 12 Kan. 416, and other cases seem fully to sustain the view we take of the matter, and to show that there was error in the charge that the stipulation was not reasonable and was void.

It is stated in the case that his honor gave the jury the following instruction, which was excepted to: "It is the duty of the defendant company to provide suitable cars for transporting live stock. The car must be sufficiently strong to resist the struggles of the stock, and the company is liable for loss occasioned by its neglect in this regard, in spite of the fact that the animals are vicious and unruly, upon the principle that it is within its power to provide those which are actually and absolutely sufficient." There was error here also, we think; for, while it may be the duty of a carrier that undertakes to ship live stock to provide cars strong enough to safely transport animals that are ordinarily unruly, the law does not impose upon it so hard a task as to detect that some of them are vicious, and act accordingly. The vehicle must be suitable for the safe conveyance of ordinary animals of the class. It is not required that it shall be strong enough to withstand the struggles of some of that class that may be not only unruly, but vicious. As there must be a new trial for the error mentioned, we omit consideration of other exceptions taken by defendant. New trial.

ZELL GUANO CO. v. EMRY et ux.
(Supreme Court of North Carolina. Oct. 17, 1893.)

COMPOSITION WITH CREDITORS—VALIDITY.

An agreement to compromise a debt for 50 cents on the dollar, to be paid at a certain time, provided other creditors accept the same terms, is not binding when some of the other creditors are allowed to retain their original claims until the notes given in the settlement are actually paid, to be surrendered only on payment of such notes, or have a secret understanding by which they are to be paid before the time agreed on with the balance of the creditors.

Appeal from superior court, Halifax county; George A. Shuford, Judge.

Action by the Zell Guano Company against Thomas L. Emry and wife. From a judgment for defendants, plaintiff appeals. Reversed.

Battle & Mordecai, for appellant. W. H. Day and J. M. Mullen, for appellees.

BURWELL, J. The answer of the feme defendant sets up as a defense a composition agreement entered into by the plaintiff and certain of her other creditors to whom she was indebted for fertilizers. The

plaintiff denied that it had made any such compromise. The jury, responding to the first issue, have found that the plaintiff did "agree to compromise the debt sued on with the defendant Emma J. Emry for fifty cents on the dollar, to be secured as alleged in the answer, provided other creditors accepted same terms of settlement." Turning to the answer to ascertain how the "fifty cents on the dollar" was to be secured, we find it was to be done "by mortgage or deed of trust on real estate, each creditor to pass upon the sufficiency offered for his respective debt, and if, upon investigation, the same proved not satisfactory, she (defendant) pledged herself to make it so." And from the same source we ascertain that the terms of settlement, so far as they related to the time of settlement, were that the payment should be made in the fall of 1890. It therefore became necessary, in order that the plaintiff might be defended in the recovery of its entire original debt, that it should be established that the other creditors did accept the same terms of settlement. There was no composition agreement, as far as plaintiff was concerned, unless this condition, which, according to the verdict, was annexed to its acceptance of the proposition of settlement made to it, was fulfilled. Instead of proving its fulfillment, we think the defendants have admitted its nonfulfillment. Among the creditors to whom this proposition was made by defendants, and who were to be parties to the composition agreement, were the Goldsboro Oil Company, Lister's Agricultural Works, and H. S. Miller & Co., the last named being the creditor through whose agent the proposition was submitted to the plaintiff. We find in the record that on the trial it was admitted "that the defendants settled with Lister's Agricultural Chemical Works on the terms testified to by W. E. Daniel; that they settled with H. S. Miller & Co. on the terms set out in their deed of trust, (Exhibit B,) and with the Goldsboro Oil Company, after judgment was taken for the debt in full, on the terms testified to by the defendant T. L. Emry on his cross-examination." The "terms testified to by W. E. Daniel" were that if the fifty per cent. was not paid at the time agreed upon, to wit, in November, 1890, "the whole debt was to remain due." The terms of the settlement with H. S. Miller & Co., which were incorporated in the deed of trust made to secure the note given to represent the sum due according to the compromise, were that those creditors (Miller & Co.) should continue to hold their original notes, and should not surrender or cancel them until the new note for one-half the debt was actually paid; and, if the latter note was not paid at maturity, (November 15, 1890,) then the original debt was to be in full force against the defendant, "without any offset except what may be paid thereon." Concerning the settlement made with the Goldsboro Oil

Company, the defendant T. L. Emry testified that when notified by the agent of Miller & Co., to whom the negotiations with that company and with the plaintiff had been intrusted, that the Goldsboro Company would not accept the proposition made to it, he opened negotiations with them himself; and, stating what took place as the consequence of these latter negotiations, on his cross-examination he said: "They sued and took judgment at May term, 1890, of Goldsboro court, with the understanding, which was inserted in the judgment, that they would accept fifty per cent. within a certain time." We must assume that the terms upon which these three several settlements were made were agreed upon by the parties concerned in each, and that these settlements carried into effect the only agreements made with these particular creditors.

The terms of these settlements differed very materially, we think, from the terms of that settlement which was offered to the plaintiff, and which it conditionally accepted. It is true that in each the ratio of proposed payment to the entire debt is the same, to wit, 50 per cent. But to two of these creditors it was allowed to make only a conditional compromise. They were not required to surrender or cancel the original indebtedness, and accept in lieu thereof absolutely a new promise to pay one-half of the surrendered debt in the fall, but were allowed to retain their original claims against the defendant, they promising to surrender them if the payment of one-half the sum was promptly made as agreed; otherwise, the original claim was to be in full force. This was not the proposition made to the plaintiff by the agent of the defendants, as testified to by him in their behalf, nor is it the composition agreement set out in the answer. The retention of the old debt under such condition was an advantage not offered to plaintiff. We think it even more evident that the Goldsboro Oil Company did not accept the same terms of settlement which were tendered to the plaintiff; that it demanded and received a settlement by cash before the fall of 1890. If it had accepted in good faith the terms offered to the plaintiff, and afterwards—but not because of any secret understanding—payment had been anticipated merely for the accommodation of the debtor, no complaint could reasonably be made. But such are not the facts of this case. Here we have a proposition on the part of a debtor to enter into a certain composition agreement with a certain class of her creditors, and an agreement on the part of one creditor that he will enter into that composition, provided the other creditors will also do so. Nothing less than the strictest compliance with the terms of the proposed composition on the part of the debtor and on the part of the other creditors, also, can bind him. The most perfect good faith is required of all. Any preference of one cred-

itor over another, whether that preference relates to the amount to be paid him, to the time when it is to be paid, or to the manner of securing its prompt payment, taints the whole contract, and renders it void. From what has been said, it seems to follow that the facts admitted by defendants on the trial, coupled with the finding of the jury on the first issue, establish the essential fact that there is no contract binding the plaintiff to accept one-half of its debt against the feme defendant in full satisfaction of it, and the other issues and the findings of the jury thereon become of no importance in determining the rights of the parties. The very foundation of the defense was destroyed by the verdict and the admissions, and plaintiff was entitled to a judgment for the whole debt according to the prayer of the complaint. The cause is remanded, to the end that judgment may be so entered. Error.

MITCHELL et al. v. BRIDGER et al.

(Supreme Court of North Carolina. Oct. 24, 1893.)

TRESPASS—CONSTRUCTIVE AND ACTUAL POSSESSION OF LAND—INSTRUCTIONS NOT WARRANTED BY EVIDENCE—ERRORS IN CERTIFICATE OF REGISTRATION—MODIFICATION OF JUDGMENT.

1. In an action for trespass to land "almost entirely" covered by water, but held under "deeds by metes and bounds," the court properly refused to instruct that if the land on which the trespass was committed was covered by water the doctrine of "constructive possession" would not apply, and that plaintiffs must show that they "were in possession" of the same.

2. Where such trespass was committed by cutting timber on a pond appurtenant to plaintiffs' mill, which had been used by them, and those under whom they claimed, for 50 years, under deeds embracing within their boundaries the land covered by the water as well as that on which the mill was situated, plaintiffs must be deemed to have actual possession of the whole, except such part as might be in the actual possession of another.

3. Instructions based on facts unsupported by the evidence are properly refused.

4. A deed from Jesse Eason to "Noah and William Hinton" was witnessed by Thomas Ruffin and H. W. King. The certificate of probate was as follows: "State of North Carolina, Bertie county court, May term, 1820. This deed from Jesse Eason to Noah and William King was proved in open court by the oath of Thomas Ruffin, one of the subscribing witnesses thereto. Let it be registered. Teste: E. A. Rhodes, Clerk." *Held*, to show that the name of King, instead of Hinton, was inserted by clerical error on the part of the clerk, and that such error did not make the certificate insufficient to warrant the registration of such deed.

5. Under Rev. Code, c. 37, § 26, providing that a contract for the sale of land shall be registered, and section 16, providing that "the registry or duly-certified copy of the record of any deed, power of attorney, or other instrument required or allowed to be recorded, may be given in evidence," the registry of such contract may be received in evidence.

6. Where there was judgment for plaintiffs, and some of the defendants were shown not to have committed any trespass on, or to have asserted any claim to, the land trespassed

on, the judgment will be modified by striking the names of such defendants from the judgment.

Appeal from superior court, Bertie county; W. A. Hoke, Judge.

Action by Thomas L. Mitchell and others against R. M. Bridger and others to recover for trespass to plaintiffs' land. There was judgment for plaintiffs, and defendants appeal. Modified.

F. D. Winston, for appellants.

SHEPHERD, C. J. The exceptions addressed to the sufficiency of the descriptions contained in the will of Joseph Eason and the deed of Leonora Burden and others to T. L. Mitchell, as well as to the charge of the court respecting the identification and location of the land upon which the trespass was committed, are plainly untenable. The principles sustaining the action of his honor in these particulars are deemed to be too well settled to require an extended discussion, or the citation of authorities.

Equally without merit is the exception to the refusal of the court to instruct the jury that, if they believed that the land on which the timber was cut was covered by water, "the doctrine of constructive possession" would not apply, and that it would be necessary to show that the plaintiffs "were in possession" of the same. Constructive possession, says Ruffin, C. J., in *Graham v. Houston*, 4 Dev. 237, is "such a possession as the law carries to the owner by virtue of his title, only, there being no actual occupation of any part of the land by anybody;" and we know of no reason or authority that excludes from the operation of this principle lands which are held, as in this case, under "deeds by metes and bounds," simply because they are "almost entirely" covered by the waters of a mill pond. The case, however, discloses that the trespass was committed by going on the pond, and cutting and carrying off certain timber trees near the run of the swamp; that this pond was appurtenant to the mill, which had been used by the plaintiffs, and those under whom they claimed, for 50 years or more, under the deeds in evidence. It is very plain that if these deeds embrace within their boundaries the land covered by the water, as well as that upon which the mill is situated, the plaintiffs would have actual possession of the whole, except such part as might be in the actual occupation of another. *Graham v. Houston*, supra. The exception, therefore, is overruled.

The exception respecting the inclosed land in the actual occupation of the defendants is without force. There was no evidence of a trespass, except upon the waters of the pond, and in assessing the damages the jury were necessarily confined to the same. The refusal to charge as requested could not have prejudiced the defendants, and especially is this so, inasmuch as his honor—it seems, by

consent of all parties—excluded from the judgment all the lands in the actual occupation of the defendants.

There was no evidence that the defendants were in the actual possession, as distinguished from acts of trespass, of the waters of the pond where the timber was cut, and the instructions based upon such an hypothesis were properly refused.

The defendants objected to the introduction of the deed from Jesse Eason to "Noah and William Hinton." The attesting witnesses to the deed were Thomas Ruffin and H. W. King. The certificate of probate is as follows: "State of North Carolina, Bertie county court. May term, 1820. This deed from Jesse Eason to Noah and William King was proved in open court by the oath of Thomas Ruffin, one of the subscribing witnesses thereto. Let it be registered. Teste: E. A. Rhodes, Clerk." It is quite manifest that the name of King, instead of Hinton, was inserted by reason of a clerical error on the part of the clerk; and, where it appears that the requirements of the law have been substantially complied with, we should be reluctant to hold, upon so slight a ground, that the certificate was insufficient to warrant the registration of the deed. "Acknowledgments are frequently taken before persons of limited skill and knowledge, and, while all the requirements of the law have been carefully and scrupulously complied with, yet errors will creep into the certificate, which manifestly are clerical. To scrutinize these certificates with severity, and declare them insufficient for slight variations or evident errors, where they substantially comply with the statute, would subserve no desirable end." 1 Devl. Deeds, 514. In the absence of testimony to the contrary, we must assume that the certificate, having been registered with the deed, was either written on the deed, or annexed thereto. Such being the case, the identification of the certificate with the deed of Eason to Noah and William Hinton is complete, for it is "this deed" which the clerk declares was proved in open court by Thomas Ruffin. The fact that Jesse Eason executed that particular paper was the essential thing to be proved, and this plainly appears from the certificate. There was no error in permitting the deed to be read in evidence.

In making out their title, the plaintiffs introduced a contract executed in 1855 for the sale of the land by one Freeman to James Burden. The defendants objected "because it was not under seal, and was not such a paper as required registration, and the original should be produced." No seal is necessary to the validity of a contract for the sale of land, and we have been referred to no authority in support of the position that the registry or certified copy of the record of any such contract may not be received in evidence. The Revised Code, (chapter 37,

§ 26,) which was in force when this contract was executed, required that it should be registered, and in section 16 of said chapter it is provided that the "registry or duly certified copy of the record of any deed, power of attorney, or other instrument required or allowed to be registered or recorded, may be given in evidence," etc. The case of *Edwards v. Thompson*, 71 N. C. 177, decided that these provisions did not put a contract for the sale of land on the same footing as an unregistered mortgage, but it was by no means held that such a contract was not allowed to be registered, and therefore its registry inadmissible in evidence. The objection to the admission of the registry was properly overruled.

In looking over the entire record, we have been able to discover but one error on the part of the court. The defendants Junius and Thomas Bridger asked the court to instruct the jury that there was no evidence that they had ever cut any timber or otherwise trespassed upon the land. This instruction was refused, and, as we can find no such evidence in the record, we must hold that there was error in the refusal. As these defendants do not claim the land, and are only concerned about the judgment against them for the damages assessed by the jury, the erroneous ruling will not necessitate a new trial, but may be corrected by striking the names of these parties from the judgment. Modified and affirmed.

CHEATHAM v. YOUNG et al.

(Supreme Court of North Carolina. Oct. 24, 1893.)

PROCEEDINGS OF TOWN COMMISSIONERS—ADMISSIBILITY IN EVIDENCE—LOCATION OF STREETS—LIMITATIONS—PLEADING.

1. The minutes of proceedings of the town commissioners whereby the relative positions of two streets were fixed are, if properly identified, competent, though not conclusive, evidence to fix their point of intersection in a controversy subsequently arising as to the location of such call in a deed.

2. In an action to recover land, defendant may prove possession by himself for seven years, in support of a general denial in the answer that plaintiff is the owner, without specially pleading the statute.

Appeal from superior court, Vance county; Henry R. Bryan, Judge.

Action by E. L. Cheatham against J. R. Young and others to recover land. From a judgment for defendants, plaintiff appeals. Affirmed.

Pittman & Shaw, for appellant. A. C. Zollicoffer, for appellees.

AVERY, J. The statement of the case on appeal is not so full or so clear as it might have been made. But it seems to have become material to the location of the plaintiff's boundary to determine where Montgomery street intersected with Garnett street

and with Wyche alley; and one of the questions involved in this inquiry was, what was the width of Garnett street, and what the distance from it to said alley? Neither the map used upon the trial nor any one of the deeds is sent up as an exhibit, and it does not appear in express terms from the testimony what was the description of the land claimed by the plaintiff.

Assuming that the inquiry of the jury was directed to the point mentioned, the first exception is to the competency of the minutes of the proceedings of the mayor and board of commissioners of the town of Henderson at two meetings held, respectively, on the 22d and the 26th of May, 1866, (*ante litem motam*), at one of which the entry was: "On motion, the street 180 feet northwest of Garnett, and running parallel with Garnett, shall be called, as formerly, 'Wyche Alley,'" and at the other it appeared that a committee was appointed to assist the surveyor in widening Garnett street from John H. Young's corner to Breckenridge street, so as to make it 83 instead of 75 feet, as it then was, "by taking eight feet on the south side and twelve feet on the north side." Where it becomes material to prove the contents of such a record, the party relying upon it may identify and offer the original, or introduce a copy properly certified. *State v. Voight*, 90 N. C. 741; Code, § 1342; 1 Greenl. Ev. § 485. In this case, the original having been identified by the testimony of Dr. Young, only the question whether such a record as that put in evidence is competent is worthy of serious consideration or discussion. The principle upon which records such as those in question are usually admitted as evidence when duly certified or satisfactorily identified has been very clearly stated by an eminent text writer: "Documents of a public nature and of public authority are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth,—the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends. The extraordinary degree of confidence thus reposed in such documents is founded principally upon the circumstances that they have been made by authorized and accredited agents appointed for the purpose, and also partly on the publicity of the subject-matter to which they relate. * * * Those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the public." Such public writings are "only receivable, however, in proof of those matters, the remembrances of which they were called into existence to perpetuate." 1 Greenl. Ev. §§ 483, 484; Best, Ev. § 219; *Clarke v. Diggs*, 6 Ired. 159; *Brundred v. Del Hoyo*, 20 N. J. Law, 328; *Swinerton v. Insurance Co.*, 9 Bosw. 361. The rec-

ords offered were made by the governing officials of a town, which was a public agency, established with defined powers, one of which was to locate, open, or widen the public streets. They were made long before the present controversy arose, and bear intrinsic testimony to the fact that the object in passing them was to fix the relative positions and bounds of Garnett street and Wyche alley, and incidentally the points of their intersection with Montgomery and other streets running diagonally across both. Such records, being publicly made by public agents, and presumably for the public benefit, may be more safely admitted to show where the streets of a city or town are located than the declarations of even disinterested deceased persons as to the situation of the lines and corners of land. It has been said that the admission of hearsay evidence as to questions of boundary had its origin partly in the obsolete rule which made it competent to prove prescription by general reputation, and partly in the fact that "in many sections of this country a single surveyed boundary line is common to a number of estates, becoming in this manner a quasi matter of general interest." *Boardman v. Reed*, 6 Pet. 328; *Shook v. Pate*, 50 Ala. 91. In *Davidson v. Arledge*, 97 N. C. 179, 2 S. E. Rep. 378, it was held that a map of the city of Charlotte, shown to have been recognized by the authorities of the city for 15 years, was competent as testimony tending to show the location of the streets laid down thereon and the distance from one to the other. This ruling seems to have been founded upon the fact that the map was made under the direction of, and was approved as correct by, the public agents whose duty it was to fix the limits of streets, and who were presumed to have acted properly, and to have caused an accurate delineation of their true location to be made for their own guidance. The presumption of accuracy of the map was doubtless a rebuttable one, in the same way the official declaration as to the proper location of Wyche alley and its distance from Garnett street, and as to the increased width of Garnett street, is competent, though not conclusive, evidence to locate a boundary line when the streets named, or their points of intersection, were called for in the deed. 2 Whart. Ev. § 1310. It is well settled that it is competent for a defendant to prove possession by himself and those under whom he may claim for seven years, in support of a general denial in the answer that the plaintiff is the owner, without specially pleading the statute. *Farrior v. Houston*, 93 N. C. 578; *Manufacturing Co. v. Brooks*, 106 N. C. 107, 11 S. E. Rep. 456. There was no error, therefore, either in admitting the testimony objected to, or in the refusal of the charge as asked by the plaintiff. No error.

MARRINER et al. v. JOHN L. ROPER LUMBER CO.

(Supreme Court of North Carolina. Oct. 24, 1893.)

ACTION ON ORDER—EVIDENCE—INSTRUCTIONS—REVIEW ON APPEAL—ERROR NOT RAISED BELOW.

1. Certain contractors who were sawing lumber for defendant company were in the habit of paying their men in part by orders on a certain store, which orders contained the request to "charge to account" of defendant; and there was some evidence that the storekeeper was an agent of defendant. *Held*, in an action on such an order, assigned to plaintiff, but not accepted by the storekeeper, that it was error to charge that defendant was liable if plaintiff had been moved to take an assignment of the order because of his knowledge that such orders had always been paid by the storekeeper, acting for defendant, and that defendant had also furnished a book of these printed blank orders to the contractors to be filled up and signed by them.

2. Under Code, § 412, subd. 3, providing that if there be error in instructions they shall be deemed excepted to without the filing of any formal exceptions, it is sufficient if exceptions to the charge be set out in the case on appeal.

Appeal from superior court, Washington county; John Gray Bynum, Judge.

Action by W. C. Marriner and another against the John L. Roper Lumber Company. From a judgment for plaintiffs, defendant appeals. Reversed.

W. D. Pruden, for appellant. A. O. Gaylord, for appellees.

CLARK, J. This is an action by the assignee of an unaccepted order against the alleged principal of the drawee. The drawee was one Blount, designated in the order as "Company Store." His habit was to pay in goods all orders drawn on him by Jewett & Wilson which contained the request, in the body thereof, "Charge to account of John L. Roper Co." At the end of each month these orders would be added up, and Jewett & Wilson would give Blount a draft for the sum thereof upon the defendant, who would be allowed by Blount a discount of 12½ per cent. for paying the same. These orders were given by Jewett & Wilson to such of their hands as they did not pay in cash. The orders did not purport to be signed by them as agents of the Roper Lumber Company. The only evidence from which such agency could be inferred was the request in the order to charge to said company, and the agency was expressly negatived by the evidence of both plaintiff and defendant, which was that the relation of the drawers, Jewett & Wilson, to the defendant, was that of contractors sawing and shipping lumber to the said Roper Lumber Company, which was under no obligation to pay such orders except when indebted to the drawers. It may be that Blount was agent for the defendant. But that is immaterial, as is also the inquiry whether the defendant was indebted to the drawers when the order was refused payment by Blount. The order not

having been accepted, no liability in favor of payee or his assignee could attach to the drawee, nor, of course, to his principal. The remedy was by an action against the drawers either on the dishonored order, or upon the original count for work and labor done. The court told the jury that no contract had been shown between the assignee (or payee) of the order and the defendant; but it charged that the defendant was liable if the plaintiff had been moved to take an assignment of the orders because of his knowledge that such orders had always theretofore been paid by Blount, acting for the defendant, and that the defendant had also furnished a book of these printed blank orders which were filled in and signed by the drawers, Jewett & Wilson. This could give neither the payee nor his assignee any greater claim upon the drawee, Blount, than the holder of a protested check would have upon a bank because it had always theretofore paid the checks of the drawer, which the holder had therefore taken, believing it good. Nor would it make any difference that the check was filled in upon a printed blank taken from a check book furnished the drawer by said bank. Whether the Roper Lumber Company was, or was not, the principal of the drawee, it cannot be made liable, since the drawee was not. As to the objection that exceptions to the charge were not taken at the trial, it has been held sufficient, under the statute, (Code, § 412, subd. 3,) and under rule 27 of this court, (12 S. E. Rep. vii.,) if they are set out by appellant in preparing his case on appeal. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. Rep. 383; *Clark's Code*, (2d Ed.) p. 383, and cases there cited. Error.

TALIAFERRO et al. v. SATER et al.
(Supreme Court of North Carolina. Oct. 24, 1893.)

CHATTEL MORTGAGE—EXTENT OF LIEN—AFTER-ACQUIRED PROPERTY.

The lien of a mortgage for an individual debt, made by defendant on all the lumber at his mill, "and all such lumber as [defendant] may hereafter purchase and saw at said mill between" certain dates, does not extend to timber contracted for by defendant, but which was paid for and manufactured at such mill by a firm of which defendant was a member.

Appeal from superior court, Halifax county; George A. Shuford, Judge.

Action in claim and delivery by H. B. Taliaferro & Co. against W. A. Sater and S. T. Rawls, partners as W. A. Sater & Co. T. H. Hale and M. C. Hale, as Hale Bros., interpleaded, claiming the property in suit under a chattel mortgage made by defendant Rawls. Interpleaders had judgment, and plaintiffs appeal. Reversed.

R. O. Burton and E. L. Travis, for appellants. T. N. Hill and W. H. Day, for appellees.

BURWELL, J. The appellees, who are interpleaders in this action, claim the property in dispute under a mortgage made to them on March 16, 1890, by the defendant S. J. Rawls to secure a debt due from him, individually, to them. In that mortgage the property assigned is described as "all the lumber owned by said Rawls at his mill now on the land of Mrs. Virginia Grizzard, in Halifax county, N. C., near the town of Halifax, both sawed and unsawed, and also all the lumber owned by him at his siding at the junction of the Wilmington & Weldon and the Scotland Neck railroads, said siding being on the main line, both sawed and unsawed, and all such lumber as the said Rawls may hereafter purchase and saw at said mill between the date hereof and the first day of August, 1891." On April 15, 1891, defendant Rawls made with one Jackson a contract, by the terms of which Jackson agreed to sell him certain pine timber trees then standing on designated tracts of land, at the price of 75 cents per thousand feet for all trees cut by him, payment to be made "at the expiration of every four weeks while engaged in cutting timber on said premises;" and this contract provided that Rawls should execute a bond in the sum of \$3,000 to secure his faithful performance of its stipulations, and it was further provided that without this bond the contract should be of no effect. This bond was not made till the 20th day of April, 1891, but we think that it related back to the date of the agreement, and perfected the contract as of its date.

On April 20, 1891, the defendants Rawls and Sater formed the copartnership of W. A. Sater & Co., and this firm, being indebted to plaintiffs, executed and delivered the following instrument: "Whereas, W. A. Sater and S. T. Rawls, partners as W. A. Sater & Co., are indebted to H. B. Taliaferro & Co. in the sum of \$576.85, less amount of freight not charged on bill of said Taliaferro & Co., and they desire to secure the same: Now, therefore, the said W. A. Sater & Co. do hereby convey to said H. B. Taliaferro & Co. all the lumber now owned by them, either sawed or unsawed, at their mill on the land of Mrs. V. S. Grizzard, or at their railroad siding, and all lumber they now own which is uncut. And the said W. A. Sater & Co. hereby do agree and bind themselves to ship to said H. B. Taliaferro & Co. all the lumber that they may hereafter saw at their said mill, to be sold by them, and applied to the payment of said debt until the same is fully paid off, and until all indebtedness hereafter incurred to said Taliaferro & Co. by reason of any advance and supplies they may hereafter furnish said mill are paid in full. And the said W. A. Sater & Co. do hereby give to said H. B. Taliaferro & Co. a lien on all the lumber they may hereafter saw at said mill, to secure them for any advances the said Taliaferro & Co.

may hereafter make said W. A. Sater & Co. for the running of said mill. S. T. Rawls. [Seal.] W. A. Sater. [Seal.] Witness: S. M. Gary. This 30th May, 1891." In the argument before us, no question was made as to the validity of the mortgages described in the pleadings, nor is it necessary for us to pass upon them, as the case is now presented to us. The mill spoken of in this latter instrument was the mill of Rawls mentioned in his mortgage to the interpleaders heretofore set out, and it was operated by the firm of Sater & Co. during the existence of the copartnership. The mortgage made by Rawls to Hale Bros. did not at all affect the right that he acquired by his contract with Jackson to cut timber on the latter's land. It put no lien on that timber, or on his right to cut it. If he had himself caused any of that timber to be cut, and had himself caused the logs to be carried to the mill and to be sawed into lumber, that lumber and any unsawed logs, being his individual property, and answering to the description contained in the mortgage, would be liable for his individual debt to the interpleaders, Hale Bros. But the evidence on the trial tended to show that what timber was cut on the Jackson land was cut, not by Rawls, but by the firm, who paid Jackson for the trees, hauled them to the mill, which the firm, not Rawls, was operating, and there the logs were sawed into lumber, not by Rawls, but by the firm, who paid all the expenses of converting the standing timber—upon which the interpleaders, as we have said, had no lien—into lumber at the mill. If these facts are true, it seems that the property in dispute—the lumber at this mill—was never subject to the mortgage given by Rawls to the interpleaders, because it was not purchased and sawed by him, and that it is subject to plaintiffs' mortgage, because it is both legally and equitably the property of the firm of Sater & Co. We therefore hold that his honor erred when he charged the jury "that if they found from the evidence that the lumber in controversy was sawed from lumber purchased by Rawls in his own name for himself before the formation of his copartnership with W. A. Sater, and was sawed by the mill owned and operated by said Rawls at the time of the execution of the mortgage by him to Hale Bros. after the date of said mortgage, and before August 1, 1891, whether the same was sawed by Rawls alone, or by him and Sater as partners, the same would be covered by the description of property contained in the mortgage from Rawls to Hale Bros. and the title passed from him unto Hale Bros., under that clause in their mortgage conveying all such lumber as said Rawls may hereafter purchase and saw at said mill between the date hereof and the first day of August, 1891; and this would be true although the timber from which the lumber was sawed may have been paid for with the copartnership

funds of W. A. Sater & Co." If it were true, as the interpleaders seem to insist, that their lien covered the Jackson timber, or rather Rawls' right to take timber from that land, then it would follow, as plaintiffs insist, that whatever clear profit they made out of sawing this timber must be applied on their mortgage debt, for a mortgagee who acquires possession of the mortgaged property must in all cases account for it, and he will not be allowed to say, when called upon to settle, that his possession was not under the mortgage, but will, upon the accounting, be credited by such sums as he may have properly paid out to perfect his title, to protect his possession, or to render the property available for the payment of the mortgage debt. But, since we hold that the interpleaders had no mortgage or lien on the Jackson timber, it is of no avail to consider questions concerning the application of profits made by a mortgagee in possession, which are raised by plaintiffs' second exception. For the error pointed out above, there must be a new trial.

COGGINS et al. v. FLYTHE et al.

(Supreme Court of North Carolina. Oct. 10, 1893.)

ACTION ON GUARDIAN'S BOND — COMPETENCY OF WITNESSES — LIABILITY OF GUARDIAN — NEGLIGENCE.

1. Code, § 580, provides that no party to an action on a bond executed prior to August 1, 1868, shall be a competent witness in such action. Acts 1886, c. 361, allows defendants who are administrators or executors to testify in actions on such bonds where there is a reference to state an account. *Held*, that in an action on a guardian's bond given before August 1, 1868, where there is a reference for an accounting, the guardians are competent witnesses.

2. In an action on a guardian's bond, where plaintiffs claim that the guardians are liable for failure to compel an accounting by an administrator of an estate in which the wards were interested, where the administrator, now deceased, had filed his inventory and account in 1866, the burden is on plaintiffs to show that the administrator did not apply the assets of the estate for its benefit.

3. In an action on a guardian's bond the sworn returns of the guardians are admissible in evidence.

4. Where an administrator reduced the personal property of his intestate to money in 1862, 1863, and 1864, and paid the debts of the estate during that time, the balance on hand was properly sealed at three dollars for one dollar, the scale value of January, 1863, being an average, instead of by an application of the scale to each item of the account.

5. Where there is no evidence of an appropriation by an administrator of the assets of the estate, he is not chargeable with interest on the receipts.

6. Where the accounts of guardians were closed every year, and the receipts and expenditures were in Confederate money, the scale was properly applied to the balance at the end of the war.

7. Where, during the war, an administrator paid with Confederate money certain simple contract debts, instead of applying the proceeds to debts of higher dignity, being charges on the

land of decedent, and by emancipation the estate of decedent became insolvent, in view of the general financial disturbances of the period, and the doubt as to whether the holders of the securities would have received payment of the indebtedness in Confederate currency, the guardians of the children of decedent are not liable on the bond because they failed to bring an action against the administrator as for a devastavit.

8. It was not negligence in a guardian in 1865 to rent the land and hire out the slaves for cash in Confederate currency.

9. A guardian is not personally liable for the necessary expenses of resisting a motion to remove him.

10. Where a testator devises certain property to certain named children of his brother by one clause of his will, and by another clause gives certain land to his brother for life, at his death the land to descend "to his children," a child of his brother born after the making of the will, but before testator's death, has an interest in the land.

11. Where a guardian allows the administrator of an estate in which his wards have an interest to take charge of the real estate, he is liable to his wards for the rents up to the time the land was sold to pay decedent's debts.

12. Where a guardian fails to sue a note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence.

Appeal from superior court, Northampton county; George H. Brown, Judge.

Action by K. R. Coggins and others against Jesse Flythe and others. From the judgment, both parties appeal. Modified.

R. B. Peebles, for plaintiffs. T. W. Mason and Willis Bagley, for defendants.

MACRAE, J. This was an action upon the bond of Flythe, guardian of the relators, heard upon exceptions to the referee's report at April term, 1892, of Northampton superior court. It is proper to say that while the case comes up upon appeals of both plaintiffs and defendants from the judgment of his honor, Judge Brown, the exceptions to be considered are from the rulings of MacRae, judge at a previous term of said court.

We will first consider the plaintiffs' appeal. Exceptions 1, 5, 6, and 7 involve the admissibility of the testimony of Jesse Flythe and William Grant, two of the defendants, being exceptions to certain findings of fact based wholly or in part upon the testimony of the said defendants. It is contended by the learned counsel for the plaintiffs that the defendants are incompetent to testify by reason of the provision of section 580 of the Code, that "no person who is or shall be a party to an action founded upon a judgment rendered before the first day of August, 1868, or on any bond executed prior to said date, * * * shall be a competent witness on the trial of such action." It will appear, however, by an examination of the record, that this action was brought upon two bonds of defendant Flythe as guardian, one executed before, and the other after, August 1, 1868, and that there was an amendment of the complaint allowed by the referee, striking out all reference to the bond executed since that date; but all of the testimony of de-

fendant Grant, and nearly all of that of defendant Flythe, was admitted before this amendment, and while the action was upon the two bonds. But we are not prepared to hold that the testimony was incompetent under section 580, even when the action is upon the bond executed prior to August 1, 1868, alone. There has been much legislation upon the subject of evidence of late years in North Carolina. Before 1866, generally speaking, no party in interest was a competent witness on the trial of an action. In that year, by chapter 43 of the Acts of Assembly, called "An act to improve the law of evidence," the door was opened to all, and now, by section 589 of the Code, "no person offered as a witness shall be excluded by reason of his interest in the event of the action." It will not be necessary to advert to section 590, which provides certain exceptions to this general rule. In the Code of Civil Procedure of 1868, under the head, "A Party may Examine his Adversary as Witness," section 333 provided: "A party to an action may be examined as a witness at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify either at the trial or conditionally or on commission." This section is the basis of section 580 of the present Code, and is the first paragraph thereof. The act of 1879, c. 183, added a proviso "that no person who is a party to a suit now existing or which may hereafter be commenced * * * that is founded on any * * * bond under seal for the payment of money or conditioned to pay money, executed prior to the first day of August, 1868, shall be a competent witness" etc. This act was construed not to apply to official bonds. *Morgan v. Bunting*, 86 N. C. 66. There was a material change in this proviso by the Acts of 1883, c. 310, in which the words "any bond" are used, and the words "for the payment of money, or conditioned to pay money," are omitted; and the plaintiff contends that the effect of the last-mentioned amendment was to make incompetent any party to an action upon any bond, official or otherwise, executed prior to August 1, 1868. Section 580 of the Code is composed of section 333, Code Civil Proc., with the proviso introduced by the act of 1879 as amended by the act of 1883. A subsequent act (chapter 361 of 1885) enables defendants who are administrators or executors to testify in actions upon bonds executed before August 1, 1868, where there is a reference to state an account. This act, it seems to us, was passed out of abundant caution, and to exclude such a conclusion in regard to executors and administrators as is sought by the plaintiff in the case of a guardian, for it is impossible that section 580 could be made to apply to the examination of a defendant upon a reference to state an account. The present action

is in the nature of a bill in equity for an account. The very nature of the action makes it a bill of discovery, the object of which is to have the defendant guardian to answer upon oath, and to make discovery of his dealings as guardian. 1 Story, Eq. Jur. § 447; 2 Story, Eq. Jur. § 689. While the act of 1879 was amended by the act of 1883 so as to strike out the words "for the payment of money," etc., and make it read "upon any bond," to give it the construction called for by the plaintiff, and to hold that the defendant guardian could not testify, nor be compelled to testify, upon the taking of the account, would take away the equitable jurisdiction of the court to require a discovery and accounting by a fiduciary, the essence of which is the examination of the defendant and the discovery of him under oath. It is to be noted that this action is not the old action for discovery in aid of the prosecution or defense of another action, which was abolished by section 579 of the Code, having been rendered useless by the changes in the law of evidence. The proceeding in which the testimony of these defendants was given was upon the taking of the account demanded by the plaintiff before the referee, and not upon the trial of the action.

Exception 2 is to finding No. 8, that "there is no evidence that the administrator used any of the money received by him on account of said estate for any other purpose than for the payment of the debts and expenses of administration of said estate, or that he did not pay out, in satisfaction of such debts and expenses, the same money which he received on account of said estate." The administrator and estate referred to above are S. J. Calvert, administrator upon the estate of Newitt Harris, deceased. The contention of plaintiffs is that the defendant guardian and the sureties on his bond are liable for the failure of the guardian to hold the said administrator to account for a devastavit alleged to have been committed by him in the said administration, to the damage of the wards of said guardian, the present relators. The said Calvert, administrator, died before the commencement of the present action. There has been no final settlement of the estate of his intestate, and no administrator de bonis non has ever been appointed for that purpose. The administrator filed his inventory and account of sales at March term, 1862, of Northampton county court, and an account of his administration was stated by the clerk of the superior court of said county in some action pending in said court, and the vouchers are now on file in said clerk's office. From these data the referee has made up the account of said administration. Plaintiffs contend that from this account there is evidence that the said administrator did use the money which came into his hands as administrator; that by June, 1862, he had received \$5,219.21, and up to January, 1863, he had paid out

only \$2,271.24; and, further, that it appears by said account that he paid a part (\$407) of one of the bonds which he ought to have paid in full before paying any simple contract debt. As to the contention that this account furnishes in itself some evidence that the administrator used the funds of his intestate for his own benefit, we think that it requires more than an admission that the administrator had the money in his possession to prove that he appropriated it to his own use. It was not always easy to pay the debts of an estate considered fully solvent in Confederate money, and this is a matter of general information. It would seem that the burden in this case should be upon the plaintiffs, for the account filed or taken before the clerk, with the vouchers, was presumably under the oath of the administrator, and therefore prima facie correct. *Grant v. Hughes*, 94 N. C. 231. It would be hard measure to put upon the defendants in this action the burden of disproving the allegations of plaintiffs as to the mismanagement of the estate, the administrator of which is now deceased. The finding we think is in accordance with the evidence. It is true that in an action against an executor or administrator, when the plaintiff shows by the inventory and account of sales that assets came into the hands of the personal representative, the burden is upon him to show that they have been duly administered; but when, in addition to the inventory and account showing assets, there is the further statement under oath of his disbursements, this is prima facie evidence, subject to attack, but it stands if no evidence is offered to dispute it. In *Villines v. Norfleet*, 2 Dev. Eq. 167, where it was sought to surcharge a settlement of an executor's accounts by commissioners appointed by the court, it was held that said settlement, while not a bar to a future action, did rebut a presumption of fraud.

Exceptions 3 and 9. These exceptions involve the correctness of the referee's finding 9, and the ruling of the judge below on the fourth, fifth, and sixth exceptions, relating to the finding of the referee that Newitt Harris was indebted to S. J. Calvert on open account \$1,200. The point is whether the account filed by the administrator is prima facie evidence of its truth, or is it necessary, when it is denied in the complaint, that the guardian should offer proof to sustain it? This is the same question which we have just discussed. Section 16 of the complaint alleges that the administrator rendered the account in December, 1866. This action, as we have said, is not for an accounting by the administrator, but it is an action against the guardian and the sureties upon his bond, alleging that the guardian negligently permitted an estate in which his wards were interested to be squandered. It was alleged that S. J. Calvert, administrator of Newitt Harris, had rendered an ac-

count in 1866, in which he retained \$1,200 to pay an alleged debt to himself, which debt was, in fact, not owing to him. There was no question about the account having been rendered; it was as to the correctness of the \$1,200 alleged debt. It appeared in the account; the plaintiffs had the right to attack it. It may be that, as was said in *Finch v. Ragland*, 2 Dev. Eq. 137, the court presumes against an administrator dealing with the estate for his own benefit; but in the same case it was said by the elder Ruffin: "It may be said that the defendant ought to discharge himself by proof. In such case the answer is proof. If an administrator inventory a debt as desperate, he cannot be charged with it but by proof on the other side that it was collected, or might have been. Here the plaintiffs have sought to charge the defendants upon their oath. They must take their answer, subject, indeed, to be disproved." That action was brought directly against the administrator for an account, etc. How much more strongly does his honor's reasoning apply to the present case, where it is sought, in a suit against a guardian, to falsify an account rendered by the administrator of an estate in which his wards were interested, the administrator having rendered an account and died long ago. This will apply to the \$1,200 retainer, where no voucher was filed, as well as to the \$556.13 item alleged to have been paid to Samuel Calvert, administrator.

Exception 4 relates to finding 11 of the referee, which is the same as finding 13 of the judge, and it is as follows: "The estate of said Drewry Harris was amply able to pay all the debts owing by said Drewry Harris as principal, and, but for the two surety debts aforesaid, it would not have been necessary to sell the lands devised by said Drewry to Thomas, Mary, Martha, and Addie Harris." The contention is that Drewry Harris' estate was amply able to pay all his debts without recourse to his lands, had the executor properly applied the proceeds of the personality, and this contention is correct; but the sale of the land became necessary by reason of the two surety debts which remained unpaid after the payment of legacies in Confederate money by the executor, and as it appeared that the executor was insolvent, and nothing could have been made out of him by an action by the guardian, the result has not been affected by this finding.

Exception 8 relates to the overruling of plaintiffs' third exception, which was in these words: "For that he admitted the guardian returns offered by defendants." These returns were referred to in the testimony of defendant Flythe, and were testified by him to be correct. They were admissible as part of testimony, and as a sworn statement in corroboration of his testimony, which we have held to be competent.

Exception 10 is—First, to the application of

the scale in the administration account; and, second, to the application of the scale in the guardian account by the referee,—that it was error to have applied the scale of Confederate currency to the balance found to be in the hands of the administrator at the end of the war. The administrator appears by the account to have reduced the personal property of his intestate to money in 1862, 1863, and 1864,—a large proportion thereof in January, 1862,—and to have paid the debts of his intestate during the years 1862, 1863, and 1865. The balance on hand at the end of the war was \$2,084.08. This sum was scaled at \$3 for \$1; the scale value of January, 1863, being an average, instead of an application of the scale to each item of debt and credit in the account. This seems to have been in accordance with the practice in North Carolina, and to be sustained by the decisions of this court. *Freeman v. Wilson*, 74 N. C. 363; *Drake v. Drake*, 82 N. C. 443; *McNeill v. Hodges*, 83 N. C. 504. The exception is further to a failure on the part of the referee to charge the administrator with interest on his receipts. Having sustained the finding that there was no evidence of the appropriation by the administrator to his own use of the funds on his intestate, we see no good reason for charging him with interest. The same exception alleges error in the application of the scale in the guardian account. This account appears to have been closed and a balance struck at the end of every year, and interest computed according to the rule in guardian accounts, and, the receipts and disbursements being both in Confederate currency, the scale was applied at the end of the war upon the balance as then found. In the account with the ward Addie Harris the balance was against the guardian, and in that with the ward Mary it was in his favor. We hold that the scale was properly applied, upon the authorities already cited, and upon reason.

Exception 11 alleges error in overruling plaintiffs' thirteenth exception to the report of the referee, for his finding that S. J. Calvert, administrator of Newitt Harris, did not use (as his own) the money belonging to the estate of his intestate. The account and vouchers showed disbursements from time to time during the period of the administration, which would indicate, in the absence of evidence to the contrary, that the money was paid out as it was received, and the plaintiff has offered no evidence to the contrary.

Exception 12 alleges error in overruling the fifteenth and sixteenth exceptions to the referee's report that the defendants ought to be held liable for what the guardian might have collected by suit upon the bond of the administrator, including the proceeds of sale by him, for assets, of the Powell and Tisdale lands. Undoubtedly, the general principle is that it is the guardian's duty to protect the interests of his wards, and that, if they suf-

fer by reason of his negligence, he and his sureties should be liable therefor. It appears that the administrator paid and retained on simple contract debts a sum which should have been applied to the payment of debts of higher dignity, and so have relieved the land devised to the wards of defendant Flythe. These two debts of higher dignity were bonds on which the intestate, Newitt Harris, was principal, and Drewry Harris was surety; and by the failure of the administrator of Newitt Harris to pay them before he retained and paid the simple contract debts, and by the subsequent insolvency of the estate of his intestate by reason of the emancipation of the slaves, a sale of the land devised by Drewry Harris to the relators became necessary, and was decreed in order to pay these bonds. At the time of the payment and retainer of the debts of lower degree by the administrator, the estate of Newitt Harris was solvent, and it became insolvent by reason of the forced emancipation of the slaves. The general rule, both at law and in equity, is that it would be a devastavit if an executor or administrator should give preference to a debt of lower class over those duly presented of a higher dignity, (*Moye v. Albritton*, 7 Ired. Eq. 62; *Schouler, Ex'rs*, § 435,) just as the general rule with regard to the acceptance and management of Confederate money is that trustees should be held to that degree of care and circumspection which prudent men exercise under similar circumstances in the conduct of their own business affairs, (*Patton v. Farmer*, 87 N. C. 337.) But it is common knowledge that there was a hesitation on the part of holders of solvent securities to receive payment of the same in Confederate money, and that after January, 1863, or, at the furthest, July 4, 1863, it was not the act of a prudent fiduciary to accept such payments. In the little light we have upon this administration, there is nothing to show us any willingness on the part of the holders of these bonds to accept payment of the same in Confederate currency, except as to the payment of \$407 on one of them in 1862. It may be that, if the administrator were alive to testify, the reason for the payment of the simple contract debts first would be made to appear to be the refusal of the holders to accept payment of bonds, then entirely solvent, in a depreciated currency. We are also affected with the knowledge, common to all, that soon after the close of the war there was such uncertainty as to the solvency of persons and estates, and such embarrassment in the collection of debts, as well might have deterred a prudent man in the management of his own affairs from incurring the expense of litigation in doubtful cases; and, while there was no statute to that effect before the act of 1869, (section 1496 of the Code,) we cannot say, fitting the principles of law and equity, which never change, to the circumstances of this case,

where the estate was amply solvent at the date of the retainer and payment, and became insolvent afterwards, without fault of the administrator, but by the overpowering effect of the war and its incidents, that in the spirit of liberality which the law exercises towards executors and administrators (Schouler, Ex'rs, 385, note 1) the courts would not then have held that there was no devastavit, and that the administrator and his sureties were not liable. Under these circumstances, we are of the opinion that the guardian, in view of all the evidence, was not negligent in failing to bring an action against the administrator of Newitt Harris.

The conclusion arrived at in the consideration of the last exception will dispose of all other exceptions based upon the theory that the guardian and his sureties ought to be held liable for such failure. It was clear the guardian could have made nothing for his wards by a suit against Isaac Peele, executor of Drewry Harris, as he was insolvent immediately after the war, and has remained so ever since. The other exceptions above referred to as virtually disposed of are 15, 18, 19, and 20, involving the question whether the defendant guardian, by due diligence, could have prevented the sale of the Potecasi land, and the exceptions to the supplemental report as to alleged errors in the statement of the account of S. J. Calvert, administrator.

Exception 13 is—First, to a failure to credit Addie Harris with the balance due her on January 1, 1866, with compound interest, etc., and that such balance should have been \$30.90, instead of \$10.01, as found. This balance was not charged against the guardian because it appeared that he had the funds on hand at the close of the war, and they became of no value. Second, the failure to credit Mary Harris with her share of the rents of land and hire of slaves for 1865 on the ground that it was negligence to have hired for cash. It appears that the guardian rented the land and hired the slaves for 1865 for cash in Confederate currency, and that the same remained in his hands at the close of the war. Was it negligence to have taken cash in the currency of the country under the circumstances? Would a prudent man have preferred to take notes just at that juncture? As was held below, ordinary rules ought not to be applied to transactions of that date when every thing was in such confusion and uncertainty in the section where these transactions occurred that all prudent men in the management of their own affairs, and fiduciaries in those of others, were at a loss to know what to do. The sequel showed that many solvent securities were soon to lose all value.

Exception 14 is for error in overruling, in part, exception 25: "For that in stating said account he erred in allowing the guardian the following items, to wit, \$3.38, paid sher-

iff bill of costs Mar. 1, 1873; no charge against wards. Motion was made to remove him as guardian, and dismissed at his costs. Voucher 58, Apr. 2, 1874, \$10.00 fee paid Attorney W. Bagley to resist motion to remove him." We have been pointed to no judgment against the guardian for the costs. If a motion was made to remove the guardian which was dismissed or denied, it would seem that he ought not to be held personally liable for the necessary expenses of resisting the motion. This exception is also to the allowance of the items \$325, March 1, 1864, and \$1,200, March 1, 1865, upon the ground that there was no evidence to support them. They appeared in the account of the guardian which he swears to be true. They were open to attack, and in our opinion were not successfully repelled. While apparently large items, the scale applied to the balance as of January 1, 1865, reduced them to very small sums.

Exception 16 was withdrawn, and 17 is admitted to be well taken. It is to an evident error of Judge MacRae in writing the word "sustained," instead of "overruled," to the defendants' tenth exception, and was so treated throughout the subsequent proceedings, and therefore did not affect the result to the prejudice of the plaintiff. There is no error.

Defendants' Appeal.

MACRAE, J. The first and fourth exceptions of defendants involve a construction of the will of Drewry Harris. The clauses of the will bearing upon the point are as follows: "Item 2. I give and bequeath unto Thomas C., Mary, and Martha, children of my brother Newitt Harris, sixteen negroes, [naming them,] to be equally divided between the said children of my brother, to them and their heirs, forever." "Item 6. I lend unto my brother Newitt Harris during his natural life my negro man 'Big John,' also, all my land, and improvements thereon, on the south or west side of Potecasi creek, and at the death of my said brother I give the said land and negro to his children, to them and their heirs, forever." The children of Newitt Harris were the present relators, Thomas, Martha, Mary, and Addie. It is contended by the defendants that the said Addie Harris is not entitled to a share with the other children of Newitt Harris in the land devised in the above-recited item 6 of Drewry Harris' will because, although said Addie was living at the death of the testator, she was not in being at the time of the making of his will, having been born afterwards, and that the true construction of said will would include only those children who were living at the time of the execution of the will, and because the intention of the testator can be collected from item 2, taken in connection with item 6, to have been in favor only of the children who were then living. The principle, as stated

in *Williams on Executors*, § 981, is: "Generally speaking, every one who, at the time of the testator's death, falls within the described class of children, will be entitled; but where it appears from express declaration or clear inference upon the will that the testator intended to confine his bequests to those, only, who answered the description at the date of the instrument, such intention must be carried into effect. A court of equity, however, is always anxious to include all the children in existence at the time of the death of the testator." Defendants rely upon *Lockhart v. Lockhart*, 3 Jones, Eq. 205, where it is said that "where a testator in one part of a will uses words descriptive of a class, and in another part uses the same words of the same persons, the presumption is that in both cases the words are used in the same sense." The application of the above-stated principle was to a very different state of facts than is presented to us. The question was whether certain children took, under the will of Sarah Lockhart, per stirpes or per capita. By item 2 there was a specific bequest "unto the children of my son John." Item 5, being the residuary clause, gives all other property undisposed of in former items of the will "to the children of my deceased son John" and my sons Benjamin and Joseph. The court found no difficulty in arriving at the conclusion that the children of John, being named as a class in the second item, and the same words of description being used in the fifth item, took there also as a class. In the present case there can be no room for construction. Item 2 gives 16 slaves to certain persons, naming them, and describing them as "children of my brother Newitt," the enjoyment to be immediate on the death of the testator. By the subsequent item he gives the land to his brother for life; "and at the death of my said brother I give the said land * * * to his children." It would be a very strained construction which would limit this devise to the children living at the execution of the will. By all rules it would take in children born after the death of the testator, and living at the death of their father, Newitt. In this case, however, Addie was living at the death of the testator, and was entitled to share in the devise. "In a bequest to a class of persons, as to children, courts will effectuate the intention of the testator by including as many persons answering the description as possible." *Meares v. Meares*, 4 Ired. 192.

Second exception. It appears from the referee's report that on November 25, 1861, Newitt Harris died intestate, leaving a considerable personal property, and two tracts of land known as the "Tisdale" and "Powell" places; that S. J. Calvert qualified as administrator on his estate in 1861, and gave bond, which bond remained solvent up to January, 1874. Until the emancipation of the slaves the estate of Newitt Harris re-

mained solvent, but the said administrator took charge of the real estate of his intestate, and declined to surrender it to the guardian, on the ground that Confederate money was depreciating so rapidly he could not tell what would be the condition of the estate. The guardian made no demand for possession until two years after the qualification of the administrator, under an apprehension that the administrator was entitled to hold the land for two years. The guardian was requested by the administrator, however, to rent out the land for 1865, and he rented the Tisdale tract for that year, and the rent appears in his account. He could not rent the Powell tract. After the emancipation said estate became insolvent, and on the — day of —, 18—, said administrator began proceedings to sell said lands for assets for the payment of debts, and said Flythe and Mary, Martha, and Thomas were duly made parties defendant. Said lands were sold on the — day of —, 18—, and the prices obtained for them appear in the account. Upon the foregoing facts the referee declined to charge the guardian with the reasonable rents of said lands, but stated an account of what said reasonable rents would be. The plaintiff excepted to the refusal of the referee to charge the guardian with said rents. This exception was sustained by the judge, and defendants excepted, and this constitutes the matter now involved in exception 2. The defendant does not except to the finding of the referee as to the value of the rents if the guardian is chargeable with them at all. The administrator has no concern with the real estate of his intestate until it becomes necessary to sell the same for assets, when the statute provides the proceeding by which he may subject the same to sale for the purpose indicated. Code, § 1436 et seq.; *Schouler, Ex'rs.* §§ 212, 213, 509. The guardian was invested with full power and authority over the estate of his wards. They were the heirs and the owners of the land of their ancestor, subject to the payment of his debts. Before the act of 1846-47 the procedure to subject the lands to the payment of debts was at the instance of the creditor and against the heirs. After this act the personal representative was required to take proper proceeding for that purpose, but until this proceeding was had it was the duty of the guardian to take charge of the land, and rent it out or use it for the benefit of the heirs. If the administrator had collected the rents and paid debts with it, there being a deficiency of personal assets, a court of equity would not hold the guardian accountable. *Hinton v. Whitehurst*, 71 N. C. 66; *Moore v. Shields*, 68 N. C. 330. The order of sale for assets ascertains that it was necessary to sell the land, but not that the rents, which ought to have been collected by the guardian, had been appropriated to the payment of debts. There is no evidence that the administrator

collected any rents. The guardian is already charged with the rent for 1865 of one tract, and, if he has shown that the other tract could not be rented for that year, he is not chargeable therefor. He should be held liable for the rents which he ought to have collected for the heirs.

Third exception. Newitt Harris, the father of the relators of plaintiff, died intestate in November, 1861, leaving considerable personal property and two tracts of land. His estate was solvent up to the emancipation of the slaves. Drewry Harris died in 1860, leaving a will by which he devised a tract of land to Newitt for life, and after his death to his children, the relators. Newitt Harris as principal, and Drewry Harris as surety, owed two bonds, one to Summerill and the other to Phillips. S. J. Calvert was administrator on the estate of Newitt Harris, and retained \$1,200 on a simple contract debt to himself, and paid Samuel Calvert \$556.13 on a simple contract debt, leaving unpaid the two bonds above described. The estate of Newitt Harris was amply able to have paid these specialty debts. The executor of Drewry Harris filed a petition to sell the lands of his testator, and sold the land to pay the two bonds aforesaid, on which Newitt Harris was principal and Drewry was surety. Plaintiff charges that the administrator of Newitt Harris was guilty of a devastavit in paying the simple contract debts of his intestate before the specialty debts, thus exhausting the personality, as it turned out, by reason of the subsequent emancipation of the slaves, and making it necessary for the executor of Drewry to sell the land which had been devised to the relators, the wards of defendant Flythe, and that said defendant should have sued the bond of the administrator of Newitt. The referee found that an action by the guardian against the administrator would have availed the wards nothing except that it would have revealed the devastavit in paying simple contract debts in preference to specialties, by reason whereof he failed to pay the bonds upon which Newitt was principal, and made it necessary to subject to the payment of the same the lands of Drewry which had been devised to the wards. Plaintiff excepted to this finding by the referee, and insisted that an account of the estate of Newitt would show that plaintiffs (relators) were greatly damaged by a failure on the part of their guardian to bring this action. Defendants excepted to all of this finding except that such suit would have availed nothing. MacRae, Judge, sustained defendants' exceptions upon the ground that the estate of Newitt was solvent at the time of the payment of the simple contract debts, and was rendered insolvent afterwards without fault of the administrator. Upon plaintiffs' exception the same judge held that upon a recasting of the account it will appear whether this exception is well taken. Defendants

except to this ruling upon the ground that it was hypothetical, and inconsistent with his rulings upon defendants' exception. Upon such recasting it is made to appear that the said estate was solvent at the time when the payments were made; and as we have held, upon consideration of the plaintiffs' appeal, that the defendants ought not to be held liable as for a devastavit, on account of the circumstances of this case, it follows that the recasting of the account worked no harm to the defendants.

Exception 5 is to the ruling of MacRae, Judge, whereby the guardian was charged with the bond of T. W. Jordan, A. J. Jordan, and F. S. Faison for the rent of the Potecasi land for 1873, due January 1, 1874. Flythe, the guardian, rented the Potecasi land for 1873 to T. W. Jordan, and took his note, with A. J. Jordan and F. S. Faison as sureties, for \$200, due January 1, 1874. At the time of the execution of the note the sureties were reputed to be solvent, but in 1872 and 1873 large judgments had been taken and docketed against said Faison. The guardian found it necessary to sue these same parties in 1872 and 1875 in order to collect other rent notes out of them, but he failed to sue upon the note in question until 1876, when all the parties thereto were insolvent. A guardian is not an insurer, but he is required to use reasonable diligence. He had notice in this instance, for he had found it necessary to sue the same parties in 1872, and again in 1875; but he waited two years before taking legal steps to collect this note, and then the parties were insolvent. If he had acted with reasonable promptness, he could have made the money. He should be held liable for its loss for the want of the exercise of ordinary care.

Exceptions 6 and 7. The referee filed the post bellum accounts of the guardian showing a balance due Addie Harris, January 1, 1881, of \$551.07, and a balance due Mary I. Coggins of \$63 on June 1, 1877. The defendants excepted to this finding for that in fact Mary L. received one-third instead of one-fourth of the rents of the Potecasi land. In this account the guardian was charged with one-fourth of said rents as that which should have been paid to Mary, but by some inadvertence the counsel for the guardian excepted upon the ground that he should have been charged with one-third of said rents, and the exception, by the same inadvertence, was sustained. The defendants' counsel, after the supplemental report, proposed to withdraw this exception, and let the account stand as originally made by the referee. As it evidently was a mistake, this ought to have been allowed. There is no analogy between this and paying money under a mistake of law. These exceptions should be sustained.

The eighth exception is to errors in the account, stated by the referee, of S. J. Calvert, administrator of Newitt Harris. As we have

held on the plaintiffs' as well as defendants' appeal that the defendant ought not to be held liable for a failure to sue the administration bond on account of the alleged devastavit, this exception should be sustained upon the fifth ground.

All of the exceptions having been disposed of, it follows that the defendants are not liable for the sum of \$186.86 each, and interest, the sum found to be in the hands of S. J. Calvert, administrator; that the plaintiffs' relator Mary is not entitled to recover of defendants the sum of \$151.39, but that the defendant Jesse Flythe ought to have judgment against Mary L. Coggins for \$17.21, with interest from the 1st of January, 1877; and that the relator Addie should have judgment against the defendants for the amount of their bond, to be discharged on the payment of \$643.10, with interest thereon from January 1, 1881. Modified.

LOCHEIMER et al. v. WEIL et al.

(Supreme Court of North Carolina. Oct. 31, 1893.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS — COMPROMISE OF SUITS — GOOD FAITH OF ASSIGNEE—RIGHTS OF CREDITORS.

An assignee for the benefit of creditors, who compromises suits affecting the assigned estate under the advice of his own counsel, and after consultation with and by the consent of counsel employed by a creditor, cannot be charged by such creditor with lack of good faith and proper diligence in making such compromises.

Appeal from superior court, Wayne county; Brown, Judge.

Action by Mayer H. Mann, J. Mann, and H. Mann, as partners under the firm name of Lochelmer, Mann & Co., against Joseph Stern, Isadore Saks, and Henry Well, and Solomon Well, as trustee for the benefit of creditors of Stern & Saks, to require a settlement of the trusteeship. Judgment for defendants. Plaintiffs appeal. Affirmed.

Exceptions to report by plaintiffs: "The plaintiffs except to the report of the referee, filed at January term, 1891, and for grounds of exception specify and say that said report is erroneous, for that: (1) In paragraph 13 thereof the referee finds as a fact that H. F. Grainger was the attorney of the creditors secured in the second class of said deed of assignment, whereas the evidence shows that he was employed to represent the trustee in the actions brought against him by the attaching creditors, and his services in that behalf were paid by said trustee, (\$75,) as shown in his account filed, marked 'B.B.' (2) In paragraph 14 thereof the referee finds as a fact that plaintiff Mann told Mr. Grainger that he (Mann) would leave the matter entirely in his (Grainger's) hands, and to do the best he could with it, whereas the evidence shows that Grainger was employed to defend the suits brought by the attaching creditors

against the said trustee, and no authority given him, or any one else, to compromise said suits. (3) In paragraph 19 thereof the referee finds as facts that in said compromise the said H. F. Grainger represented the second-class creditors, among whom were the plaintiffs in this action, whereas the evidence shows that said Grainger was employed to defend the actions brought against said trustee by the attaching creditors; and the action of Sol. Well, trustee, to plaintiffs, shows that the compromise was recommended by the trustee's lawyers, and only by them, and the said Grainger had no authority to advise or consent to any compromise or judgment so far as these plaintiffs were concerned. (4) In paragraph 22 thereof the referee finds as facts that said Sol. Well acted in good faith in assenting to said compromise and judgment, and for the best interests of his trust, whereas the evidence shows that the said compromise was only made that he (Well) might get payment in full of a debt due H. Well Bros., of which he was a member, in utter disregard of the right of the other creditors secured in said deed of trust, and without their knowledge or consent, or without the approval of a court of justice; that in this connection the referee should have found as a fact that, before the attaching creditors sued, the plaintiff Jacob Mann offered to take goods at cost prices in payment of plaintiffs' claim, they being in the second preferred class, and the defendant trustee refused, requiring the said Mann to pay for the same in cash, when the said Well, trustee, well knew that the goods assigned to him inventoried at cost \$6,437.39, and the debts in the first class only aggregated \$2,836.22; that said action on the part of the trustee was a scheme to save his own debt at the expense of the other creditors, and was not in good faith, and the referee should have so found."

Exceptions to conclusions of law: "(1) For that the referee, in his first conclusion of law, omitted to charge the defendant trustee with the full amount of goods seized by the attaching creditors,—that is, 75 per cent. of their inventoried price,—in making up his account, so far as the plaintiffs are concerned. (2) For that the referee, in his second conclusion of law credits the account of the defendant trustee with disbursements as shown in his twenty-sixth finding of facts, whereas no disbursement subsequent to the time plaintiff Jacob Mann offered to take goods at cost price in payment of plaintiff's claim should be allowed. (3) For that the referee, in his third conclusion of law, finds that H. F. Grainger was attorney of the plaintiffs in this action, and leaves the inference that he legally represented them in said compromise, which said finding, accompanied by the qualification that he was only employed to assist the defendant trustee in defending suits of attaching creditors, and for no other purpose, is misleading, and not pred-

located upon the facts. (4) For that the referee, in his sixth conclusion of law, finds that the defendants are entitled to judgment against the plaintiffs and their surety upon this prosecution bond for cost, whereas judgment should have been rendered in favor of the plaintiffs for the full amount of their claim, with interest and cost, as demanded in the complaint filed in said action."

The following is the opinion of G. H. Brown, Jr., Judge: "This cause came on to be heard before me upon exceptions of plaintiffs to the report of referee. The principal exception argued before me was as to the alleged want of authority by Grainger to Mann to compromise the suits of Claflin et al. vs. S. Well, Trustee, etc. It appears that Grainger represented Mann's firm of Lochelmer, Mann & Co. in that suit, although they were not parties to the record. It appears that he was associated with Well's counsel, and the two agreed to a certain judgment. Inasmuch as Lochelmer, Mann & Co.'s counsel consented to the judgment, it is binding, whether Grainger had authority to agree to that judgment or not. Grainger's estate is admitted or found to be solvent, and the plaintiffs' remedy is against that, if they have any. It seems that Grainger had general authority to represent interest of plaintiffs in the suit. After considering the testimony, I see no reason to overrule any of the referee's findings of fact, and I see no error in any of his legal conclusions. The report is therefore confirmed, and the several exceptions overruled. The judgment is affirmed."

Fuller & Fuller, for appellants. S. A. Woodard, for appellees.

BURWELL, J. The plaintiffs are creditors of a firm—Stern & Saks—which in 1870 made an assignment to the defendant Well to secure the distribution of their assets among their creditors, with certain preferences therein provided for, and in this action they require of him a settlement of his trusteeship. The facts found by the referee have been confirmed by his honor, and are thus conclusively determined. We find no error in the conclusions of law which were drawn from those facts. As is stated in the judgment, the contention of the plaintiffs is that the defendant trustee should be held liable to them for the value of a portion of the property assigned to him, which had been attached by two of the creditors of Stern & Saks, to wit, H. B. Claflin & Co. and Armstrong, Cator & Co. It is found that the suits brought by these two creditors, in which warrants of attachment were issued and a portion of the assigned property was seized and sold, were compromised by the trustee; and, by the terms of the compromise so made, the attaching creditors were allowed to have about two-thirds of the proceeds of the attached goods, while only one-third was paid over to the trustee. The

plaintiffs had a right to demand that the defendant trustee should be diligent and faithful in the management of the estate committed to his charge in part for their benefit. But his compromising the suits mentioned above was not at all incompatible with either good faith or due diligence. A trustee may compromise suits brought against him affecting the assets in his hands, and he will not be liable to the cestuis que trustent, provided he has acted with due care, and in good faith has done what, under the circumstances that surrounded him at the time, seemed best for the interest of those whom it was his duty to honestly serve. It may be conceded that an attorney has no authority to compromise his client's cause that has been committed to his charge without special authority so to do. That is well settled. A general employment as attorney does not include such authority. But that recognized principle does not fit the case before us. Here is a question of diligence and fidelity on the part of the defendant trustee. The charge against him is that he sacrificed the assets committed to him by the compromise of these suits,—that he allowed \$1,000 of the assets to be, by that compromise, diverted from the creditor to whom it belonged to the plaintiffs in those suits; and his reply to this charge is that he acted in this matter in good faith and with due diligence, and to prove this he asserts that this compromise was made by counsel whom he had employed to represent the interest of the creditors, and after consultation with an attorney in whose hands the appellants had placed their claim against Stern & Saks for collection. We repeat that the question here is not whether an attorney, under a general authority to conduct a suit, has authority to compromise his client's cause, (which of course must be answered in the negative,) but whether a trustee who, under advice of his own counsel, and after consultation with and by the consent of counsel employed by the creditor, compromises suits affecting the trust estate, is chargeable by that creditor with lack of good faith and proper diligence because he made that compromise. We think that this query must also be answered in the negative, and that there is no error in the judgment. Affirmed.

LILES et al. v. ROGERS et al.
(Supreme Court of North Carolina. Oct. 31, 1893.)

SUBROGATION—SURETIES ON SEVERAL BONDS.

When a sheriff has given two bonds to the state, conditioned for the collection and payment of state and county taxes, respectively, and has paid the state with part of the money collected for county taxes, without notice to the state officials, or the sureties on the bond for state taxes, these sureties are not liable to the sureties on the county-tax bond for the sum misapplied, under the doctrine of subrogation, since the state-tax bond was extin-

guished by performance, and the state could not have been compelled to refund the money, nor had it refunded, could it have revived the sureties' liability.

Appeal from superior court, Wake county; George H. Brown, Jr., Judge.

Action by B. Liles and others against J. Rowan Rogers and others on a bond. Judgment for defendants. Plaintiffs appeal. Affirmed.

Armistead Jones and Battle & Mordecai, for appellants. Busbee & Busbee, Batchelor & Devereux, and J. C. L. Harris, for appellees.

SHEPHERD, C. J. This case comes before us on demurrer to the complaint, from which it appears that the defendant Rogers, as sheriff of the county of Wake, executed three bonds to the state,—one conditioned upon the payment and collection of county taxes, one conditioned upon the payment and collection of state taxes, and the other conditioned upon the due execution of process, etc. It further appears that the sheriff, being engaged in the collection of said taxes, used a part of the money collected by him as county taxes in his settlement of the state taxes with the state treasurer; but it is not alleged that the state treasurer, or the defendant sureties to the state-tax bond, had any knowledge whatever of the misapplication of the said money. This action is brought by the sureties on the county-tax bond against the sureties on the state-tax bond, and the prayer is that the defendants be required to "refund" to the plaintiffs the sum of \$2,700, the amount misapplied by the said sheriff.

Conceding, for the purposes of the argument, that the sheriff held the money in the character of a trustee, it is very plain that it cannot be followed into the hands of the defendant sureties, as it does not appear that any part of the said money ever came into their possession. In the absence, therefore, of any averment connecting them with the alleged breach of trust, their liability, if any, must result from their contractual relations with the state. It is only through this medium that the plaintiffs can look for relief, and hence it is insisted that they are entitled to recover upon the principle of subrogation. Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. *Sheld. Subr. § 1.* The doctrine is distinctly a creature of equity, and the ground of relief does not stand entirely upon the notion of mutual contract, either expressed or implied. *Brinson v. Thomas*, 2 Jones, Eq. 414; 1 Story, Eq. Jur. 472; *Beach, Mod. Eq. Jur. 797.* The principle is applied where the person claiming its benefit has been compelled to pay the debt of a third person in order to protect his own rights, or to save his own property. Accordingly, it has been held that the sureties on the official bond of an in-

solvent sheriff, who have been compelled to pay money collected by a defaulting deputy, may recover of the sureties on a bond given to the sheriff by the deputy, conditioned upon the faithful performance of his duties. *Brinson's Case*, supra. The doctrine applies, also, for the benefit of a purchaser who has extinguished an incumbrance upon the estate which he has purchased; of a co-obligor or surety who has paid the debt which ought to have been met by another; and in other cases of a similar character to be found in the Reports and text-books. While it is true that privity is not, in all cases, necessary, still, to entitle one to relief, he "must have paid the money upon request, or as surety, or under some compulsion made necessary by the adequate protection of his own right." *Beach, Mod. Eq. Jur. 801.* It has therefore been held that if several or successive obligations of suretyship be not, in substance and nature, for the same thing, and have no relation to nor operation upon each other, the doctrine of subrogation cannot be invoked. *Langford v. Perrin*, 5 Leigh, 552. Tested by these general principles, it would seem that the plaintiffs are not entitled to the relief prayed for, since it is not pretended that they, or any one pursuant to their directions, have actually paid any money for the benefit of the defendant sureties, or that by reason of their contractual obligations, or otherwise, they were in any manner compelled to do so. Extending to them, however, the doctrine insisted upon, let us consider whether it can aid them in the present action. As soon as a surety has paid the debt, an equity arises in his favor to have all of the securities which the creditor holds against the principal debtor transferred to him, and to avail himself of them as fully as the creditor could have done. The securities referred to do not include those which are extinguished by the payment of the debt, such as the bond securing such principal debt; and, unless the surety procures it to be assigned for his benefit to a third person, it is utterly extinguished, both at law and in equity, and he becomes a simple contract creditor, (*Briley v. Sugg*, 1 Dev. & B. Eq. 366; *Sherwood v. Collier*, 3 Dev. 380; *Hodges v. Armstrong*, Id. 253; *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. Rep. 227,) and entitled to be subrogated only in respect to the collateral securities taken and held by the creditor, (*McCoy v. Wood*, 70 N. C. 125.) Indeed, the whole doctrine of subrogation is predicated entirely upon the discharge of the original obligation. *Sheld. Subr. § 1*, and *Beach, Mod. Eq. Jur. 798.* This principle is well established in this state, and is fully sustained by the English decisions prior to the enactment of the mercantile law amendment act, (19 & 20 Vict.) Thus, in *Coplis v. Middleton*, 1 Turn. & R. 231, Lord Eldon said: "The general rule, therefore, must be qualified by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor.

In the case, for instance, where, in addition to the bond, there is a mortgage, with a covenant on the part of the principal debtor to pay the money, the surety paying the money would be entitled to say, 'I have lost the benefit of the bond, but the creditor has a mortgage, and I have a right to the benefit of the mortgaged estate which has not got back to the debtor.'" So, also, Lord Brougham, in *Hodgson v. Shaw*, 3 Mylne & K. 190, observes: "Thus, the surety paying is entitled to every remedy which the creditor has. But can the creditor be said to have any specialty, or any remedy on any specialty, after the bond is gone by payment." So it is said by Beach, Mod. Eq. Jur. 811: "It was formerly [prior to the act above mentioned] the rule in England that a surety could have no right of subrogation to such securities as were extinguished by the payment of the debt, such as the bond securing the principal debt." While many of the American courts have conformed their rulings upon this subject to the principle declared by the act of Victoria supra, this court and the courts of Alabama, Vermont, and perhaps other states, continue to follow the original doctrine, as declared by the courts of England, the only modification of the rule in North Carolina being in favor of a surety who has paid the debt of a deceased principal. Rev. Code, c. 110; Code, § 2096. According to these principles, the bond to which the defendants were sureties was discharged by the payment and settlement made with the state treasurer, and cannot be revived in favor of the plaintiffs.

It is further to be observed that the party for whose benefit the doctrine of subrogation is invoked and exercised can acquire no greater rights than those of the party for whom he is substituted, and if the latter had not a right of recovery the former can acquire none. *Sheld. Subr.* § 3; *Clark v. Williams*, 70 N. C. 679. Could the state, after the settlement with the sheriff of the state taxes, have revived the liability of the defendants by refunding the money? The answer to this question depends upon whether the money could have been recovered of the state, and it is settled by abundant authority that, in the absence of notice of the misapplication, no such recovery could have been had. Where a trustee illegally transfers trust funds, it is essential to their recovery that the person receiving them should have taken them with actual notice, or under such circumstances as would put him upon inquiry. *Bunting v. Ricks*, 2 Dev. & B. Eq. 130; *Lockhart v. Phillips*, 1 Ired. Eq. 342; *Gray v. Armistead*, 6 Ired. Eq. 74; *Folk v. Robinson*, 7 Ired. Eq. 235. In the present case, there was no notice, either actual or constructive, and a settlement was made in consideration of the payment. This settlement had the effect of discharging the defendant sureties, and the state, having, on the faith of the payment, parted with its security, could have

resisted a recovery. If this be so, it could not voluntarily refund the money, and recover of the defendants. The state, therefore, having no right to recover of the defendants, there is nothing to which the plaintiffs can be subrogated. Suppose the defendant Rogers had borrowed money from a bank, and given these defendants as sureties on the note, and when the note matured he had paid it with county funds in his hands, without the knowledge of the bank or of the defendants. Could the sureties on the county-tax bond of Rogers have recovered of sureties to the note which had thus been discharged? Very clearly not, and such a case differs in nothing, we think, from the case before us. This may appear to be very hard on the plaintiffs, but it is, we hear, a common practice for sheriffs to settle with the state out of the county tax funds; and it is better that sureties who assume such risks should suffer by reason of the unfaithfulness of their principals, than that the court, in the effort to extricate them, should disregard well-settled principles, and introduce uncertainty and confusion into the administration of the laws. After a careful consideration of the case, we are unable to see how this action can be maintained. The judgment of his honor, therefore, must be affirmed.

WELLS v. BOURNE, Sheriff, et al.

(Supreme Court of North Carolina. Oct. 31, 1893.)

SHERIFFS — LIABILITY ON FORTHCOMING BONDS — SECONDARY EVIDENCE.

1. Under Code, § 327, providing that a sheriff who delivers property in controversy in claim and delivery to defendant, without taking a proper bond and requiring it to be justified, becomes "responsible for the defendant's sureties," the sheriff is not liable on a judgment for plaintiff until execution has been issued and returned nulla bona.

2. Such execution and return must be produced in evidence against him, and cannot be proved orally, unless their absence be explained.

Appeal from superior court, Edgecombe county; W. A. Hoke, Judge.

Action by R. S. Wells against H. C. Bourne and others, sureties on his bond as sheriff, for damages from the failure of the sheriff to take a delivery bond on restoring property seized on claim and delivery. Judgment for defendants. Plaintiff appeals. Affirmed.

John L. Bridgers & Son, for appellant.
Gilliam & Son, for appellees.

SHEPHERD, C. J. The defendant sheriff, in delivering the property to the defendant without taking a proper undertaking and requiring the same to be justified, became "responsible for the defendant's sureties," (Code, § 327,) or, in other words, became liable himself as a surety to such undertaking. The measure of liability upon such an undertaking is the delivery of the property to the plaintiff, (if such delivery be ad-

judged,) with damages for its deterioration, or, if such delivery cannot be had, then for the value of the property. Id. § 326. It was necessary, in order to subject the sheriff as surety, to show that execution had been returned unsatisfied. The execution issued to the sheriff of Wilson county, and his return of nulla bona was not introduced, nor its nonproduction accounted for, and his honor properly excluded oral evidence thereof. The law requires such returns, etc., to be in writing, and public policy requires that such evidence shall not be dispensed unless it has been lost or destroyed. The return in this instance is not within the principle of *Pollock v. Wilcox*, 68 N. C. 46, and other cases cited, in reference to the exception where the fact sought to be proved is collateral to the writing. The evidence being properly excluded, there was nothing to show any actual damage sustained by the plaintiff, and the judgment below must therefore be affirmed.

RUSS v. BROWN.

(Supreme Court of North Carolina. Oct. 31, 1893.)

COSTS—ADMISSION OF INDEBTEDNESS—EFFECT.

Where a verdict is rendered against defendant for a sum which in his answer he admitted to be due, he is liable only for costs accrued previous to the filing of the answer and for those of judgment.

Appeal from superior court, Wake county; Henry R. Bryan, Judge.

Action by W. M. Russ against J. B. Brown. From a judgment for defendant, plaintiff appeals. Affirmed.

The following issues were submitted to the jury: (1) Did the plaintiff contract with defendant, as alleged in the complaint? Answer. No. (2) Were the plaintiff's services for the first three months satisfactory to the defendant? A. They were, at \$75 per month. (3) What sum does the defendant owe the plaintiff? A. \$61.50, with interest from January 14, 1892, till paid.

Armistead Jones, for appellant. Battle & Mordecai and J. W. Hinsdale, for appellee.

MacRAE, J. The jury having found, in response to the first issue, and there was no such special contract as was alleged in the complaint,—in other words, that the defendant did not agree to pay the plaintiff \$125 per month for the last nine months in the year, provided defendant was satisfied with plaintiff's services for the first three months,—the second issue became immaterial, and the practical question was as to the value of the plaintiff's services, for it was admitted that plaintiff had served defendant for a year. Upon the third issue, the first and second having been put out of the way, the question and answer were relevant and material. The second exception was not re-

lied upon, and is not set out. The defendant having admitted in his answer that he was indebted to the plaintiff in the sum of \$61.50, and offered to permit judgment to be entered against him for said sum, his honor properly adjudged that defendant was liable only for the costs of the action up to the filing of the answer and of judgment. Affirmed.

HILL et al. v. PIONEER LUMBER CO. et al.

(Supreme Court of North Carolina. Oct. 31, 1893.)

CORPORATIONS—INSOLVENCY—SECURING DEBTS TO DIRECTORS—RIGHTS OF CREDITORS.

The capital of an insolvent corporation is a trust fund for the payment of its debts, and a director of such a corporation, who is also a creditor, cannot take advantage of his superior means of information to obtain a judgment by confession from the corporation, and so secure his debt as against other creditors.

Appeal from superior court, Wayne county; Brown, Judge.

Action by I. F. Hill and others against the Pioneer Lumber Company, G. A. Griswold, and others, to set aside for fraud a judgment confessed by defendant company in favor of defendant Griswold. Defendants demur. Judgment for plaintiffs. Defendants appeal. Affirmed.

Busbee & Busbee, for appellants. Aycock & Daniels, for appellees.

MacRAE, J. This case is presented to us as upon a demurrer, all the facts alleged in the complaint being admitted in the answer, and the conclusion of law contended for by the plaintiff being denied, thus raising the issue of law whether the facts stated in the complaint constitute a cause of action. It is admitted in the pleadings that, at the time of the confession of judgment in favor of G. A. Griswold against the Pioneer Lumber Co., the defendant corporation was insolvent; that said Griswold and one Hall were the only stockholders, and constituted the board of directors; that said Hall was president, and said Griswold was secretary and treasurer, of said corporation; and that Griswold was present at and participated in the meeting at which resolutions were adopted directing Hall, as president, to confess judgment against the company in favor of Griswold. On this state of facts, the plaintiff I. S. Hill contends that the directors became trustees of the corporate property for the benefit of the creditors, and could not take advantage of their knowledge and position to gain an advantage over the other creditors. We advert to the fact that there appear to be but two members of the defendant corporation. But for the admission in the answer, we might inquire whether there has been such an incorporation as is permitted by section 677 of the Code, as this privilege is extend-

ed to any number of persons not less than three. However, as the answer admits that the said defendant is a corporation duly created by the laws of North Carolina, we will proceed at once to the consideration of the only question presented,—whether an insolvent corporation may confess judgment under the statute to a director in the same, who is also a creditor.

There may have been a discussion at an earlier day as to the precise relation in which a director stands to the corporation of which he is an officer,—whether an actual or a quasi trustee for the shareholders, and, in case of the insolvency of the corporation, for the creditors, also. But there can be no doubt that he occupies a fiduciary relation to the company, which, by virtue of his office, he represents in the management of its principal functions; neither can there be any doubt that the capital stock and property of the corporation, in case of its insolvency, constitute a fund, first, for the satisfaction of its creditors, and next for the shareholders. As is said by Mr. Justice Miller in *Sawyer v. Hoag*, 17 Wall. 610: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation; and when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." As it is stated in 2 Story, Eq. Jur. § 1252: "Perhaps to this same head of implied trusts upon presumed intention (although it might equally well be deemed to fall under the head of constructive trusts by operation of law) we may refer that class of cases where the stock and other property of private corporations is deemed a trust fund for the payment of the debt of a corporation, so that the creditors have a lien or right of priority of payment on it, in preference to any of the stockholders in the corporation." This doctrine was clearly stated by Mr. Justice Story in *Wood v. Dummer*, 3 Mason, 311, in 1824, and has been generally followed and announced in the treatises on this branch of the law ever since that time. 2 Mor. Priv. Corp. § 780; 1 Beach, Priv. Corp. § 116. And we are not without authority in our own court for the same principle, as very clearly stated in an interesting and able opinion of the late Mr. Justice Davis in *Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. Rep. 680. This much being established, we may find the duty and liability of the director laid down in the very many, and sometimes diverse, decisions in the leading courts of this country. As he is selected and intrusted with the management of the affairs of the corporation, and

has charge of its property and business, it applies to him that, "whenever confidence is reposed, and one party has it in his power, in a secret manner, for his own advantage, to sacrifice those interests which he is bound to protect, he will not be permitted to hold any such advantage." 1 Story, Eq. Jur. § 323. As a sequence to the foregoing propositions, we find: "An insolvent corporation being indebted to its officers and directors, they executed the notes of the corporation in their own favor, and, having obtained judgment by default, issued execution thereon. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation, held, that this conduct of the officers was a fraud in law, which gave them no preference over general creditors in the distribution." *Hopkin's Appeal*, 90 Pa. St. 69, cited as an illustration under the head of "Liability of Directors for Fraud," 1 Lawson, Rights, Rem. & Pr. § 343. In 17 Amer. & Eng. Enc. Law, at page 122, where very many cases pro and con are cited, this principle is evolved from the weight of authorities: "It may be stated as a general rule that directors of an insolvent corporation cannot, as creditors of such corporation, secure to themselves a preference. They must share ratably in the distribution of the company's assets." In 1 Beach, Priv. Corp. § 2416: "The directors of a company stand in the same relation towards creditors of the corporation that they do to its shareholders, being trustees for the benefit of corporate trustees, also." Mr. Justice Davis, in *Drury v. Cross*, 7 Wall. 299, speaking of the directors of a railroad company, says: "It was their duty to administer the important matters committed to their charge for the mutual benefit of all parties interested, and in receiving an advantage to themselves not common to the other creditors they were guilty of a plain breach of trust." It is true "that a director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure the payment of them, invalid." *Oil Co. v. Marbury*, 91 U. S. 587. And there would be nothing to hinder a director from loaning money and taking liens upon the corporate property as security for its repayment, and in enforcing his lien, provided it was an open and entirely fair transaction; but even then it would be looked upon with suspicion, and strict proof of its bona fides would be required.

There are many decisions, however, which hold that although directors are bound to discharge their duties prudently, diligently, and faithfully, and apply the assets, in case of insolvency, for the benefit of creditors instead of stockholders, yet they are not technically trustees, nor bound to apply the assets ratably among the general creditors.

These decisions hold that they may not only make a preference between creditors, but such preference may be made in their own favor if they be creditors, and in such cases they must act with the utmost good faith. 17 Amer. & Eng. Enc. Law, 122, note. This doctrine was held in *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. Rep. 395, and in a note to this case in 59 Amer. Rep. at page 466, a great many cases are cited, all holding the contrary doctrine to the case last named, and sustaining that to which we adhere; and although it appears, from an examination of some of the cases cited in the American & English Encyclopedia on this subject, that there are very respectable and high authorities which would seem to relieve directors from the burden incident to their trust, we cannot hesitate to adopt the views which seem to us the most consistent with the virtuous exercise of the confidence reposed in them, and hold these fiduciaries to the duty which bids them put self-interest behind that of the creditors, who have not the same means of information, which might enable them to protect themselves. There are many cases cited in the brief of plaintiffs' counsel, and others found in the reports of the different states, which, for lack of decisions in North Carolina, are to us persuasive authority. The latest we have seen is that of the supreme court of Georgia in *Lowry Banking Co. v. Empire Lumber Co.*, 17 S. E. Rep. 968, where the proper distinction is made between a mortgage to a director of an insolvent corporation as an indemnity for liabilities already incurred, and one made in the execution or performance of an agreement or undertaking entered into at or prior to the time when the liability was incurred. It might be, in some instances, greatly to the benefit of the creditors and shareholders that directors should in good faith advance to the corporation funds upon security, to enable it to carry out its undertakings.

To apply these principles to the case in hand. The defendant seems to be a corporation composed of but two persons or members, both of whom were necessarily officers and directors. The advantage to these persons in being erected into a corporation was most probably that they might thereby avoid, not to say evade, personal liability for the debts of the concern. It fails of success, and becomes insolvent, which means that it owes more than its capital can pay. It holds a meeting, in which, of course, both of its members participate, and by a unanimous vote it orders the one to confess judgment, in the name of the corporation, to the other, for a large amount of money "due by note." Will this transaction stand, to the detriment of the other creditors of the corporation? This is the first case of the kind which has come before this court for determination. It is an interesting and important question. By reason of the facility afforded by the statute

for the formation of private corporations, much of the business of the country and of this state is now being transacted through such agencies. They offer many advantages to the stockholders, and in some respects they are fraught with danger to the public, unless they are held within the bounds of law and equity. Here comes in the beneficence of that public policy which places all corporations under the visitation of the courts. Can there be any essential difference between the principle as applied to a confession of judgment under the Code and a mortgage? Most of the cases we have observed were those of mortgages to secure directors or other officers who were creditors of their own corporations. In the few cases which have come before this court under section 677 of the Code, notably in *Davidson v. Alexander*, 84 N. C. 621, it has been held that on account of its liability to abuse, and for the purpose of enabling other creditors to have the opportunity to make full investigation if they should so desire, the requirements of the statute should be strictly complied with. It will be observed that the case of *Sharp v. Railroad Co.*, 106 N. C. 308, 11 S. E. Rep. 530, was the confession of judgment by a corporation to one of its officers, and under circumstances calculated to excite inquiry, if not suspicion; but the appeal was from an order made upon a motion to vacate the judgment, where only matters of irregularity could be considered. To attack the same for fraud, it was necessary to bring an independent action, as has been done in this case. The effect of a confession of judgment is more expeditious in securing a lien, and offers a more immediate means of securing payment of a debt by the issue of execution and sale of the corporate property, than that given by a mortgage, for a mortgage made by a corporation cannot create a preference over antecedent creditors until a reasonable time after registration, which is notice, has been afforded them to protect their rights. Code, §§ 685, 1255. The preference is attempted to be reached by the confession instead of by a mortgage. The preference in this case is to be avoided by whatever means it is sought. In holding that an insolvent corporation cannot prefer one of its directors, who is also a creditor, before other creditors, we are not at variance with the decision in *Blalock v. Manufacturing Co.*, 110 N. C. 99. The fourth headnote in that case is misleading when it says: "A corporation has the right to prefer a just debt to one of its officers, to those of other creditors."¹ The judgment was that the debt of this officer should be postponed until the other creditors had been paid. The law is that, where a corporation is insolvent, its capital is a trust fund for the payment of its debts. A director, creditor upon a debt theretofore existing, cannot take advantage of his super-

¹ But see 14 S. E. Rep. 501.

rior means of information to secure his debt as against other creditors. Judgment affirmed.

KING v. DUDLEY et al.

(Supreme Court of North Carolina. Oct. 24, 1893.)

PLEADING—AMENDMENT—CHANGING CAUSE OF ACTION.

In replevin for a crop raised on land formerly owned by plaintiff's deceased husband, the complaint alleged that the land had descended to plaintiff's three infant children, for whom one of the defendants had been appointed receiver; that she had occupied the tract on which the crop was grown as lessee of the receiver; and that it was withheld from her by the receiver and her second husband. *Held*, that an amendment by which she laid claim to only part of the crop, as having been cultivated by her on the portion of the tract on which the mansion house of her deceased husband was located, and in which she claimed to be entitled to dower, did not assert a cause of action wholly different from that set out in the original complaint, nor change the subject-matter of the action.

Appeal from superior court, Pitt county; George A. Shuford, Judge.

Action by L. C. King against E. B. Dudley, administrator, etc., of John M. King, deceased, and S. V. Joyner, to recover possession of certain personal property and a crop of cotton and corn, alleged by plaintiff to belong to her. The action was originally brought against John M. King and S. V. Joyner, but, King having died, his administrator was substituted. R. R. Cotton was permitted, during the pendency of the action, to come in and defend, claiming as assignee or mortgagee of John M. King. From a judgment in plaintiff's favor, defendant Cotton appeals. Affirmed.

The original complaint read as follows:

'The plaintiff alleges: (1) That she is the wife of John M. King, one of the defendants above named, having intermarried with him on the 11th of December, 1887. (2) That, previous to her said intermarriage, the plaintiff had been the wife of B. S. Atkinson, who died intestate in the county of Pitt on the 11th day of November, 1884, leaving, him surviving, the plaintiff and the following children, his only heirs at law, to wit, Peyton T. Atkinson, Alice Atkinson, and Helen Atkinson, all of which said children are under the age of fourteen years; the said Peyton T. being eleven years old, and residing with his grandmother Allie Joyner, and the said Alice and Helen, aged, respectively, ten and eight years, and residing with their mother, the plaintiff. (3) That at the time of the decease of plaintiff's first husband, the said B. S. Atkinson, he was seised and possessed of two valuable tracts or parcels of land situate in said county of Pitt, one of which was and is known as the 'Bensboro Place,' containing about 1,400 acres, and the other as the 'Moye Place,' containing about 1,200 acres, about 400 acres of the first-

named tract, and about 250 acres of the last-named tract, being now cleared and under cultivation, and said tracts descended to his said children as such heirs at law, subject to the dower of this plaintiff. (4) That on the — day of —, 1888, by reason of the fact that the said infants were owners of said estate and without guardian, on motion made in due proceedings for that purpose in the superior court of said county of Pitt, the judge of said court appointed the defendant Samuel V. Joyner a receiver, to take under his care, control, and management the estates of the said infants. (5) That the dower of the plaintiff in said tracts of land has not, as yet, been laid off to her, and she has been in sole possession of and cultivating the said tracts ever since the death of her said first husband, and that she has been rendering to said infants through the said receiver, by agreement with him, a certain stipulated part of the crops raised on said tracts, in payment and satisfaction of their interests therein. (6) That under and by virtue of an agreement between the defendant John M. King and the defendant S. V. Joyner, receiver as aforesaid, ratified by this plaintiff, she (the plaintiff) has become bound to pay to the said infants, out of the crops raised on said two tracts during the present year, twenty bales of lint cotton, each of the weight of four hundred pounds, ten of which bales are to be paid out of the crop on said Bensboro tract. (7) That, in right of the plaintiff's said possession, her husband, the defendant John M. King, has ever since her intermarriage with him been managing and superintending the cultivating, making, and harvesting of the crops on the said Bensboro tract, and that on the said tract is situate the mansion house and last residence of her said deceased husband. (8) That in corn, fodder, and other effects the plaintiff has furnished, during the present year, at least three hundred and seventy dollars in value for the carrying on of the farming operations in cultivating the crops on said Bensboro tract, besides teams and farming implements necessary to such cultivation. (9) That the plaintiff is the owner of the following property now employed in making said crops, to wit: One black mule five years old, one black mule age unknown, one bay mule six years old, one gray mule six years old, one sorrel mule six years old, one bay horse seven years old, one two-horse wagon, five carts, twelve plows, two cotton planters, and a large number of other farming utensils, of the value of eight hundred dollars. (10) That this plaintiff is informed and believes the crops now standing and growing on said Bensboro tract of land will, when harvested, amount to at least twenty-four thousand pounds of lint cotton, of the value of twenty-one hundred dollars, and two hundred barrels of corn, of the value of six hundred dollars. (11) That, as the plaintiff is advised,

informed, and believes, she is entitled to the immediate possession, management, and control of all the property specified in article nine of this complaint, and of all the crops on the said Bensboro tract. (12) That the plaintiff has demanded possession of the same of the said defendant John M. King, but he has refused, and still refuses, to deliver the same to the plaintiff, and wrongfully withholds the same from her. (13) That, as the plaintiff is informed and believes, the defendant John M. King has been improvidently contracting debts and giving liens on said crops and teams for the payment of the same, without the knowledge or consent of this plaintiff; and that the said defendant claims to be the sole owner of said crops and teams, and threatens to dispose of the same as if they were his own, and to deprive the plaintiff of the same, or of the value thereof. (14) That the defendant John M. King is insolvent, and, if he should so dispose of said property, the plaintiff would be without remedy against him in any action to recover the value of the same."

On the trial, plaintiff was permitted to amend her complaint as follows: "The plaintiff, amending her complaint by leave of the court, alleges, for second cause of action: (1) That on the 11th day of November, 1884, the plaintiff was, and for many years prior thereto had been, the wife of B. S. Atkinson, living with him at his residence on the Bensboro tract of land, in Pitt county. (2) That on said 11th day of November, 1884, the said B. S. Atkinson died intestate at his said residence, seised and possessed of the said Bensboro tract of land and other lands, and leaving, surviving him, the plaintiff, his widow, and Peyton T., Alice, and Helen, their children, minors. (3) That on the death of her said husband the plaintiff became entitled to dower in the said Bensboro tract of land, and in the other lands of which he died seised and possessed. (4) That from the death of her said husband the plaintiff has continued to reside on the said Bensboro tract of land, claiming dower therein, though the same has not been assigned her; and in the year 1889 she was in possession of the mansion house on said land, and of a five-horse crop of the cultivated lands thereof, and has had crops cultivated thereon with her team by croppers or tenants; and that the crops on said land cultivated by her are worth \$——. (5) That the defendant John M. King has wrongfully taken the possession of said crops, and wrongfully and unlawfully withholds the possession thereof from this plaintiff; and that he and the defendant Cotten, who has made himself a party to this action, claiming said crops, threaten to apply said crops to the payment of debts of said John M. King to said Cotten, which debts, as she is informed and believes, the said Cotten claims to be liens on said crops, by virtue of mortgages or crop liens executed by defendant King there-

on. That the defendant King claims the right to and possession of said crops, as she is informed and believes, under an alleged rental of the land on which same were grown from said defendant Joyner, as receiver of the other defendant heirs at law of B. S. Atkinson; and said defendants, as she is informed and believes, claim some interest therein as such heirs at law. That the value of said crop is \$——, and that the plaintiff is the owner, entitled to the immediate possession thereof. The crops claimed are those cultivated by Rufus Phillips, Moses Stancill, Gracie Streeter, alias Atkinson, Allen Foreman, James Jones, and Nancy Leach. In consideration of the amendment being allowed, the plaintiff admits that she is not the owner of the other crops cultivated on said Bensboro farm in 1889, and waives claim to the same."

The amended answer was as follows: "The defendants R. R. Cotten and E. B. Dudley, administrator de bonis non of John M. King, answering the amended complaint, say: (1) The first allegation is admitted. (2) The second allegation is admitted. (3) The third allegation is denied. (4) The fourth allegation is denied. (5) They deny that John M. King or his personal representative wrongfully took possession of said crops, or that either of the answering defendants wrongfully and unlawfully withhold possession of said crops from the plaintiff. The defendant Cotten is in possession of certain crops raised on the Bensboro farm, but they aver such possession is lawful; that the plaintiff has no interest therein, but that the said Cotten is the owner thereof by virtue of certain mortgages, liens, sales, and contracts, which he is ready to produce; that John M. King rented said lands in the year mentioned; and that Cotten has succeeded to all his rights, and that the plaintiff is not entitled to the possession of said crops. (6) And the said defendants reiterate their former answers as if the same were herein written."

The court, among other things, charged the jury that according to the plaintiff's own evidence, and all the evidence in the case, the plaintiff had no interest in the Bensboro farm in the year 1889, further than to have her dower assigned to her therein, and that she was not entitled to any part of the crop or rents and profits from said farm, by reason of the fact that she was the widow of B. S. Atkinson, inasmuch as she had not had dower assigned to her in said land, and since said year had had dower assigned her in another and totally different tract of land; but that if the jury believed from the evidence that she was permitted by S. V. Joyner, receiver of the heirs of B. S. Atkinson, or by John M. King, the lessee of said receiver, to remain in possession of said land, or a part thereof, and by her tenants and with her teams to cultivate five crops upon it, either under a contract with the said lessee or without any express contract

whatever, then she was the owner and entitled to the possession of said five crops, or so much thereof as did not belong to her tenants, and that the title to the same did not pass by the deeds of John M. King to Royster & Strudwick and R. R. Cotten; and that if she was permitted, as aforesaid, to remain in possession of said land and cultivate said crops, she would be entitled to recover the value of her interest in the same and in this action. To this instruction the defendant Cotten excepted. The court also instructed the jury that if the plaintiff was entitled to recover, and the jury should so find, then she was chargeable with rents to the receiver, and she would be entitled to recover only the value of the five crops, less five-thirteenths of the value of 4,000 pounds of lint cotton, to wit, 1,338 pounds of lint cotton, it being admitted that 4,000 pounds of lint cotton was the amount of rent to be paid to the receiver of the heirs of B. S. Atkinson, and that only 13 one-horse crops were raised on the plantation that year. The court was of the opinion that the rent should be apportioned according to the amount of the land cultivated, and not the amount of crops raised, inasmuch as 4,000 pounds of lint cotton was to be paid for the entire farm, and there was no evidence as to the amount of land cultivated, except that 13 one-horse crops were raised on the entire farm, and the plaintiff raised 5 of these. To this charge the defendant Cotten excepted.

Jarvis & Blow, for appellant. Jas. E. Moore, for appellee.

BURWELL, J. The plaintiff in her first complaint alleged that she was the owner of certain stock, wagons, and farming tools, which she described in the ninth article of that complaint, and of all the crops grown on a certain plantation, known as the "Bensboro Tract," in the year 1889, and that the possession of said property was wrongfully withheld from her by her husband and S. V. Joyner. This land had belonged to her former husband, B. S. Atkinson, and upon his death had descended to three infant children. The mansion house of said Atkinson was on this plantation, and no dower had been assigned to the plaintiff. S. V. Joyner had been appointed receiver of the estate of the said infants, and the plaintiff averred that the entire crop was hers under an arrangement between the receiver and herself, she being liable to him for the children's share of the rent. The defendant King died, and his administrator was made a party, and R. R. Cotten interpleaded in the action, and claimed the crop and a portion of the other property under a mortgage made thereon by King to Royster & Strudwick, and by them assigned to him. Upon the trial, after the plaintiff had introduced her evidence, or a portion of it, his honor intimated that she

had failed to establish her alleged title to the crop as lessee of the receiver, and then allowed her, notwithstanding the objection of defendants, (Dudley, administrator, and Cotten,) to file an amended complaint, called by her counsel a "second cause of action," in which she set out that she was the owner, not of the whole crop, but of "a five-horse crop," grown on said plantation in 1889 by her tenants; that in that year she, being entitled to dower in the said tract as well as in other lands of which B. S. Atkinson died seised, occupied the mansion house on said tract, and had a five-horse crop cultivated thereon by her own tenants, who used her stock. We think it was entirely within his honor's discretion to allow this amendment. It did not change the subject-matter of the action. She had claimed all the crop. She, by the amendment, only admitted that a part of it belonged to the defendants. In her original complaint she asserted title to the crop as lessee of the receiver. In her second complaint she set out her relation to the Bensboro tract as the widow of B. S. Atkinson; that her dower had not been assigned to her, but that she did occupy and cultivate a five-horse farm on said land in 1889; and that the crop so cultivated by her was hers, and was wrongfully withheld from her. The effect of this amendment was neither to assert a cause of action wholly different from that set out in the original complaint nor to change the subject-matter of the action, and was allowable. *Kron v. Smith*, 96 N. C. 389, 2 S. E. Rep. 532. It is to be noted that S. V. Joyner, the receiver, who in this action is the representative of the infant heirs of B. S. Atkinson, did not object to this amendment. No exception was taken to the issues submitted to the jury. A careful examination of his honor's charge, as set out in the case, leads us to the conclusion that the law applicable to the matters thus at issue was fairly and clearly stated. There was certainly some evidence that the plaintiff had occupied by her tenants that part of the Bensboro tract on which she claimed to have cultivated "a five-horse crop" by the use of her own separate property. It matters not under what supposed right she occupied this portion of the land, for the purposes of this action, if in fact she did occupy it, and did grow a crop on it. Under the charge of the court and the verdict of the jury, the owners of the land (the heirs of B. S. Atkinson, represented by the receiver) got their rent, and are satisfied. The tenants by whose labor the five-horse crop was raised got their share, and they make no complaint. The appellant has no right to any part of the crop, except as assignee of a mortgage put thereon by J. M. King, plaintiff's husband. He had no better title than King had, and the verdict, founded in part on acts and declarations of the husband, has established the fact that the plaintiff was the true owner of the

crop which in her amended complaint she claims. If, by her conduct, she had estopped herself from asserting title to this crop against Royster & Strudwick, King's mortgagees, or their assignees, it was incumbent on the defendant, by proper issues and proper prayer for instructions, to invoke the aid of that estoppel in defense of his rights. He pleaded it, and, as there is no exception to the charge in this respect, we assume that the trial was in this respect satisfactory to him. What we have said seems to cover all the exceptions taken to the charge, and the exceptions to the admission of evidence were not pressed before us. We find no error, and the judgment must be affirmed.

JETER v. BURGWIN et al.

(Supreme Court of North Carolina. Oct. 24, 1893.)

PARTNERSHIP—AS AGAINST CREDITORS.

One who advances money to another to enable such other to carry out a specified contract for the manufacture of goods, with the understanding that the repayment of the loan is to be contingent on the profits, can be charged as partner by creditors of the manufacturer only as to the specific contract; and where he has not held himself out as a partner, a creditor of the manufacturer, whose debt was incurred after the termination of the contract, cannot hold the lender as a partner, though no notice of the dissolution of the quasi partnership was ever given.

Appeal from superior court, Vance county; George A. Shuford, Judge.

Action by W. L. Jeter against the Henderson Tobacco Company and W. H. S. Burgwyn to charge the defendant Burgwyn as a partner for a debt of the Henderson Tobacco Company. The court intimated that he would charge the jury in defendant's favor, and plaintiff submitted to a nonsuit, and appeals. Affirmed.

W. H. Cheek and H. T. Watkins, for appellant. J. H. Bridgers, for appellees.

SHEPHERD, C. J. The ruling of his honor, which is presented for review, does not involve a consideration of the question suggested in *Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. Rep. 467, and *Cossack v. Burgwyn*, 112 N. C. 304, 16 S. E. Rep. 900,—whether a loan to a partnership, to be paid out of the profits, does in itself, without any holding out, impose upon the lender a partnership liability to third persons. In *Cossack's Case*, after referring to the principle of the ancient English cases, that sharing in the profits was, with one or two exceptions, an absolute test of partnership, we stated that, even under the modern doctrine as declared by the house of lords in 1860 in *Cox v. Hickman*, 8 H. L. Cas. 268, (see *Reams' Case*, supra,) such sharing would at least make out a prima facie case as to the existence of that relationship. If, however, we should go further, and concede that any par-

ticipation whatever in the profits would be conclusive evidence of partnership as to third persons, we would still be unable to perceive any force in the exception to the charge of the court. What constitutes a partnership is a question of law, (*Jones v. Call*, 93 N. C. 170,) and there is nothing in the various contracts between the Henderson Tobacco Company and the defendant Burgwyn, nor in their dealings with each other, that indicates an intention that Burgwyn was to become an actual partner in the said company. The plaintiff, therefore, in order to recover of Burgwyn, must show such circumstances as would constitute a partnership as to third persons, or, as it is sometimes termed in the text-books, a "quasi partnership." The Henderson Tobacco Company was, it seems, engaged in the manufacture and sale of tobacco, and had on the 20th of December, 1889, entered into a contract with one Blackwell to manufacture 300,000 pounds of certain brands of smoking tobacco during the next year, which the said Blackwell was to sell at a price which would net the company an estimated profit of \$39,000. On the day above mentioned, Burgwyn and the company entered into an agreement reciting that the former had indorsed a note for the latter of \$5,000, and that Burgwyn was to advance to the company during the succeeding 12 months an additional \$5,000, to enable the company to carry out the Blackwell contract. It was agreed that the company was to secure Burgwyn to the amount of \$10,000 by conveying to him all of their stock of leaf and manufactured tobacco, and their machinery, fixtures, etc., which conveyance was executed on the same day. In the aforesaid agreement it was further stipulated that the company should execute to Burgwyn a note for \$5,000, which note was also executed on the same date. This note, it is conceded, was independent of the indorsement and advances just referred to, and was not secured by the conveyance of the property above mentioned. It was given in consideration of the indorsement and advances, and there was an apparent conflict in the testimony of Burgwyn and his statement on a previous trial in respect to the manner in which it was to be paid. The plaintiff contended that it was to be paid out of the profits of the Blackwell contract, and that its payment was entirely contingent upon such profits. The defendant Burgwyn insisted that the payment was not so contingent, but was an absolute engagement on the part of the company to pay at all events, and without reference to profits. Assuming the correctness of the plaintiff's view of the facts, and also his contention that such a view would constitute a quasi copartnership, yet it appears from the authorities that such a copartnership would relate only to the Blackwell contract. Lindley, in his work on Partnership, says: "If persons who are not partners agree to share the profits and loss, or the profits of

one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to anything else." Volume 1, p. 49. According to the contention of the plaintiff, the note was to be paid out of the profits arising from the Blackwell contract, and it is clear that if the said contract had terminated before the plaintiff's debt was contracted the defendant Burgwyn, not having held himself out as a partner, would not be liable as such. This would be true, although no notice of a dissolution of the particular quasi copartnership was given. Id. 213. There is no evidence that the said defendant ever so held himself out, or that plaintiff knew anything of the transaction in question. It must follow, therefore, that if the Blackwell contract terminated before the 7th of February, 1891, the date of the contract sued upon, the plaintiff cannot recover. His honor charged the jury that they must so find if they believed the testimony of Burgwyn and Dangerfield, which was explicit and uncontradicted on this point. In this there was no error. Nor was there error in his instruction that clauses Nos. 9 and 10 in the contract of April 29, 1890, and the contract of October 8, 1890, stating that Burgwyn's rights under former contracts should be continued, were no evidence that the contract with Blackwell had not terminated. The plaintiff, upon this charge, suffered a nonsuit, and appealed. For the reasons given we think the nonsuit must stand. Affirmed.

SYME v. RICHMOND & D. R. CO.

(Supreme Court of North Carolina. Oct. 24, 1893.)

RAILROAD COMPANIES—INJURY TO PERSON ON TRACK.

A locomotive engineer, who sees a man on the track, going in the same direction as the train, is justified in assuming that he will step off, to avoid collision, when the danger signals are given; and the fact that a passing train on an adjoining track is making considerable noise does not render the engineer negligent in not attempting to stop his engine, since it is the duty of a person on the track to look, as well as listen.

Appeal from superior court, Wake county; Brown, Judge.

Action by Andrew Syme, administrator, etc., of Thomas Roberson, deceased, against the Richmond & Danville Railroad Company, for the death of his intestate. At the close of the evidence, the court intimated that he would charge that plaintiff was not entitled to recover, whereupon plaintiff submitted to a nonsuit, and appealed. Affirmed.

The following is plaintiff's evidence as to how deceased was killed:

"T. A. Bowen: Live in the country. Work in Raleigh. I came in town by railroad track. Defendant's track is generally used as a walkway. I have been living where I now live six years. Great deal of walk-

ing done by public on defendant's track leading out of Raleigh to the west. The North Carolina Railroad track and the Raleigh & Augusta Air-Line track are eight or ten feet apart. Ties project about eighteen inches further. There is a ditch on side of track, and embankment runs up. Same on both sides. No pathway on either side of the tracks. The tracks of both roads are on one bed. Boylan's bridge spans both roads,—the North Carolina and the Raleigh & Augusta. The two tracks diverge, going east, after passing under the bridge. The deceased was killed forty or fifty yards west of the bridge. I saw the deceased when he was killed. The defendant's engine was coming from the North Carolina Railroad depot, going west. The tender was ahead, and engine backing. Roberson, the deceased, was going west. He had a bucket on his left arm. When Roberson was struck, there was a freight train on the Raleigh & Augusta track, passing along by the side of the deceased. I was fifty yards west of the deceased. I was coming to Raleigh, going east. Deceased was going west. The engine of the Raleigh & Augusta freight train was off against me, going west, when deceased was struck. Raleigh & Augusta train had fourteen or fifteen cars. Don't know exactly how many. I saw Roberson's face. It was towards me. He was walking briskly up the road towards me. The Raleigh & Augusta freight train was making considerable noise. When the engine and tender of defendant's struck deceased, it passed over him, and came nearly to a stop about thirty yards from deceased. You can't see the Raleigh & Augusta train from up the road until it comes under the bridge. When I first saw defendant's engine and tender, it was east of the bridge. From where engine and tender was when I first saw it, a man could see to where I was. The deceased was between me and the said engine. Don't think a person can see all the way to North Carolina Railroad depot from bridge. Distance from bridge to depot, 300 to 400 yards. A person on an engine on North Carolina road situated halfway between depot and said bridge can see to and under said bridge. It is possible to see a freight train from the Richmond & Danville depot from Hargett Street station to bridge. When I first saw Richmond & Danville engine and tender, it was thirty-five or forty yards from deceased, and had just got to bridge. From this point to where deceased was is open and straight, and Roberson could have been seen perfectly plain. The Raleigh & Augusta train was passing by deceased when Richmond & Danville engine struck deceased. The Raleigh & Augusta train had about half of it passed deceased. The freight train and engine and tender were running neck and neck. I waved my hand once or twice to deceased. He did not pay any at-

attention to it. I don't know whether deceased stepped over from Raleigh & Augusta track or not. I heard the whistle of Richmond & Danville engine very plainly, and deceased was between me and engine. I motioned several times to deceased to get out of way, and he did not do so. There was plenty of room on the outside of Richmond & Danville or of North Carolina track for deceased to have stepped off. There was room on side of embankment and in the ditch, which was two feet deep. I stepped in ditch, and was not hurt. Engine passed me before it stopped. I was on same track as Roberson. If deceased had been on Raleigh & Augusta track, there was room on outside of that track for deceased to have stepped in, and saved himself. I heard whistle of engine of defendant blow twice, plainly. Engine had been slowed down before it struck deceased, because it stopped about thirty yards after it passed him, and after it passed me. Buck Howell was on same track, between me and Roberson. When engine blew, Howell also got off track, and so did I. Deceased did not. Both of us were further from Richmond & Danville or North Carolina engine than deceased. At the time Richmond & Danville engine blew, the Raleigh & Augusta engine was just about up in front of me. The train was passing Howell, and also deceased.

"George Davis: Live in the Fourth ward of Raleigh. Roberson was killed about 6:30 A. M. on October 9, 1891. I was ahead of him, going west on North Carolina track. I saw freight train on Raleigh & Augusta track. Was about 170 feet ahead of Roberson. Did not see deceased when he got on track, or when he was killed. I was going on up the road west. The Raleigh & Augusta train was going west. I heard engine on North Carolina track blow three times. It was then going west. I looked back, and saw nothing between me and the engine. I thought it was blowing for me to get off. I was right smart distance ahead of North Carolina engine. I am certain I saw no one between me and that engine. I stepped off on outside in ditch, and engine passed me. I got on track again, and looked back, and saw something on track. It was Thomas Roberson, dead. His whole body was between the rails. There was a hole in his head, and his foot cut off. His head was towards the east. The engine on the North Carolina Railroad did not stop. As it passed me, it was running fast,—thirty to thirty-five miles an hour. The shifting engine on the North Carolina track was going faster than Raleigh & Augusta freight train. When I started on the track, Thomas Roberson got on the track behind me, and I started in same direction that he did. From Boylan's bridge, and one hundred yards east of it, a person could see straight ahead to Cox

avenue, nearly three-fourths of mile. There was room on outside of North Carolina track to get off in ditch, just as I did. When I heard engine blow on North Carolina track, the train on Raleigh & Augusta track was passing me, and the engine of that train had got beyond me going west. Cross-Examination: The freight was running pretty fast. Can't exactly say how fast it was running. About fifteen miles an hour. I met two men coming towards city, walking in ditch, one behind the other. They were thirty yards from bridge, west. The engine on the Raleigh & Augusta track was pulling fourteen cars, and was coming under bridge when I first saw it. It was exhausting very heavily. Did not see Richmond & Danville engine when I first saw Air-Line train. I looked back to see if Raleigh & Augusta train was on track I was on. I saw a man on the track behind me. I had got only a few steps before Raleigh & Augusta engine passed me. It was good daylight. Could see very plainly. The engine on North Carolina road was not far from the bridge, when I heard it blow. It had just passed under bridge going west, and then blew not far from bridge. The body of the deceased was lying about as far as from here to courthouse steps from bridge. This distance is about eight-five feet. The freight train on North Carolina or Richmond & Danville road came by the agricultural college about a half an hour after I got to work on building out there."

The defendant introduced the following evidence:

"A. F. Fowler: I am a shifting engineer on the Richmond & Danville Railroad. On October 9, 1891, when the man Roberson was killed, I had started out from depot for lantern lights on switch targets. I did not stop until I passed over deceased. At Boylan's bridge I first saw deceased. He was not on our track. He was coming from Raleigh & Augusta track, and got on ours. He was going west, and got on under bridge. As soon as I saw him get on track, I told the fireman to ring the bell. He did so. I blew whistle,—short, sharp blows,—the danger signal. As soon as I saw he did not notice signal, I reversed engine at once, at the risk of bursting out cylinder. I threw steam on the reverse to stop the quicker, and applied the brakes. When he first got on track, I did not stop engine, because I supposed he would obey signal and get off as I blew and rang bell. As soon as I saw he did not notice signal, I used every appliance to stop. The engine came nearly to a stop just after passing over body, after running about the length of the engine. After I saw I had passed over body, I went on, and got switch lights, and came back for body. I was going twelve miles per hour when I reversed. I got to body, and laid it one side, and sent for coroner. Cross-Examination: I am still employed by the Richmond & Danville Rail-

road. I was looking the way I was going, (witness showed how he was sitting, with face towards the side, and leaning back out of window, in which position he could readily see in the direction the engine was going,) and was sitting on my seat. My body was facing towards engine, and I looked out window, with head out, looking west,—the direction I was going,—and my hand on throttle. I don't know whether seat is higher than tender or not. I was about thirty yards from bridge when the engine of the Raleigh & Augusta train went under bridge. The deceased had just then stepped upon our track, and I then blew, and fireman rang bell. Our freight train from Greensboro was due at 6:45 or 6:47 A. M. I suppose I was thirty yards from deceased when I commenced blowing whistle. When I first saw deceased, he was about fifty yards off, coming from Raleigh & Augusta track, where it comes away from our track. The deceased could have seen my engine, and which way it was going, before he got on our track. He must have been about twenty yards from our track. It requires about twenty-five or thirty yards to stop my engine. I blew whistle as soon as he got on our track, and continued to blow. I had fifteen minutes to go and get switch lights, and get back, before our freight was due. This was plenty of time. Raleigh & Augusta train went on. I never did pass it. The body was about twenty-five yards from bridge when struck, I think. It was about thirty yards from bridge when we got hold of body. It was about twenty-five yards from bridge, east, when I first saw deceased, and blew and rang bell. I did not stop at first, but blew and rang bell. As soon as I saw deceased did not notice this, I had got nearer deceased, about twenty yards or so from him. Can't tell, exactly. Then I reversed engine and applied brakes. The engine passed nearly over the body before coming to a stop. I saw the man had been struck before I could stop. I started up to get lights, as ordered, before freight could get here, and I came back at once, and removed the body. If deceased had stopped under the bridge between the two tracks, there was plenty of room, and he would not have been hurt.

"Charles Hardie: I was the fireman on switch engine. Was putting in coal in the furnace when Fowler told me to ring the bell. I did so. Fowler reversed engine and put on steam to stop. He, before that, blew alarm whistle. I have been fireman now eighteen months. Our freight was due there at 6:45. I don't know how far west of bridge deceased was, when stricken. The body was twenty-five or thirty yards west of bridge, when found.

"Alex Henly: I was on engine that morning. Was sitting on fireman's box. When I first saw deceased, we were close on him. I was not looking before. I heard engineer

shut off, and then I looked. I was sitting on fireman's box, and not looking west."

W. N. Jones and Battle & Mordecai, for appellant. Busbee & Busbee, for appellee.

EVERY, J. Counsel for plaintiff did not contend that the intestate was deficient in any of his senses, or wanting in physical power or mental faculties; and, if they had, there would have been no evidence to support the contention. A priori, the engineer had no reason to think him other than a man possessed of all of the usual powers of mind and body, and was warranted in assuming that he would step off the track, and avoid a collision, until it was too late to save him. *McAdoo v. Railroad Co.*, 105 N. C. 145, 11 S. E. Rep. 316; *High v. Railroad Co.*, 112 N. C. 385, 17 S. E. Rep. 79. When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law, as a rule, imputes the injury to his own negligence. *Meredith v. Railroad Co.*, 108 N. C. 616, 13 S. E. Rep. 137; *Norwood v. Railroad Co.*, 111 N. C. 238, 16 S. E. Rep. 4. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of want of ordinary care on the part of the defendant, while, in any aspect of the case, the plaintiff's intestate was negligent in getting upon the track in front of the engine without looking, and exposing his person to injury, when he might have seen that it was approaching, and have avoided the collision by stepping off the track. We cannot yield to the ingenious suggestion of the able counsel for the plaintiff that the engineer must have seen the long freight train, and known the fact that the engine was "exhausting heavily," so as to render intestate so insensible to the approach of the other train as if he had been deaf, and that, therefore, the defendant's engineer was negligent in not attempting earlier to stop the engine. But it was the duty of the intestate to look as well as listen, under the circumstances, and he was negligent if he failed to use his eyes as well as his ears. *McAdoo's Case*, supra. On the other hand, the engineer was justified in assuming that intestate had looked, had notice of his approach, and would clear the track in ample time to save himself from harm. Even when a railroad company violates a statute or an ordinance by running at a given rate of speed in a town or city, negligence will not be presumed, in all cases. 2 Wood, Ry. Law, 1097, and note. But in our case there was no evidence of the existence of a town ordinance, nor was any statute forbidding such running cited by counsel; and no matter what the speed of the engine may have been, it did not appear that the accident occurred in a populous part of the city, or when there was at the time, or usually, such a number of persons using the track that an individual walking upon

It would not be able readily to see a moving train, or that all who used it as a foot-way could not secure their safety by stepping off of the track. On the contrary, the undisputed evidence is that the plaintiff's intestate had but to step to the ditch to place himself beyond the pale of danger, whether he was walking on the Raleigh & Augusta Railroad track, or that of the North Carolina Railroad. We think that the judgment should be affirmed.

LANE v. ROGERS.

(Supreme Court of North Carolina. Oct. 24, 1893.)

WITNESS—TRANSACTIONS WITH DECEASED.

In an action to recover money alleged to have been deposited with a deceased person, evidence by plaintiff that the deceased handed her a book containing memoranda of the sums deposited by her is evidence as to a transaction with the deceased, and is inadmissible, under Code, § 590.

Appeal from superior court, Wake county; Brown, Judge.

Action by Mollie J. Lane against Candis Rogers, executrix, etc., of Andrew Jackson, deceased, and her husband, Luke Rogers, to recover \$1,025, alleged to have been deposited by plaintiff with Andrew Jackson. There was a verdict and judgment in defendant's favor, and plaintiff appeals. Affirmed.

It was admitted that Andrew Jackson died, leaving a will, and that Candis Rogers was the sole legatee and devisee under said will, and that she was appointed and qualified as executrix thereof, and that defendant Luke Rogers was the husband of the said Candis, and that she has children by him, the said Luke. On the trial the plaintiff introduced a memorandum book containing a statement of the sums alleged to have been deposited with the said Andrew Jackson by the plaintiff, amounting to \$1,023, and purporting to have been signed by the said Jackson, and witnessed by C. H. Lane, now the husband of the plaintiff. Said C. H. Lane, being offered as a witness for the plaintiff, testified that on the morning of the day of his marriage to the plaintiff the said Jackson handed this book to plaintiff in his presence. The plaintiff, being sworn as a witness for herself, was asked, "State when and where you first saw the book now shown you," the book being the one about which C. H. Lane had just testified; and the object of the question, as stated by the plaintiff's counsel, was to show that she first saw the book in the possession of Andrew Jackson at the time he handed it to her, on the day of the marriage. The evidence was objected to under section 590 of the Code, and the objection was sustained, and the evidence excluded. Plaintiff excepted. The plaintiff further offered to show by C. H. Lane, recalled as a witness for her, that Luke Rogers had said to him that the

plaintiff's claim was just, and ought to be paid. Upon objection this evidence was rejected, and the plaintiff again excepted.

Batchelor & Devereux and S. G. Ryan, for appellant. Battle & Mordecai, for appellee.

CLARK, J. The plaintiff was asked, "State when and where you first saw the book now shown you." The object of the question, as stated by plaintiff's counsel, was "to show that she first saw the book in the hands of defendant's intestate at the time he handed it to her on the day of the marriage." The intestate's "handing her the book" was a personal transaction between the plaintiff and the deceased, and the question being asked, as stated by her counsel, with a view of bringing out that as a part of her statement, it was properly ruled out, under section 590 of the Code. It is true it was competent to show by her that she saw the book in the hands of the intestate on the day of her marriage, (*Gray v. Cooper*, 65 N. C. 183; *March v. Verble*, 79 N. C. 19; *McCall v. Wilson*, 101 N. C. 598, 8 S. E. Rep. 225,) since that would not have been a transaction with the intestate. But the plaintiff's husband had testified that the book had been handed to the plaintiff by the intestate, and the object seems to have been to corroborate him by her testimony embracing that fact. If the object had been only to indicate the time, that could have been done by stating simply that she saw the book in the hands of the intestate on the day of the marriage. But, whatever the object may have been, we can only pass upon the inquiry as made. That the plaintiff did not properly restrict the inquiry, or amend it, so as to exclude the incompetent matter, was her own fault. The other exception is without merit, and was not relied on in this court. No error.

SIMMONS v. NORFOLK & B. STEAM-BOAT CO.

(Supreme Court of North Carolina. Oct. 24, 1893.)

CORPORATIONS—DISSOLUTION—REMOVAL OF OFFICER FROM STATE—SUMMONS—RETURN.

1. In view of the fact that many statutes plainly contemplate that corporations chartered by the state shall keep their principal offices, and certainly some of their agencies, within the state, the failure of a domestic corporation to maintain its principal office within the state, as required by its articles of incorporation, and the withdrawal of all agencies from the state, is an abuse and misuse of its corporate franchise, within the meaning of Code, c. 16, § 694, authorizing a stockholder to institute proceedings for the dissolution of a corporation "for any abuse of its powers, to the injury of plaintiff or of the corporation."

2. Where a summons in a special proceeding is improperly made returnable to the superior court in term, it is proper for the judge to remand the proceedings with directions that the summons be amended so as to make it returnable before the clerk on a day certain.

Appeal from superior court, Martin county; G. H. Brown, Jr., Judge.

Action by Dennis Simmons against the Norfolk & Baltimore Steamboat Company for a dissolution of the defendant corporation, and the appointment of a receiver. From an order appointing a receiver, defendant appeals. Affirmed.

Batchelor & Devereux and Jas. E. Moore, for appellant. Don. Gilliam, for appellee.

SHEPHERD, C. J. This proceeding is brought for the purpose of obtaining a decree of dissolution against the defendant company, and the most important question to be considered is whether the complaint sets forth facts sufficient to entitle the plaintiff to the relief prayed for. The defendant was incorporated under the general act for the formation of corporations, (Code, c. 16,) and it is therein provided, among other things, that all corporations so created may be dissolved by "special proceedings" instituted by any corporator "for any abuse of its powers to the injury of the plaintiff or of the corporators, or of its creditors or debtors." Section 694. The articles of incorporation provide that the business of the defendant shall be the "transportation of produce and merchandise and all other kinds of freight and passengers to and from the various landings on the Roanoke river in North Carolina to and from the cities of Norfolk, in Virginia, and Baltimore, in Maryland, and to and from said cities to the said landings, and to and from all other points intermediate between said river and said cities; and its principal place of business shall be at Williamston," in this state. The plaintiff, who is one of the corporators, alleges that in 1887 the control and management of the defendant corporation passed into the hands of nonresident stockholders, "since which time the original aim and purpose of said corporation has been departed from, the value of the company's property greatly depreciated, the business fallen away, and its general affairs gradually, but steadily, grown worse." It is further alleged "that for more than a year now past the defendant company has altogether ceased to operate said ports, or any of them, within this state; that no single agency or place of business has been maintained within this state, and that the town of Williamston has been absolutely discontinued as the principal place of business of said company, as required by said article of incorporation." "It is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they are incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for breach of trust. The duties assigned by an act of incorporation are conditions annexed to the grant of the franchises conferred, (Ang. & A. Corp. § 776,) and duties implied are

equally obligatory with duties expressed, and their breach is visited by the same consequences." Attorney General v. Petersburg & R. R. Co., 6 Ired. 456; Field, Corp. 456, note. It has been held, without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records, and its principal officers, within the state which incorporated it, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporation. State v. Milwaukee, L. S. & W. Ry. Co., 45 Wis. 579. In commenting upon this decision, Mr. Morawetz (Priv. Corp. 361) says: "This doctrine is correct only provided the legislature has expressed the policy of the state by some special enactment, or by a general system of legislation regarding incorporated companies. There is no such rule at common law. It is always implied in the grant of a charter of incorporation, where there is no indication to the contrary, that the company shall have its central office or place of management in the state under whose laws it was organized. This, however, is merely a rule applicable to the construction of charters in determining the intention of the corporators and of the state, and is not an arbitrary rule of law." Accepting the principle as thus modified, and applying it to a corporation doing business, like the defendant, exclusively under a charter granted in this state, it would seem very clear that by the policy of our laws, as indicated by "a general system of legislation," the duty referred to is imposed upon the defendant. We have many statutes which plainly contemplate that such a corporation shall keep its principal place of business—certainly some of its agencies—within the limits of the state. Of such are sections 362 and 363 of the Code, relating to the attachment of shares of stock in corporations, and the interests and profits thereon, and authorizing the service of a certified copy of the warrant of attachment on "the president or other head of the association or corporation, or with the secretary, cashier, or managing agent thereof." Of such also are the provisions of section 694, Id., authorizing the dissolution of the corporation upon the return of an execution unsatisfied upon a judgment docketed in the superior court of the county "where it has its only or principal place of business." Reference may also be had to the visitatorial powers conferred upon the board of railroad commissioners, which, together with other provisions of the law, clearly show that a corporation of this character cannot entirely withdraw all of its officers and agencies from the state. The decision in State v. Milwaukee, L. S. & W. Ry. Co., supra, was based to some extent upon similar statutory provisions, and the

general principle of that case has been here discussed for the purpose of showing that the express provision of the charter of the defendant, requiring its principal place of business to be at Williamston, in this state, may well be sustained by the general policy of our laws. The case is also direct authority that such a violation by a corporation of its charter is "an abuse and misuser of its corporate powers," and is within the spirit and meaning of our statute upon the subject. Without considering, then, the other causes assigned in the complaint, we are of the opinion that the persistent violation of the charter in withdrawing, as alleged, the principal place of business from Williamston, and all of its agencies from the state, would authorize the court to decree a dissolution of the defendant corporation. Attorney General v. Petersburg & R. R. Co., *supra*.

The summons in this proceeding was improperly made returnable to the superior court in term, and his honor remanded the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. This order, together with the other directions to the clerk, is fully sustained by the principle laid down in *Epps v. Flowers*, 101 N. C. 158, 7 S. E. Rep. 680. The judgment must be affirmed.

KINARD v. COLUMBIA, N. & L. R. CO.
(Supreme Court of South Carolina. Nov. 3, 1893.)

RAILROAD COMPANIES — ACCIDENT AT CROSSING — STATUTORY LIABILITY — PRACTICE IN CIVIL CASES — NONSUIT.

1. A motion for a nonsuit cannot be considered, where the grounds on which it is based involve the determination of a question of fact.

2. Injuries received at a railroad crossing by being thrown from a vehicle, on the frightening of the horse at an approaching train, are not caused "by collision with the engine and cars of a railroad corporation at a crossing," within Gen. St. § 1529, where there was no actual collision with either engine or cars.

Appeal from common pleas circuit court of Newberry county; James F. Izlar, Judge.

Action by Samuel J. Kinard against the Columbia, Newberry & Laurens Railroad Company for personal injuries. Judgment for plaintiff. Defendant appeals. Reversed.

Lyles & Muller, for appellant. Johnstone & Cromer, for respondent.

McIVER, C. J. This was an action to recover damages for injuries sustained by reason of the alleged negligence of the defendant company. The allegations contained in the complaint are, substantially, as follows: That, on the day the disaster occurred, plaintiff was traveling in a buggy along the public highway which crosses the railroad a short distance below the town of Prosperity, and was on the roadbed, ready to cross the railroad, when a locomotive with a train of cars

approached, which the officers and agents of defendant company negligently caused to approach the said crossing at great speed, and negligently and carelessly omitted, while approaching the said crossing, to give any signal by ringing the bell or sounding the whistle, by reason whereof the plaintiff was unaware of their approach, and that in consequence thereof the plaintiff, while attempting to avoid a collision, and to control the mule by which his buggy was drawn, was thrown from his buggy to the ground with such force as to break his collar bone. At the close of plaintiff's testimony, defendant moved for a nonsuit, upon two grounds: (1) That there was no testimony tending to show "that this accident comes under the provisions of the act relating to that matter; * * * that the act was not intended to meet cases of simply frightening animals." (2) That "the testimony shows that the accident was caused by Mr. Kinard's own handling of the mule, rather than as resulting from the approach of the train." The motion was refused by the circuit judge upon the ground that the plaintiff "was there intending to cross," and after hearing the testimony of defendant, and that of the plaintiff in reply, the case was submitted to the jury, who found a verdict in favor of the plaintiff; and, judgment having been entered thereon, the defendant appeals, alleging error in the refusal of the motion for a nonsuit.

The plaintiff's testimony tended to show that he was traveling along the public highway, intending to cross the railroad track, at the crossing near which the disaster occurred, in a buggy drawn by a mule, but before he reached the crossing, and before he had got upon defendant's roadbed, he stopped to speak to a friend at a point some 15 or 20 feet from the railroad track, and while there, seeing the train approaching at a distance of some 50 yards or more, he attempted to turn his buggy, when the singletree or the traces broke, (the plaintiff saying the former, while his witness in the buggy with him said the latter,) whereby the mule was released, and the shafts of the buggy were run into a bank, and the plaintiff was thrown from the buggy, and received the injury complained of. There was also testimony tending to show that the signals required by section 1483, Gen. St.,—ringing the bell or blowing the whistle,—were not given by the approaching train; that it was not a regular, but an extra, train; and that plaintiff had no knowledge of its approach until it reached a point some 50 yards distant from the crossing,—too late, considering the speed at which it was running, for the plaintiff to venture to cross in front of it. There was also testimony tending to show that plaintiff's mule was frightened by the approaching train, and this was probably the reason why plaintiff attempted to turn his buggy in order to get further from the railroad track. From

this outline of the leading facts of the case, gathered from the testimony, all of which may be found in the "case," the sole question for us to determine is whether there was error in refusing the motion for a nonsuit. It is quite clear that the second ground upon which the motion for a nonsuit was based cannot be sustained, as that would involve a determination of a question of fact,—whether the plaintiff was guilty of contributory negligence,—and it is too well settled by numerous cases that such a question cannot be considered on a motion for a nonsuit to need any citation of the cases.

The question is therefore narrowed down to the inquiry whether there was error in refusing to sustain the first ground of the motion, to wit, that there was no testimony tending to show that the action could be sustained under the provisions of section 1529 of the General Statutes, for the language used by the circuit judge in refusing the motion shows very clearly that he considered the question in that aspect solely. In speaking of the plaintiff he said: "If he had crossed over, and been on the other side, I am satisfied that the statute would not cover his case, but he was there intending to cross." From this it is apparent that his honor construed the section as giving a right of action to a person who was injured at a railroad crossing, if he was there intending to cross. We cannot concur in this construction, for the statute, in express terms, only gives the right of action therein provided for to a person injured, either in person or property, "by collision with the engine or cars of a railroad corporation at a crossing," and makes such corporation liable only for damages "caused by the collision." When, therefore, as in this case, there was not the slightest evidence of any collision at all, either with the engine or cars of the defendant company, it is very clear that the plaintiff had no cause of action under the statute, and that the circuit judge erred in ruling otherwise. Regarding, therefore, the action as an action under the statute, as it was manifestly considered by the circuit judge, the judgment below must be reversed for error in his ruling upon that subject. But as it may be possible that the plaintiff will be able to maintain his action, without reference to the statute, as an action for injuries sustained by reason of defendant's negligence at common law, a nonsuit will not now be granted, but the case will be remanded for a new trial, when the question which has not yet been considered by the circuit court, and cannot, therefore, be now considered by us, to wit, whether the plaintiff can maintain his action at common law, may be made. It will be observed that there is a great difference in the defense to an action under the statute and to an action at common law. In the former, in order to sustain the defense of contributory negligence, it would be necessary to show either gross negligence on the

part of the plaintiff, or that he was acting in violation of law, while in the latter such a degree of negligence would not be required to be shown. It would therefore be manifestly unjust to allow a judgment recovered in an action erroneously treated as an action under the statute to stand, notwithstanding such erroneous ruling. It may be, in this very case, (though of course we intimate no opinion upon the subject,) that, while the defendant would not be able to show such gross negligence on the part of the plaintiff as would protect it in an action under the statute, yet a lesser degree of negligence, sufficient to protect it in an action at common law, might be shown. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

McGOWAN and POPE, JJ., concur.

TILLINGHAST v. BOSTON & PORT ROYAL LUMBER CO. et al.

MOORE v. S. C. FORSAITH MACH. CO.

(Supreme Court of South Carolina. Nov. 3, 1893.)

CONFLICT OF LAWS—CONTRACTS—PLACE OF MAKING AND PERFORMANCE—BREACH—WRITS—SERVICE OF PROCESS OUT OF STATE.

1. A promise to pay, contained in a telegram sent from Massachusetts to South Carolina, is a contract made in Massachusetts; and no cause of action can arise thereon in South Carolina, as the place of making is, presumably, the place of performance.

2. A contract cannot give rise to a cause of action until there has been some breach of such contract.

3. The courts of South Carolina cannot acquire jurisdiction of a foreign corporation, which has no property in the state, simply by personal service on such corporation in another state. *Pennoyer v. Neff*, 95 U. S. 714, followed.

Appeal from common pleas circuit court of Hampton county; J. H. Hudson, Judge.

Actions by W. S. Tillinghast against the Boston & Port Royal Lumber Company and the S. C. Forsaith Machine Company, and by James W. Moore against the S. C. Forsaith Machine Company, on contracts. On rehearing of a judgment which affirmed an order setting aside the service of summons and complaints, and dismissing the complaints. Reaffirmed.

The following is the letter referred to in the opinion: "Manchester, N. H., 5-5, '92. W. S. Tillinghast, Esq., Hampton C. H., S. C.—Dear Sir: In accordance with our promise by wire, we write you concerning the subject of your telegram to us on the 27th, reporting that Mr. Mitchell has returned, and given us a statement of affairs at Alameda. We are not clear from him as to your claims, nor is there anything in your message to make same clear; and we ask you to have the kindness to advise us fully

what you do claim from this company, and what you claim from the Boston and Port Royal Lumber Company, as we are willing to pay anything that is just therein. But as we understood a reference was to be made, as agreed upon by both parties, as to what would be proper in the amount of fees, but this does not appear to materialize, will you have the kindness, therefore, to give us fully a statement of your claims, and they shall have prompt attention upon our part. Yours, respectfully, W. E. Drew, Agent."

C. J. C. Hutson, L. F. Youmans and James W. Moore, for appellants. Jeff. Warren and C. P. Sanders, for respondents.

McIVER, C. J. These two cases were originally heard and considered together by this court during November term, 1892, and on the 21st of February, 1893, this court filed its opinion affirming the orders appealed from, as may be seen by reference to 17 S. E. Rep. 31. Subsequently, the appellants filed petitions for rehearing, which were granted, (17 S. E. Rep. 724, 725,) and the cases were reheard during the present term of this court. As we still think there are some differences in the facts of the two cases, notwithstanding the opinion of counsel to the contrary, we are of opinion that it will be better to consider the cases separately.

In the Tillinghast Case, it appears that on the 7th of May, 1892, the plaintiff issued a summons against the two companies named as defendants herein, calling on them to answer the complaint, dated—and, we suppose, filed—on the same day. In that complaint the plaintiff alleges that he is an attorney at law, practicing in the courts of this state; that as such he had previously instituted an action in the name of one W. R. Smith against the Boston & Port Royal Lumber Company, alleging insolvency of said company, waste of assets, and asking that a receiver be appointed to take charge of said company's property for the protection of the rights of creditors and shareholders of said company; that he applied for and obtained an order for the appointment of a temporary receiver, who took charge of said assets; that, prior to the day agreed upon for the hearing of the motion for the appointment of a permanent receiver, all the parties interested, either as shareholders or creditors of said Boston & Port Royal Lumber Company, met in the city of Boston, and settled their conflicting claims and interests; that as soon as the said adjustment was made, all parties being desirous that the proceedings for the appointment of a receiver should be discontinued, a telegram was sent by the S. C. Forsaith Machine Company, one of the defendants in the receiver case, that they would be responsible for the expenses of said case, which expenses included plaintiff's fee in said case, which expenses were to be ascertained by a reference; that on receipt of

said telegram an agreement, in writing, was entered into between the plaintiff herein, the said W. R. Smith, plaintiff in the receiver case, and E. F. Warren, Esq., attorney for both of the defendants herein, a copy of which is exhibited as a part of the complaint; that, upon the delivery of said agreement to the plaintiff herein, he took an order discontinuing the receiver case, whereupon the assets of the Boston & Port Royal Lumber Company were surrendered by the temporary receiver; that the plaintiff herein, without success, attempted to have the reference contemplated by said agreement, and finally one Hiram Mitchell, who came here as agent, and was the agent of the S. C. Forsaith Machine Company, refused to have the reference, and left the county, returning to New Hampshire; that the Boston & Port Royal Lumber Company is a foreign corporation, created under the laws of the state of Maine, and doing business and owns real and personal property in Hampton county, S. C.; that the S. C. Forsaith Machine Company is a foreign corporation, created under the laws of the state of New Hampshire, and owning an interest in the stock or property aforesaid of the Boston & Port Royal Lumber Company in Hampton county aforesaid; that plaintiff is a resident of South Carolina, and the contract for the payment of his fee, as aforesaid, arose and was made in Hampton county, S. C.; and, after other allegations as to the value of his professional services, the plaintiff demanded judgment for the same. The following is a copy of the telegram referred to in the complaint: "Boston, Mass., April 9, 1892. To E. F. Warren, Hampton, S. C.: Discontinue all suits against lumber company, and get the matter out of court, and we will be responsible for cost, to be ascertained by reference, as the lumber company will resume business. S. C. Forsaith Machine Company. Manchester, N. H.,"—and the following is a copy of the agreement entered into after receipt of said telegram: "The state of South Carolina, county of Hampton. In common pleas. W. R. Smith, Plaintiff, vs. The Boston & Port Royal Lumber Co. Whereas, all parties interested in above case have agreed to a settlement thereof; and whereas, the S. C. Forsaith Machine Company, of Manchester, N. H., has agreed to pay W. S. Tillinghast, plaintiff's attorney, his fee herein, (it being conceded by all parties hereto that such fee is to be paid, under the law, out of the general assets of the Boston & Port Royal Lumber Company,) such fee to be ascertained by a reference; and whereas, it is agreed that the Boston & Port Royal Lumber Company will protect W. R. Smith in his interest as the same may appear: In consideration of the foregoing, the above-entitled cause is to be withdrawn. It is further agreed that said reference to ascertain the amounts of said fees and costs will be held within next week, before —,

if said fees and costs cannot be adjusted without such reference. [Signed] W. S. Tillinghast, Plaintiff's Attorney. E. F. Warren, Defendant's Attorney. W. R. Smith." On the 5th of July, 1892, upon the usual affidavit of the plaintiff, an order of publication was granted by the clerk of the court of common pleas for Hampton county, S. C., requiring publication to be made in the Manchester Daily Mirror, a newspaper published in the city of Manchester, state of New Hampshire, once a week for six successive weeks, and that a copy of the summons and complaint be forthwith deposited in the post office in Hampton, addressed to the S. C. Forsaith Machine Company, Manchester, N. H. Such communication appears to have been sent by registered letter on the 8th of July, 1892, but it does not appear that any publication was ever made; the plaintiff relying upon service of the defendant company in New Hampshire in lieu thereof, as appears by the affidavit (a copy of which is set out in the "case") of one Daniel T. Healey, sheriff of the county in which the city of Manchester is located, made before one Thomas D. Luce, styling himself "Clerk Supreme Court," of said county, and certified to by him under his "hand and official seal," though no copy of such seal is affixed. It may be as well to state here that the action was dismissed as to the Boston & Port Royal Lumber Company upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and, there being no appeal from the order entered to that fact, the case should now be considered as an action against the S. C. Forsaith Machine Company alone. Upon the papers above set forth and referred to, a motion was made before his honor, Judge Hudson, to set aside service of summons and complaint on the said defendant, made at their place of business in the city of Manchester, state of New Hampshire, and to dismiss the complaint of plaintiff for want of jurisdiction, whereupon the following order was granted: "On hearing the pleadings in above-stated case, and on motion of Jeff. Warren, attorney for the S. C. Forsaith Company, defendant, to set aside service of summons and complaint on the said defendant, made at their place of business in the city of Manchester, state of New Hampshire, and to dismiss the complaint of plaintiff for want of jurisdiction, counsel having been heard, it appearing to the satisfaction of this court that the defendant, S. C. Forsaith Machine Company, are a foreign corporation, and nonresidents of this state; that they have no property within the limits of this state, are represented by no agent, and have no place of business therein; that the cause of action, to wit, the breach of the contract, did not arise within the limits of this state; and that service of summons and complaint was made in the city of Manchester, state of New Hampshire,—ordered, that the com-

plaint of plaintiff be dismissed, this court having no jurisdiction, on the grounds above set forth." Subsequently, the judge filed a paper setting forth more fully his reasons, a copy of which may be found in the former report of this case in 17 S. E. Rep. 31, and which, therefore, need not be set out here. From this order, plaintiff appeals upon the three grounds set out in the record, which make, substantially, three questions: (1) Was there error in holding that the cause of action did not arise in this state? (2) Was there error in holding that the breach of the contract constituted the cause of action? (3) Was there error in holding that, even if the cause of action arose in this state, the courts of this state could not take jurisdiction of an action in personam, and render a personal judgment against a party served with the summons outside of the limits of this state?

To determine the first question, two inquiries present themselves: First, when was the contract made? Second, where was it to be performed? These inquiries involve mixed questions of law and fact; and, so far as the latter are concerned, the finding of the circuit judge is conclusive, in a case of this kind. *Hester v. Fertilizer Co.*, 33 S. C. 609, 12 S. E. Rep. 563. But the rule of law is that, "In the absence of anything indicating the contrary, the place of the making of a contract is presumably that of its performance," as was said by Mr. Justice McGowan in *Curnow v. Insurance Co.*, (S. C.) 16 S. E. Rep. 133, quoting with approval from *Bish. Cont. § 1391*; and, as was held in *Rodgers v. Association*, 17 S. C. 410, the cause of action on a contract arises at the place where it is to be performed. Where, then, was the contract made, upon which the plaintiff bases his action, if, indeed, there was any such contract?—a point which is not now before us, and upon which we do not desire to be regarded as even intimating any opinion. It does not appear that the plaintiff ever before had any professional connection with the S. C. Forsaith Machine Company, and, if made at all, it must be traceable to the telegram copied above; and that was sent from Boston, Mass. We cannot regard the written agreement between Tillinghast, Warren, and Smith, set out above, as any evidence of any contract on the part of the defendant company to pay anything. The fact that Mr. Warren was attorney for that company in a litigation then pending could not invest him with authority to bind his client to pay money, without some authority other than that arising from his professional relations; and, certainly, the terms of the telegram conferred no authority to enter into such agreement. Indeed, the terms of that paper do not show that Mr. Warren undertook to bind his client to pay any sum of money whatever. On the contrary, the agreement contained nothing more than a recital of the fact that the

defendant company had agreed to pay the fee of Mr. Tillinghast; and whether that recital was strictly correct or not is not a question now to be considered. If, therefore, there was any agreement on the part of the defendant company to pay the plaintiff's fee, it must be found in the telegram above referred to; and, if it contains any promise to that effect, such promise was not made in this state, but in Boston, and, under the rule above referred to, must be there performed, as it is quite clear that there is nothing in the telegram indicating the contrary. Appellant, in his argument, seems to rely somewhat upon a letter printed in the "case," from the agent of the defendant company to Mr. Tillinghast, as tending to show that defendant acquiesced in the arrangement for the payment of plaintiff's fee. But, as we did not consider that the terms of that letter indicated any such acquiescence, we did not deem it important to set out that letter, in making our statement of the case. Still, we would be glad to have the letter incorporated in the report of the case, in deference to the views of its importance by appellant's counsel. But even if that letter contained a positive promise to pay the fee, or a direct admission of defendant's liability, such promise, whether express or implied, was not made in this state, but in the state of New Hampshire; and hence, under the rule above stated, the cause of action could not be regarded as arising in this state, as there is nothing in the letter indicating that such supposed promise was to be performed elsewhere.

As to the second question presented by the grounds of appeal, we deem it only necessary to say that we cannot understand how any contract can give rise to a cause of action until there has been some breach of such contract. The mere fact that a person has entered into a contract with another can give no cause of action, and none can arise until there is some breach of such contract, which, therefore, must be regarded as the cause of action. The contract may give a party the right to demand its performance according to its terms, but there is no delict, and no cause of action, until the other party refuses or neglects to perform some duty required of him by the terms of the contract. We do not think, therefore, that there was any error on the part of the circuit judge in holding that the breach of the contract constitutes the cause of action.

The third question presented by the grounds of appeal is more difficult, and is much more important than either of the other questions. The Code provides, in section 143, that "civil actions in the courts of record of this state shall be commenced by service of a summons," and in subsequent sections (155 and 156) proceeds to prescribe how such service shall be made. In section 155 the provision is that, if the action be against a corporation, it must be by delivery of a

copy of the summons to certain officers or agents of the corporation, "but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or where such service shall be made within this state personally upon the president, cashier, treasurer, attorney or secretary thereof," followed by a special provision as to certain specified corporations, which have no application to the present case, as the defendant here is not one of the corporations specified. In section 156, provision is made for the service of the summons by publication in certain specified cases, the only one of which, applicable here, is couched in the following language: "Where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein." That section contains this further provision: "Where publication is ordered, personal service of the summons out of the state is equivalent to publication," etc. Section 158 provides that in the cases mentioned in section 156 the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Section 159 provides how proof of the service of the summons shall be made, and contains this language: "When the service is made out of the state, after order of publication, the affidavit of the person making the service shall be made before the clerk of any court of record in the state or district in which such service shall be made, who shall certify the same under his official seal,"—which was afterwards amended by the act of 1884 (18 St. 745) so as to include other officers besides such clerk. Section 160 provides that "from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction."

It must be admitted that, if we look alone to the provisions of the several sections of the Code above referred to, there is strong ground for the position taken by appellant,—that, if the cause of action arose in this state, the court had acquired jurisdiction of the defendant corporation, for in view of the findings of Judge Hudson that the defendant was a foreign corporation, having no property within this state; that it was duly served with a copy of the summons in the state of New Hampshire, after order of publication had been made,—we must take the facts so found, and there is no room for the objection, taken in the argument, to the proof of service as lacking the official seal of the clerk, as no such exception was taken below. So that the naked question now presented is that, even assuming that the cause of action in this case arose in this state, whether the courts of this state could acquire jurisdiction of this foreign corporation, which had no property in this state, through which it might have been reached by a proceeding in rem, at least so far as such property was con-

cerned, simply by personal service on such corporation in another state. This question, as it seems to us, has been conclusively settled in the negative by the highest authority in the case of *Pennoyer v. Neff*, 95 U. S. 714. In that case, *Neff*, being a nonresident of the state of Oregon, but owning property therein,—the land in question,—was sued on a money demand, in which action the state court of Oregon undertook to acquire jurisdiction of the person of *Neff* by publication under a statute of that state practically identical with our Code in this respect, and rendered judgment against him for the amount of such demand, and under the execution issued to enforce such judgment the land was sold by the sheriff, and bought by *Pennoyer*. Subsequently, an action was brought by *Neff* against *Pennoyer* to recover possession of the land in the circuit court of the United States for the district of Oregon, and carried thence by writ of error to the supreme court of the United States. The case turned upon the validity of the sale by the sheriff, or, rather, the validity of the judgment under which such sale was made; and the court held that the state court of Oregon could not acquire jurisdiction of the person of a nonresident defendant in a personal action simply by service by publication, and hence that the judgment was a nullity. As is said by Mr. Justice Field in delivering the opinion of the court, one of the well-established principles of public law respecting the jurisdiction of an independent state over persons and property is "that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Conf. Law*, c. 2; *Wheat. Int. Law*, pt. 2, c. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others; and so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory, so as to subject either persons or property to its decisions." This doctrine does not deny or interfere with the right of a state to acquire jurisdiction over the property of a nonresident, located or found within such state, by a proceeding in rem,—for example, by attachment, or some proceeding in the nature of a proceeding in rem provided for by the laws of such state; but under such a proceeding no personal judgment can be rendered against the nonresident, and the judgment can only affect him so far as his property found in the state is concerned. See *Stanley v. Stanley*, 35 S. C. 94, 14 S. E. Rep. 675. The same doctrine had been previously laid down in *Galpin v. Page*, 18 Wall. at pages 367, 368, where it is said: "Even the court of king's bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel

an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit." The case of *Pennoyer v. Neff*, has not only been recognized and followed in numerous subsequent cases, but, so far as we are informed, has never been questioned by any tribunal. Even the learned judge (Mr. Justice Hunt) who dissented in that case did not question the doctrine for which we have cited the case, but based his dissent upon the sole ground that, inasmuch as *Neff* owned land within the state of Oregon at the time the action was commenced in which the judgment in question was recovered, it could be subjected to such judgment, even though no proceeding by attachment had been instituted. It is true that in that case the defendant was a natural person, and not, as here, a corporation, and that the service there was by publication, and not, as here, by personal service outside of the limits of the state. But neither of these circumstances can make any substantial difference between that case and this, for in the case of *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. Rep. 354, the doctrine of *Pennoyer v. Neff* was applied to a case of a foreign corporation, and it is there said: "The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations." And we are unable to discover any reason why it should be otherwise. See, also, *Railway Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. Rep. 859, where the same doctrine was applied in the case of a foreign corporation.

The other point of difference amounts to nothing, for the statute of Oregon, like our statute, expressly declares, "Where publication is ordered personal service of the summons out of the state is equivalent to publication and deposit in the post-office," thus putting the two modes of service precisely upon the same footing. Besides, in the case of *Sugg v. Thornton*, 132 U. S. 524, 10 Sup. Ct. Rep. 163, where the doctrine of *Pennoyer v. Neff* was applied, the case shows that the party who objected to the jurisdiction of the Texas court on the ground that there had been no legal service upon him was actually served in Wyoming Territory. It is apparent from what is said in other cases that the supreme court of the United States recognize no difference in the two modes of service. so far as the question we are considering is concerned, for in *Machine Co. v. Radcliffe*, 137 U. S. at pages 294, 295, 11 Sup. Ct. Rep. at page 94, it is said, upon the authority of *Pennoyer v. Neff*, and other cases there cited, "that a personal judgment is without validity, if rendered by a state court in an action upon a money demand against a nonresident of the state, upon whom no personal service of process, within the state, was made, and who did not appear." And in *Wilson v. Seligman*, 144 U. S. at pages 44, 45, 12 Sup. Ct. Rep. at page 542, the following passages from the opinion in *Pennoyer v. Neff* are quoted with

approval: "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. * * * No state can exercise direct jurisdiction and authority over persons or property without its territory. * * * It is in virtue of the state's jurisdiction over the property of the nonresident, situated within its limits, that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. * * * Where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely in personam,—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory, and respond to proceedings against them. * * * Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. * * * A judgment which can be treated, in any state of this Union, as contrary to the first principles of justice, and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered. * * * To give such proceedings any validity, there must be a tribunal competent, by its constitution,—that is, by the law of its creation,—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance."

These being the well-settled principles applicable to a case like the one now under consideration, established by the supreme court of the United States,—a tribunal which is invested with final jurisdiction in controversies between citizens of different states,—it seems to us that we are bound, if practicable, to put such a construction upon the provisions of our Code, above referred to, as will bring it into conformity with such principles. This, we think, can be done by construing the above-mentioned provisions of our Code as applying only to cases in which a warrant of attachment has been issued, or to some other proceeding in rem, or in the nature of a proceeding in rem, and not to cases of mere personal actions, in which only a personal judgment can be obtained, for it must be remembered that an action cannot now, as formerly, be commenced by a writ of foreign attachment, but that now, under the Code, an attachment is merely a provisional remedy in aid of an action; and hence, to make it available, an action must be commenced in regular form, and judgment therein must be recovered before the attachment can yield the fruits which it is designed to produce. We

are therefore compelled to construe the provisions of the Code, above referred to, providing for the mode of making a nonresident a party to an action, as applying only to such actions as may be regarded as proceedings in rem, and not applying to merely personal actions, in which only a personal judgment is sought or can be obtained. This being a purely personal action, in which no warrant of attachment has been or could be obtained, inasmuch as the defendant has no property within this state, we think that the court never acquired jurisdiction of the defendant corporation, by service of the summons out of the state, and hence there was no error on the part of the circuit judge in dismissing the complaint for want of jurisdiction.

The second case mentioned in the title of this opinion—that of Mr. Moore—differs in at least one very material respect from the case just considered. Here the undisputed evidence is that the contract which constitutes the basis of plaintiff's action was made in this state by a duly-authorized agent of the defendant corporation, and subsequently ratified by the general agent of said corporation; and, as there is nothing even tending to show that such contract was to be performed elsewhere, it must, under the rule announced in *Tillinghast's Case*, be regarded as a contract made and to be performed in this state, and hence that the cause of action arose in this state. If this were all, then a different conclusion from that reached in the case first considered would follow. But, under the views which we have taken of the third question presented by the appeal of Mr. *Tillinghast*, we are compelled to conclude that the court never acquired jurisdiction of the defendant corporation by a simple service of the summons in the state of New Hampshire, for in this case, as in the former, there was no warrant of attachment obtained, and none could have been, by reason of the undisputed fact that defendant, though a foreign corporation, had no property within the limits of this state. There was therefore no error on the part of the circuit judge in dismissing the complaint in this case for want of jurisdiction. For the reasons hereinbefore stated, we must adhere to the judgment rendered at the former hearing. The judgment of this court is that the judgment of the circuit court in each of the cases stated in the title of this opinion be reaffirmed.

McGOWAN and POPE, JJ., concur.

MARTIN v. SUBER.

(Supreme Court of South Carolina. Nov. 3, 1893.)

ACTION ON NOTE — ADMISSION OF EXECUTION — RIGHT TO OPEN AND CLOSE — CONTRACTS OF MARRIED WOMEN.

1. In an action on a note, defendant averred in her answer that she "did sign a note similar to the one in the complaint, and that

she supposes that said note is correctly exhibited in the complaint;" that under certain promises she signed a note for her husband's debts, "the same being the note herein sued on," and that at the time of the signing of "said note" she was a married woman. *Held*, that there were such admissions of the execution of the note as to give defendant the right to open and close.

2. The mere actions and conduct of an alleged agent, not acquiesced in by the alleged principal, are not sufficient to establish the agency.

3. A note is not within the purview of Act Dec. 24, 1887, providing that all conveyances, mortgages, and like instruments of writing, affecting her separate estate, executed by a married woman, shall be effectual to convey or charge such separate estate whenever the intention so to do is declared therein.

Appeal from common pleas circuit court of Newberry county; James F. Izlar, Judge.

Action by James N. Martin against Texanna Suber. From a judgment for defendant, plaintiff appeals. Affirmed.

The charge delivered by the circuit judge was as follows:

"Mr. Foreman and Gentlemen: I come to the performance of my part of the duty in this case with a great deal of hesitation. I will, however, endeavor to give you, as I understand it, the law applicable to the case, with the hope that you may be able to find the facts from the testimony as you have heard it from the witnesses, and come to a correct and just conclusion in this case. This action is brought by the plaintiff to recover a certain sum of money alleged to be due to him by the defendant on a promissory note bearing date the 27th of January, 1888, which reads as follows: '\$665.92. One day after date I promise to pay to the order of J. N. Martin six hundred and sixty-five and 92-100 dollars, for value received, with interest from date. [Signed] Texanna Suber.' The defendant admits the execution of the note, but denies in her answer that she is liable to the plaintiff thereon. She alleges that she was a married woman at the time the debt was contracted for which the note was given; that the debt was contracted by her husband, and that she was urged to give her note in payment of the account of her husband, and signed the same under certain conditions, which you have heard read in her answer. The plaintiff replies to the allegations set out in the answer that the consideration of said promissory note was for the benefit of the separate estate of the defendant. This is a brief statement of the pleadings and the issues raised thereby. You are to deal with, and are the sole judges of, the facts. I cannot even intimate an opinion as to them. I can only give you the law applicable to the case, as I understand it, and leave you to find the facts and apply the law to the facts as you may find them from the evidence.

"In this case the execution of the note sued on is admitted. On this point, therefore, you will have no difficulty. There is, however, some difficulty as to the law of the case,

and I confess that I have some doubts as to the principles of the law by which you should be governed in deciding the issues raised. But, be that as it may, you are to take the law from the court, and if I should err there is a tribunal specially provided to correct my errors. Under the pleadings in this case it seems to me that you must necessarily go back in your deliberations to the contract which is claimed to be the consideration of the note set out in the complaint. If the supplies furnished by the plaintiff in 1886 were furnished to the defendant for the benefit of her separate estate, and were used and expended by her in making the crops upon her plantation during the year 1886, I am of opinion that she could, even in 1888, have given a promissory note in settlement of the account for supplies, which would be binding upon her. This being the case, certain important questions are presented for your consideration. Were the supplies advanced to the defendant by the plaintiff, and for the benefit of her separate estate? Or were they advanced to her husband, on his own credit, and for his own benefit, and used by him in making his own separate crops, in which his wife had no interest, and from which her separate estate derived no benefit? Or were the advances made to the defendant, and for the benefit of her separate estate, through her husband as her agent? A husband may act as the agent of his wife in obtaining supplies for carrying on her farming operations on her separate estate; but the authority must be shown. Does the evidence satisfy you that in obtaining the supplies in 1886 the husband of Mrs. Suber was acting as her agent, and with her authority? The mere declarations of the husband will not be enough to establish such agency. You must take all the testimony bearing upon this issue, and answer the question. The burden of proof is upon the plaintiff on this issue, and he must prove the agency to your satisfaction. Now, if the testimony satisfies you that the supplies were advanced to Mrs. Suber directly or through her husband as her authorized agent, and that these supplies were for the benefit of her separate estate, then the plaintiff would be entitled to recover the amount due on the note, with interest from its date. If, on the other hand, you are satisfied from the evidence that the supplies were advanced to the husband, to be used in making his own crops planted that year, in which his wife had no interest, and from which she was to derive no benefit, then the plaintiff would not be entitled to recover.

"Again, if the supplies were advanced to the husband, and in 1888 Mrs. Suber gave her note to the plaintiff to secure the debt of her husband, her liability on the note would depend upon the construction of the act of 1887. Now, this act reads as follows: 'All conveyances, mortgages and like formal instruments of writing, affecting her separate

estate, executed by a married woman, shall be effectual to convey or charge her separate estate whenever the intention so to convey or charge such separate estate is declared in such conveyances, mortgages or other instruments of writing.' Now, what instruments of writing affecting a married woman's separate estate shall be effectual to charge the same? The act says, 'All mortgages and like formal instruments of writing.' When shall such instruments of writing be effectual to charge the separate estate of a married woman? The act says, 'Whenever the intention so to charge her separate estate is declared in the mortgage or other instrument of writing.' Is a promissory note a like formal instrument of writing with a mortgage? There are certain formalities attending the execution of mortgages, such as signing, witnessing, and delivery, and, in cases of mortgages of real estate, sealing. The act says 'all mortgages;' this includes chattel mortgages. The same formalities attend the execution of a promissory note as attend the execution of a chattel mortgage. Both require to be signed and delivered. It is true that a chattel mortgage should be witnessed, if it is to be recorded; yet witnessing is not essential to its due execution. It may, therefore, be concluded that a promissory note is a like formal instrument of writing with a chattel mortgage. But it is not every like formal instrument in writing that will be effectual to charge the separate estate of a married woman under the act. It is only those like formal instruments which affect her separate estate; that is, those instruments which act upon her separate estate,—that is, create a lien or charge upon it which incumber it. Now, a promissory note is not such instrument of writing. But, if we admit that a promissory note is one of the like formal instruments in writing included in the act, this cannot help the plaintiff, because the act says in plain terms such instrument in writing shall be effectual to charge her separate estate whenever the intention so to charge such separate estate is declared in the instrument in writing. This being the case, a mortgage—one of the instruments named in the act—would not be effectual to charge the separate estate of a married woman if the intention so to charge is not declared in the mortgage. It will not do to say that the fact that a married woman executes a mortgage of her separate estate is a sufficient declaration of her intention to create a charge upon it. In interpreting statutes the rule is that they must be so construed as that every word and clause shall have effect. If the mere execution of the mortgage was a sufficient declaration of the intention of a married woman to create a charge upon her separate estate, then these words of the act would be meaningless and nugatory. There would be no necessity for them. And it will be borne in mind that the act says 'whenever'—that is, at whatever

time—the intention to charge is declared in and not by the mortgage or like formal instrument of writing. The provision was in the nature of a condition. It was intended to put the woman on her guard, to call specially to her attention the nature of the act she was about to perform, and to impress her with its solemnity. It was for her protection. In order to create a charge upon her separate estate the act must be strictly followed. The power to charge her separate estate can only be exercised by complying strictly with the provisions of the statute. If this is done, a married woman, under the act of 1887, may charge her separate estate for the payment, not only of her own debt, but for the debt of her husband.

"So, then, gentlemen, the first question for your consideration is to ascertain, as I have previously said, whether or not these supplies were advanced directly to Mrs. Suber, and for the benefit of her separate estate; and, if you come to the conclusion that they were, then, as I have already said, the plaintiff would be entitled to recover. If you come to the conclusion, however, that they were not so advanced, but that they were advanced to the husband for his benefit and to carry on his farming operations, and were expended in the cultivation of his crops, and his wife had no interest in them, and derived no benefit from them, the plaintiff could not recover; and even in the event that they were advanced to the husband, and the defendant afterwards gave her note for it, I charge you that under this note the plaintiff could not recover, because the interpretation which I have given you of the statute of 1887, as I understand it, requires that it must be such an instrument as would affect the separate estate of a married woman, and I have already charged you that a promissory note is not such an instrument; and, even were it such an instrument, this note could not create a charge upon her separate estate, because the declaration required by the act is not contained in the note. I have further charged you with reference to the agency, and you will remember the law which I have given you in regard to the husband's acting as the agent of his wife. There was something said in this case by one of the witnesses, Mrs. Suber herself, that there were thirty or forty dollars of this note that were for supplies that were advanced to her and for the benefit of her estate, and which she got the benefit of, and which her counsel said she was willing to pay. It is for you to ascertain from the testimony, if you can arrive at it, what was the amount of this sum, and if you come to the conclusion that it went to her benefit, and the testimony is satisfactory to you on this point, you would be warranted in finding that much of the note for the plaintiff, but I leave that entirely with you; you must ascertain that fact from the testimony which you have heard. Is there anything further

that you would have charged, gentlemen? (To counsel.) Mr. Carlisle: Nothing, except that the actions and conduct of the husband may go towards establishing the agency. The Court: I have told them they must take all the testimony they have heard bearing upon the subject of agency, and determine that question. The husband's mere declarations do not establish agency. Mr. Johnstone: We are ready to pay this thirty or forty dollars, but contend that it cannot be recovered under this note. The Court: A paper or lien was put in showing that these advances were made by J. N. Martin & Company, and the note shows that it was made to J. N. Martin. If you come to the conclusion that this was a new contract altogether, and had no connection whatever with these supplies, then I have charged you that the plaintiff could not recover under this note. So, gentlemen, if you come to the conclusion that the plaintiff is entitled to recover in this case, you will find for the plaintiff the amount of the note, with interest from date at seven per cent., writing out the amount in words, and not in figures. If you come to the conclusion that the plaintiff is not entitled to recover under the charge which I have given you, the form of your verdict would be simply, 'We find for defendant.' "

M. A. Carlisle, for appellant. Johnstone & Cromer, for respondent.

McIVER, C. J. This was an action to recover a specific sum of money which the defendant had promised to pay to the plaintiff by her promissory note. The first allegation in the complaint, and the only one which it is deemed necessary to notice, is in the following words: "That the defendant is indebted to plaintiff in the sum of six hundred and sixty-five dollars and ninety-two cents, with interest from the 27th day of January, A. D. 1888, at the rate of seven per cent. per annum, which said sum of money the defendant, by her promissory note, bearing date the 27th day of January, A. D. 1888, undertook and promised to pay to plaintiff,—a copy of which note is as follows, to wit: '\$665.92. Jan. 27, 1888. One day after date I promise to pay to the order of J. N. Martin six hundred and sixty-five 92—100 dollars, for value received, with interest from date. Texanna Suber.'" The defendant answered, saying: "(1) That she emphatically denies that she is or was indebted to the plaintiff in the sum of six hundred and sixty-five dollars and ninety-two cents, with interest from the 27th day of January, 1888, as stated in the complaint, or in any sum whatever. (2) That she admits that she did sign a note similar to the one mentioned in the complaint, and that she supposes that said note is correctly exhibited in the complaint; but she denies that said note represents any debt of hers, or that it is in any sense binding upon her. (3) That she al-

leges that the plaintiff herein had a claim or account against Mr. J. Benson Suber, of the county and state aforesaid, and urged her to give her note for or assume the payment of the said claim or account, at the same time, and as an inducement to her to accede to his request, promising her that she should pay the same when it suited her convenience, and at no other time, and distinctly promising her that she should not be pressed in the payment thereof. That, under these promises, she signed a note for said indebtedness of the said J. Benson Suber, the same being the note herein sued on. That if said note is to be held binding upon her, she demands that it be reformed by this court so as to conform to the real contract by her, if any legal contract she made with the plaintiff." In the fourth paragraph of the answer the defendant alleges "that at the time of the signing of said note, and at the present time, she was and is a married woman," and had no legal capacity to make any contract such as that evidenced by said note. In the fifth paragraph she alleges that she has been damaged to an amount stated by the conduct of the plaintiff in inveigling her into the signing of the said note, and by failing to incorporate therein the terms and conditions upon which she so signed, and by his failing to observe said terms, for which amount she demands judgment against the plaintiff. The plaintiff replied, denying the material allegations contained in defendant's answer upon which she rests her defense.

At the trial defendant's counsel stated "that, the execution of the note being admitted," the defendant had the right to open and reply, and the court so ruled, to which exception was duly taken by plaintiff's counsel. The trial proceeded accordingly, and, after a charge by the circuit judge, a copy of which should be inserted in the report of this case, the jury found a verdict for defendant, and the plaintiff appeals from the judgment entered thereon, upon the following grounds, alleging error on the part of the circuit judge in his ruling and in his charge in the following particulars: "(1) In that he held that the defendant had the right to open and reply in this action, and that the burden of proof was upon the defendant. (2) In that he charged the jury that the mere declarations of the husband were not enough to establish agency for the wife in this action, and that the burden of proof was upon the plaintiff on this issue, and that plaintiff must establish the agency to the satisfaction of the jury. (3) In that he charged the jury that, even in the event that the supplies were advanced to the husband, and the defendant afterwards gave her note for them, the plaintiff could not recover on this note, as the statute of 1887 requires that it must be such an instrument as would affect the separate estate of a married woman, and a promissory note is

not such an instrument; and, even if it were, this note could not create a charge upon her separate estate, because the declaration required by the act is not contained in the note. (4) In that he refused or neglected to charge the request of the plaintiff that the actions and conduct of the plaintiff may go towards establishing the agency."

As to the first ground of appeal it is clear that there is no ground for the alleged error there complained of. Since the case of *Addison v. Duncan*, 35 S. C. 165, 14 S. E. Rep. 305, where the previous cases were collected and reviewed, it must be regarded that the rule is well settled that where the plaintiff's whole cause of action is admitted by the pleadings, and the defendant relies solely upon an affirmative defense, which, of course, he is bound to establish, the burden of proof is upon the defendant, and he is entitled to open and reply. As is there said: "The true test is, who would be entitled to the verdict if the case is submitted to the jury simply upon the pleadings, without evidence being adduced by either side? If the plaintiff, then unquestionably the defendant, being the actor, would be entitled to open and reply." Applying this test to the case under consideration, it is clear that there was no error in the ruling complained of. The plaintiff here sought to recover damages for the breach of the contract evidenced by the note set out in the complaint, and all that it was necessary for him to show to entitle him to recover was the execution of said note by the defendant. But when the execution of the note was admitted in defendant's answer, there was nothing left for the plaintiff to prove, and hence, if the case had been submitted to the jury upon the pleadings simply, without any evidence being adduced on either side, there can be no doubt that the plaintiff would have been entitled to the verdict, as, the only fact which it would otherwise have been necessary for him to prove having been admitted by the pleadings, there was nothing left for him to prove; and under such admission he would unquestionably have been entitled to recover. It is urged in the argument on behalf of the appellant that the execution of the note was not, in fact, admitted by the answer; and to meet this view we have been particular to set out the pleadings more fully than otherwise would have been deemed necessary. It seems to us impossible to read the answer without perceiving that the execution of the note was distinctly admitted more than once. In the second paragraph of the answer the language is: "That she admits that she did sign a note similar to the one mentioned in the complaint, and that she supposes that said note is correctly exhibited in the complaint." In the third paragraph the language is: "That under these promises she signed a note for said indebtedness of the said J. Benson Suber, the same being the note herein sued on," (*italics ours*;) and in the fourth

paragraph of the answer defendant says "that at the time of the signing of said note" (referring plainly to the note set out in the complaint) she was a married woman, etc. In the face of these repeated admissions, contained in the answer, we are at a loss to conceive how it is possible to deny that the execution of the note was admitted in the pleadings. This case differs materially from the case of *McConnell v. Kitchens*, 20 S. C. 430, for there the action was based upon a written contract, containing certain terms and stipulations, while the defendant, in his answer, in effect denied that the contract was properly described in the complaint, and, on the contrary, alleged that the contract really contained other terms and stipulations, as appeared by a copy thereof set out in the answer. Hence it was very properly held that the defendant, not having admitted, in his answer, plaintiff's cause of action as set out in the complaint, was not entitled to open and reply. Here, however, the defendant, in her answer, did distinctly admit the execution of the note set out in the complaint, and hence she was entitled to open and reply.

The second and fourth grounds of appeal, both relating to alleged errors in the charge in respect to agency, may be considered together. It seems to us that when the circuit judge instructed the jury that it was competent for a husband to act as agent for his wife, and that it was for them to determine whether the evidence was sufficient to show that in this case the husband was acting as the agent of his wife in purchasing the supplies for which the note was given, the jury were properly instructed as to the law applicable to that view of the case, for it certainly needs neither argument nor authority to show that, before one person can be made liable for a contract made by another, there must be satisfactory evidence that the person making the contract had the authority of the person sought to be charged to make such contract; in other words, there must be satisfactory evidence of agency. This evidence may be direct or circumstantial, and, when the jury were told that they "must take all the testimony bearing upon this issue and answer the question" we do not see what more could be required. As to the alleged refusal of the implied request to charge "that the actions and conduct of the husband may go towards establishing the agency," we think it is answered by several considerations. In the first place, the judge did not refuse to so charge the jury; on the contrary, his reply was: "I have told them they must take all the testimony they have heard bearing upon the subject of agency, and determine that question." In the second place, the testimony not being either set out or stated in the "case," we have no means of ascertaining whether there was any testimony upon which such a request could have been based. But, in the third place, we do not

think that such a request could properly have been granted in its unqualified form, and therefore, under the well-settled rule that when requests are submitted, unless they are correct as submitted, they may be refused, there is no error in refusing such requests. *Gunter v. Manufacturing Co.*, 15 S. C. 443; *Insurance Co. v. Lawrence*, 2 Pet. 25; *Railroad Co. v. Horst*, 93 U. S. 291. Now if, as we shall presently see, mere declarations of the alleged agent are not competent to establish the agency, upon the same principle mere actions and conduct of the alleged agent would not be competent to establish agency. Hence, even if the circuit judge had flatly refused to charge in accordance with this implied request,—which, however, we do not think he did,—there would have been no error; for the mere actions and conduct of the husband, unless shown to have been known to and acquiesced in by the wife, would not be competent evidence of the agency. That “the mere declarations of the husband will not be enough to establish such agency” seems to us too plain for argument. It would be a very dangerous doctrine to establish that one person could be made liable for a debt contracted by another simply by the declarations of the person contracting the debt that he was acting as agent of the person sought to be charged. Indeed, we think that until there is some other evidence of the agency, such declarations are mere hearsay, and as such incompetent. See 1 Greenl. Ev. p. 158, note b, and cases there cited; *Renneker v. Warren*, 17 S. C. 139.

It only remains to consider the third ground of appeal, which, as it seems to us, was taken under a misconception of the judge's charge. In the first part of the charge the jury were fully and properly instructed as to the law applicable to the case outside of the act of 1837, in terms to which no exception was or could be taken. But, as the note sued on was executed after the passage of that act, it became necessary to construe that act, in order to ascertain whether the defendant would be liable even though the jury should come to the conclusion that the supplies which constituted the consideration of the note were furnished to the husband, and not to the wife. It is very manifest that the jury must have reached the conclusion that the supplies were furnished to the husband, and not to the wife, for otherwise their verdict, under the first part of the charge, would necessarily have been in favor of the plaintiff. So that this ground of appeal raises only the question whether the circuit judge put the proper construction upon the act of 1837. The first section of that act (the only one pertinent to this controversy) reads as follows: “All conveyances, mortgages, and like formal instruments of writing affecting her separate estate, executed by a married woman, shall be effectual to convey or charge her separate estate whenever

the intention so to convey or charge such separate estate is declared in such conveyances, mortgages, or other instruments of writing.” As was held in *Mortgage Co. v. Mixson*, (S. C.) 17 S. E. Rep. 244, the manifest object of that act was to effect a radical change in the previous law, not only by substituting a question of intention for a question of power, but declaring how such intention should be manifested. Hence, whenever a question as to the liability of a married woman on any of the classes of written instruments referred to in the act is presented, the question is no longer a question whether the married woman had the power to make such instrument, but the sole inquiry is whether she has declared her intention, in the instrument, to charge her separate estate. It will be observed that the act does not cover all instruments in writing, but only “conveyances, mortgages, and like formal instruments of writing” affecting the separate estate of the married woman. Hence, unless the instrument in writing in a given case falls within one or the other of the classes mentioned, the act will not apply. So that the first inquiry here is whether a mere promissory note falls within either of the classes mentioned. We agree with the circuit judge that it does not, for the reason that it is not a “like formal instrument in writing” to either of the classes specifically mentioned,—conveyances or mortgages,—which necessarily imply a transfer of or a charge upon the separate estate of the married woman. This is not only implied from the essential nature of the instruments specified, but also from the subsequent words in the statute, “shall be effectual to convey or charge her separate estate.” Now, it is very clear that a simple promissory note has none of the elements of a conveyance, and it seems to us equally clear that a note cannot properly be said to be a charge upon any estate. But, even if we are in error in this latter respect, a note is certainly not an instrument affecting the separate estate of the married woman; but, without resting our decision upon this point, it is sufficient for us to say that the absence of any declaration of intention on the part of the maker of the note in the note upon which the action was based was abundantly sufficient to take the case out of the operation of the statute; for this court has held, in the case of *Reid v. Stevens*, 17 S. E. Rep. 358, that even in the case of a formal mortgage of real estate, which does not contain the declaration of intention provided for by the act of 1837, the married woman will not be bound unless it appears that the contract which the mortgage was given to secure was a contract as to her separate estate. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

ODOM et al. v. NEW ENGLAND MORTGAGE SECURITY CO.

(Supreme Court of Georgia. April 10, 1893.)

ACTION ON NOTE—USURY—LAW OF PLACE—EVIDENCE—PLEADINGS.

1. A promissory note, payable in the city of New York, with interest from its date at the rate of 8 per cent. per annum, is open to attack for usury by proof that the law of New York limits the rate of interest to 6 per cent. per annum, and declares void all contracts in which any higher rate is stipulated or reserved.

2. In an action upon such a note as that referred to above, a plea of usury, setting forth the statute of New York, the plea not being demurred to, but allowed to stand for trial, is sufficient to admit in evidence that statute, whether the sum on which the usury was to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken, or reserved, be set forth in the plea or not.

3. The fact that the note was secured by a deed of even date with itself, executed in Georgia, and conveying land situate in Georgia, would not render the statute of New York inadmissible as evidence to support the plea. Some of the material facts which affirmatively appear in other cases, such as *Security Co. v. McLaughlin*, 13 S. E. Rep. 81, 87 Ga. 1, and *Jackson v. Mortgage Co.*, 15 S. E. Rep. 812, 88 Ga. 756, are not disclosed by the record in this case.

(Syllabus by the Court.)

Error from superior court, Muscogee county; J. H. Martin, Judge.

Action by the New England Mortgage Security Company against E. H. Odom and others on a promissory note. Plaintiff had judgment, and defendants bring error. Reversed.

Thornton & McMichael, for plaintiffs in error. W. E. Simmons and Little, Worrill & Little, for defendant in error.

BLECKLEY, C. J. When the statutes of the state of New York, by a duly-certified copy, were offered in evidence to sustain the pleas of usury, two objections were made,—one that the evidence was irrelevant, the other that the pleas did not state the amount of interest charged. On these objections the evidence was excluded.

1. The excluded evidence would have shown that by the law of New York the rate of interest is limited to 6 per cent. per annum, and that all contracts reserving or stipulating for a higher rate are void; void not only as to the usury, but as to principal and interest also. The promissory note declared upon was payable to Flint or order at the office of the Corbin Banking Company, New York city, with interest at 8 per cent. per annum. The general rule is that as to the rate of interest the law of the place of performance controls, unless the parties intended that the law of some other place should apply, and contracted with reference to the latter. The question of intention is one of fact, and as such is always open to investigation. Tried by the face of the note itself, the parties to this contract seem to have had

in view the law of the state of New York as the one applicable to the payment of interest as well as to the payment of principal. If they did, they must have intended to violate that law, for they stipulated for a rate of interest which it forbids. The pleas of usury in the case are based upon this theory; and if, in point of fact, the parties contemplated the laws of New York, and not the laws of Georgia, or some other state or country, as governing performance in respect to the rate of interest, the defense ought to prevail. It is perfectly competent for the plaintiff, by evidence in answer to the pleas, to show as matter of fact that the parties did not intend the law of New York to apply, but did intend some other law to have application as to the rate of interest. This fact being shown, whether by direct or circumstantial evidence, the presumption arising upon the face of the instrument would be rebutted, and the law of New York would give place to the law of the state or country which the parties intended should apply. It is not alleged in the declaration, nor does it otherwise appear from any of the pleadings, where the note sued upon was executed. So far, therefore, as the pleadings are concerned, no place whatever is directly suggested as furnishing the law of the contract declared upon, except the state of New York. This being so, what room is there for doubt that the pleas of usury are good in substance as an answer to the declaration?

2. Neither of the pleas was demurred to, though one of them contains blanks which ought to be filled, and neither of them is sufficiently detailed and specific as to some particulars to render them good in form as pleas of usury under the Code, § 3470a. But, as the statute of New York renders void the whole contract, and not merely a part of it as does our statute, the want of these particulars may be treated as defects of form; and the exclusion of the evidence because of them, the pleas being good in substance, was not authorized.

3. It seems that the parties went to trial upon the pleas, and the plaintiff below introduced in evidence the note sued on, and a deed of even date therewith, executed in Georgia, conveying land situated in Georgia. This was all right, and perhaps from the note, if the place of execution appeared on its face, and the deed and its contents, the jury could have inferred that the parties had in view the law of Georgia, and not the law of New York, in fixing the rate of interest. But certainly this would not prevent the defendants below from introducing evidence to support their pleas. The plaintiff's evidence might answer the pleas by evidence already in as well as by more to come in, but that would not render the statute of New York inadmissible as evidence to support the pleas. The admissibility of evidence to support a plea does not depend upon what evidence the plaintiff introduces to overcome it.

Until the plea is proved, there is nothing to overcome. We rule nothing in this case which conflicts with *Security Co. v. McLaughlin*, 87 Ga. 1, 13 S. E. Rep. 81, and *Jackson v. Mortgage Co.*, 88 Ga. 756, 15 S. E. Rep. 812, or other like cases. Some of the material facts which affirmatively appeared in them as matter of evidence do not appear on the face of the pleadings in this case. And on the question of supporting the pleas by evidence we cannot look to what the plaintiff proved or could have proved, since to do this would be to rule out evidence offered by the one side because the other side had already answered it, or else could answer it by other evidence. We need not say that this would be absurd, but it would certainly be very unsound practice. Judgment reversed.

HOWARD v. JOHNSON.

(Supreme Court of Georgia. March 3, 1893.)
NEGOTIABLE INSTRUMENTS — USURY — RELEASE OF SURETY — JUDGMENT ENTRY — LEADING QUESTIONS.

1. Where in an action against principal and surety the latter defends, but the former does not, and the verdict is against the principal, only, for the amount of the debt sued for, the legal effect is a finding in favor of the surety, and a judgment accordingly is not erroneous. Though a judgment declaring him to be discharged may be irregular in form, it is good, in substance, as a judicial announcement of the legal effect of the verdict, as between the plaintiff and the surety.

2. The legal effect of usury in a promissory note, in preventing a surety from whom the usury is concealed from being bound by his undertaking, cannot be evaded by afterwards purging the note of usury by an arrangement between the creditor and the principal debtor, in which the surety takes no part, and to which he does not assent.

3. The allowance of a leading question in the examination of a witness is generally matter of discretion, and no cause for a new trial. (Syllabus by the Court.)

Error from city court of Cartersville; Shelby Attaway, Judge.

Action on a promissory note by W. H. Howard against Lindsey Johnson, as surety, and another, as principal. From a judgment against the principal, only, plaintiff brings error. Affirmed.

John W. Akin, for plaintiff in error. Albert S. Johnson, for defendant in error.

BLECKLEY, C. J. 1. The trial took place on a defense presented alone by the surety, the principal not defending; and the verdict rendered was in favor of the plaintiff against the principal, only, and was silent as to the surety. This was in accordance with the form of verdict which the court instructed the jury to bring in if they found the surety was discharged or not bound. No doubt, superadding an express finding in favor of the surety would have made the verdict better in form, but in substantial

legal effect the verdict was the same without this addition as it would have been with it. No one reading the whole record together, and intelligently construing it, would fail to understand that the jury considered the debt sued for as the several debt of the principal, and not as the joint debt of both defendants. The plaintiff claimed as against both. One defended; the other did not. The jury found for the plaintiff as against the latter, only. This was equivalent to finding against the plaintiff as to the former. The judgment declaring the surety discharged may have been irregular in form, but it was good in substance, for it declared judicially the legal effect of the finding. In this respect it was quite as efficacious as would have been a judgment that the surety recover of the plaintiff his costs, which, on the verdict rendered, would have been good, both in form and substance, as a discharge of the surety.

2. It is now settled law in this state that concealed usury in a promissory note which contains a waiver of homestead or exemption prevents a surety signing the note with his principal from being bound by the instrument, provided he makes this defense in due time and proper manner. The defense cannot be evaded by any arrangement between the creditor and the principal purging the note of usury, the surety taking no part in the same, and not assenting thereto. The purgation made or attempted in this instance was not only after the execution of the note, but after suit on it was brought. Most certainly a contract which was without obligation as to the surety when it was made could not be rendered obligatory upon him by something done afterwards, without his concurrence or co-operation, and which he has never ratified or adopted.

3. Granted that the question propounded to Johnson, the surety, was leading, the allowance of it was not cause for a new trial. Such details in practice are generally subject to the discretion of the trial court. The objection to the answer to this question, that it was not matter of fact, but was matter of opinion, merely, is without any color of merit. There was no evidence showing, or tending to show, that the surety had any notice or knowledge of the usury when the note was executed. The evidence showed he was ignorant of it. Judgment affirmed.

JACKSON v. STATE.

(Supreme Court of Georgia. March 3, 1893.)
ASSAULT WITH INTENT TO RAPE — WHAT CONSTITUTES ASSAULT — QUESTIONS FOR JURY — SUFFICIENCY OF EVIDENCE.

1. Where a man, under the incitement of lust, and with the intention of gratifying it by force, enters the bedroom of a virtuous woman, at a late hour in the night, and gets upon the bed in which she is sleeping, within reach of

her person, for the purpose of ravishing her, he commits an assault upon her, although he may not actually touch her, being prevented from so doing by her outcry, and by the interposition of an occupant of the adjoining room.

2. Social customs, founded on race differences, and the fact that there was difference of race between the accused and the woman alleged to have been assaulted, may be considered by the jury upon the question of whether the assault was committed with intent to rape, the evidence showing that the room in which the woman was sleeping was entered late at night, and there being nothing to indicate that the entry was by permission or due to any encouragement held out by her upon which to found a hope or expectation of consent.

3. The charge of the court complained of did not trench upon the province of the jury, and was free from substantial error.

4. The evidence was barely sufficient to uphold the verdict. It made a case on which the jury might well have doubted whether the accused intended to ravish, but the verdict negatives the existence of any reasonable doubt, and the trial judge was satisfied with the finding.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

Major Jackson was convicted of assault with intent to rape, and brings error. Affirmed.

O. G. Gurley, for plaintiff in error. W. N. Spence, Sol. Gen., for the State.

BLECKLEY, C. J. 1. As defined by the Code, § 4357, an assault is an attempt to commit a violent injury on the person of another. Where a rape is intended, the injury contemplated can be inflicted only by actual contact of the sexual organs of the man with those of the woman. In order for an assault with intent to rape to be committed, is it necessary that the persons of the two should be in such proximity as that the organs of the male shall be within what may be termed "striking distance" of the organs of the female? Or, is the virile member to be treated as a gun, which is harmless until brought within "carrying distance" of the target? We think not. It seems to us that where rape is intended, and the would-be ravisher, with the purpose of presently executing his intention, enters the bedroom of the woman when she is asleep, and mounts upon her bed, thus bringing himself near enough to seize at will her person, or some part of it, the attempt to commit a violent injury upon her is complete. Certainly, when matters have proceeded thus far, she would be in imminent danger of being ravished. Nothing but a change of intention on the part of her assailant, the interference of some third person, or her own resistance, would be likely to shield her. No actual touching of the woman's person is necessary to complete the assault. There need be nothing more than the intention to accomplish sexual intercourse presently by force, and the active prosecution of that intention until a situation of immediate, present danger to the woman is produced. If, in the

case before us, the accused, under the incitement of lust, and with the intention of gratifying it by force, entered the bedroom of the girl, near midnight, and got upon the bed in which she was sleeping, within reach of her person, for the purpose of ravishing her, he committed an assault upon her, even if he did not actually touch her, except casually and incidentally while she was in the act of leaping out of bed to escape from him, or even if he did not touch her at all, he being prevented from consummating his design by her outcry, and by the intervention of her father, who occupied an adjoining room. Under the evidence in the record, the acts done by the accused, if they were accompanied with an intention to ravish, were quite sufficient to constitute an assault.

2. The doctrine of the court's charge to the jury that, upon the question of intention, social customs, founded on race differences, and the fact that the man was a negro and the girl a white person, might be taken into consideration, is undoubtedly correct. There was nothing in the evidence to indicate that the girl was not virtuous, or that she had held out any encouragement to this negro, or to any other person, white or black, to enter her bedroom for illicit intercourse. Not the faintest trace of a reason appears on which he could have founded any hope or expectation of consent. Surely it was legitimate for the jury to note any departure from the customary modes of visiting which was involved in a nocturnal entrance by a negro man into the bedroom of a white woman during the hours usually devoted to sleep. The difference of sex, to say nothing of the difference of race, would afford ample ground for directing attention to this element of the case.

3. The charge of the court complained of was substantially correct throughout, and no part of it trenched unduly on the province of the jury. We find nothing in it which challenges more than mere verbal criticism.

4. We confess to a serious doubt in our own minds as to whether the accused really intended to commit rape. Two facts strongly indicate the contrary; one of these being that he knew the father of the girl occupied an adjoining room, and was near enough at hand to protect her; and the other being that, instead of seizing her while asleep, he paused upon the bed, and called her by name. Why he should have done this if his mind was made up to violate her person, we are at some loss to understand, or even to conjecture. But the workings of a criminal mind, especially while under the dominion of brutal passion, are often mysterious. A bad man, who has procured his own consent to commit a great outrage, will frequently take great risks and prosecute his criminal enterprise in the most foolish manner. Desperation and folly are close relatives, and are found not seldom in each other's company. Guilt is shrewd only when it is timid. When it becomes bold and reck-

less, it is in no mood to consult discretion, or to heed the dictates of prudence. The jury had a right to interpret the prisoner's conduct in the light of this trait of vicious human nature, and, so doing, there was no violation of sound logic in reaching the conclusion at which they arrived. They might well have doubted, as we do, whether there was an intention to ravish, but we cannot say that 12 honest, fair-minded men might not be free from any reasonable doubt on the subject. We cannot, therefore, do otherwise than accept the verdict as negating the existence of any such doubt in the jury box, the presiding judge having approved the finding. Had we been present and witnessed the whole trial, we might have been no less satisfied than he was. Our conclusion is that the evidence was sufficient, though barely sufficient, to uphold the verdict, and that in denying a new trial no error was committed. Judgment affirmed.

DANIEL v. WILSON.

(Supreme Court of Georgia. Oct. 31, 1892.)

CORPORATIONS — DURATION OF EXISTENCE — RECEIVERS — EJECTMENT — DEFENSE — ESTOPPEL.

1. The charter of a loan and building association granted by the superior court at October term, 1866, expired by statutory limitation at the corresponding date in 1886.

2. Where the superior court of the county in which a corporation was located appointed, in 1879, before the charter expired, a receiver for all the assets of the corporation, and in another suit, commenced after the charter expired, appointed another receiver in 1887 for all the assets then remaining, and ordered the latter receiver to institute such actions as he thought necessary to reduce to possession any property claimed by third persons to which the corporation had title, a defendant in an action of ejectment brought by the second receiver cannot protect himself against a recovery by setting up outstanding title in the first, the first having been appointed pendente lite, and no final decree, so far as appears, ever having been made in the cause. It is doubtful whether title to the realty of the corporation would vest in the first receiver by the mere order appointing him, but, if it did, he never having asserted it, it was divested by the order appointing the second receiver in so far as to enable that receiver to recover the property, and administer it under the direction of the court as provided for by section 1688 of the Code. The same court, having jurisdiction over both receivers and over the custody by them of any assets brought in by either, would be competent to protect the rights of all parties, including the defendant in ejectment, against any conflicting claims by the receivers.

3. A receiver of an extinct corporation, if he would be estopped at all by the acquiescence and assistance of a stockholder and ex-officer of the corporation in a sale of assets made by a third person after the charter expired, would not be estopped unless it appeared that such acquiescence and assistance were with knowledge that the corporation had some right or title to the assets thus dealt with. Where the assets consisted of a small parcel of woodland embraced in a larger tract, and the larger tract was sold and conveyed by a third person with the assistance as well as acquiescence of the stockholder and ex-officer, he not being aware

at the time that the larger tract included the smaller one, there would be no estoppel. Especially would there be none which could be set up and asserted in a mere action of ejectment brought by the receiver against the purchaser, to which action the stockholder and ex-officer was no party.

4. The purchaser of land at an administrator's sale gets no better title than the intestate had. Hence, where the intestate had conveyed absolutely to his creditor, whether in payment of a debt or only as security therefor, a purchaser from his administrator got no title as against the creditor, except upon condition of redeeming the land if it was taken by the creditor as security only.

5. There was no error in admitting or rejecting evidence, or, if any, it was immaterial to the substantial merits of the case. Upon the controlling facts the plaintiff was entitled to recover, and the court was correct in directing the jury accordingly.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action in ejectment by R. H. Wilson, receiver, against John B. Daniel. Plaintiff had judgment, and defendant brings error. Affirmed.

Julius L. Brown, for plaintiff in error.
Hillyer & Lee and Caudler & Thomson, for defendant in error.

BLECKLEY, C. J. 1. By Code, § 1676, par. 2, the duration of any corporation chartered by the superior court is limited to 20 years. The charter involved in this case was so granted in the year 1866, consequently it expired at the corresponding time in the year 1886, and there is no suggestion that it was renewed afterwards.

2. For the reasons suggested in the second headnote, we are of opinion that the receiver appointed after the dissolution of the corporation could recover, notwithstanding the appointment of the first receiver, and notwithstanding that appointment had never been formally revoked.

3. The third headnote explains very fully why the receiver should not be treated in the present action as being estopped by the acts and acquiescence of one of the stockholders of the extinct corporation, who was formerly an officer of that corporation.

4. Both parties claimed under George W. Knight,—the receiver by a warranty deed from Knight, executed in 1869, and duly recorded, conveying the premises to the corporation; the defendant by a deed from Knight's administratrix, executed in 1887, conveying to defendant a larger tract, of which the premises in dispute were shown by evidence to constitute a part. The defendant contended that the deed to the corporation, though absolute in terms, was made to secure a debt which Knight owed to the corporation, and, consequently, that the sale and conveyance afterwards made by Knight's administratrix was an administration of the property, the title of the corporation being divested thereby, and passing to the purchaser from the administratrix. We think

it manifest that, were the fact as contended, the legal consequence claimed to flow therefrom would not follow. The deed to the corporation, being absolute, passed the title out of Knight into his grantee, whether the conveyance was made only to secure a debt or in payment of a debt. No title being left in Knight, there was none which constituted a part of his estate when he afterwards died, and, consequently, none which his legal representative could have administered. All that she could possibly have administered was Knight's equity to redeem, and that was all which a purchaser from her could acquire. This being so, the latter could protect his purchase only by paying or tendering payment of the debt as security for which Knight's deed was excuted. Until such payment or tender the purchaser could not resist an action of ejectment based, as this was, on that deed. The cases which rule that an administrator of a mortgagor or of a debtor by judgment may administer fully as against the mortgagee or the judgment creditor, are not applicable, because in such cases there is only a lien outstanding against the property administered, the title being in the mortgagor or debtor; whereas in such a case as the present the title itself, and not a mere lien, is in the creditor. Of course, if the conveyance by Knight to the corporation was not made to secure a debt, but in payment, no interest whatever was left in him or his estate, and, consequently, the sale by his administratrix passed nothing to the purchaser relatively to the premises now in dispute.

5. If there was any error in admitting or rejecting evidence, it was immaterial to the substantial merits of the controversy. Upon the controlling facts, the plaintiff was entitled to recover, and the court committed no error in directing the jury accordingly. Judgment affirmed.

CITY OF ATLANTA v. WARNOCK.

(Supreme Court of Georgia. Nov. 9, 1892.)

ABATEMENT OF NUISANCE—SEWER GAS—DISCRETION OF COURT.

1. The municipal government of Atlanta, though invested by statute with plenary powers over the subjects of streets, sewers, drainage, water supply, and sanitation, has no right to create and permanently maintain a nuisance dangerous to health and life, which nuisance consists of openings, called "manholes," in a sewer located in a public street contiguous to the dwelling of a citizen, the manholes being allowed to emit poisonous gases in large quantities through perforated covers placed over them. This is true, at least, where the dangerous character of the nuisance results, in all probability, not from defects inherent in the general system, but from defective execution of the system, in failing to adapt it to local conditions, such as steep grade in the particular street in which the unwholesome sewer is constructed and maintained.

2. There was no abuse of discretion in

granting the temporary injunction, enjoining the city "from continuing said manholes in such condition as to allow the escape of noxious gases." In the light of the pleadings and the evidence, the terms of the order were sufficiently definite and specific.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action by Mary J. Warnock against the city of Atlanta for injunction to abate a nuisance. Plaintiff had judgment, and defendant brings error. Affirmed.

J. B. Goodwin and J. A. Anderson, for plaintiff in error. Hall & Hammond, for defendant in error.

BLECKLEY, C. J. 1. There was evidence indicating that the system of sewerage adopted by the city was a good and safe one, and that the nuisance complained of, or its dangerous character, did not result from any defect inherent in the system itself, but was due to defective execution, in failing to adapt the system properly to the steep grade of the street in which this particular unwholesome sewer was constructed and is maintained. There was ample evidence that poisonous gases, in large quantities, were emitted through the manholes in this sewer, which were dangerous to health and life, and that the plaintiff, whose residence was on adjacent premises, was subjected to special injury and annoyance thereby. If such a nuisance owed its origin, not to the general system of which this sewer was a part, but to a defective execution of the same at this particular place, there can be no doubt of the power to restrain the city from continuing the nuisance, notwithstanding the municipal government is, by statute, invested with plenary powers over streets, sewers, drainage, and sanitation. Whether a nuisance attributable to a mistaken exercise of the legislative power of the city in adopting an unsafe or unwholesome system of sewerage might be the subject-matter of injunction, is a question on which no decisive opinion need be expressed, the strong probability being that the nuisance now under consideration had a different origin.

2. In granting the temporary injunction restraining the city "from continuing said manholes in such condition as to allow the escape of poisonous gases," the presiding judge did not abuse his discretion; and the terms of the order were sufficiently definite and specific, construing them in the light of the pleadings and the evidence. The city officials, if they honestly and conscientiously endeavor to comply with the injunction, will have no real difficulty in ascertaining, to a reasonable certainty, what manholes they are to deal with, and what gases are to be kept from escaping through the same. Any affected ignorance on this subject is not to be anticipated. Judgment affirmed.

LEE et al. v. ATLANTA ST. R. CO.
(Supreme Court of Georgia. Nov. 9, 1892.)
PRACTICE—STIPULATION OF COUNSEL TO BE IN
WRITING—WAIVER.

In order to be enforced by the court, any consent of counsel not to insist that the brief of evidence shall be filed within 30 days after the trial, where a motion for a new trial is made, must be in writing. Rule 20, Code p. 1348. In the present case there was no waiver by conduct outside of the alleged express consent, and, the latter not being in writing, there was no error in dismissing the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action between Annie Lee and others and the Atlanta Street Railroad Company. From a judgment dismissing the motion for a new trial after verdict for the railroad company, Lee and others bring error. Affirmed.

Westmoreland & Austin, for plaintiffs in error. N. J. & T. A. Hammond, for defendant in error.

BLECKLEY, C. J. The main case tried below came within the act of 1889, which requires the brief of evidence to be filed, as well as the motion for a new trial to be made, within 30 days after the trial was had. The brief of evidence not having been filed until after the 30 days had expired, the court, for that reason, dismissed the motion for a new trial. It was insisted that this was wrong, because the delay to file the brief was matter of consent between counsel for the respective parties. There was no waiver by conduct outside of the alleged express consent, and the latter was not in writing, nor was it admitted to have been made by the party or the counsel against whom it was sought to be enforced. In other words, the fact that there was any consent of counsel was controverted. This being so, rule 20 of the superior courts, (Code, p. 1348,) applies. This rule reads thus: "No consent between attorneys or parties will be enforced by the court, unless it be in writing and signed by the parties to the consent." The counsel evidently misunderstood each other, and thus one of the actual evils against which the rule was aimed arose in the present case. There was no error in dismissing the motion for a new trial. Judgment affirmed.

LOWE BROS. CRACKER CO. v. BROOKE
et al.

(Supreme Court of Georgia. Nov. 14, 1892.)
RECEIVERS—APPOINTMENT—WHO MAY APPLY FOR
—EVIDENCE.

1. To obtain a receiver under the insolvent traders' law. (Code, § 3149a.) as amended by the act of 1889, it is necessary that three unsecured creditors should unite in filing the petition, unless the petitioning creditors represent one-third of the whole unsecured indebtedness of the insolvent debtor. If one of the three peti-

tioning creditors be secured, whether by personal security or otherwise, he cannot be counted as an unsecured creditor.

2. If the second creditor's place in the proceeding can be supplied by amendment bringing in another creditor not at first a party, the amendment must allege that such added creditor is unsecured.

3. The evidence adduced at the hearing showing that one of the petitioning creditors was secured by a solvent indorser, and was therefore not entitled to the harsh remedy afforded by the insolvent trader law, the judge erred in appointing a receiver and granting an injunction.

(Syllabus by the Court.)

Error from superior court, Fulton county; Marshall J. Clarke, Judge.

Action by George W. Brooke and others against the Lowe Bros. Cracker Company for the appointment of a receiver, and other relief. Plaintiffs had judgment, and defendant brings error. Reversed.

Read & Brandon and Mayson & Hill, for plaintiff in error. C. D. Maddox and Alex. & Victor Smith, for defendants in error.

BLECKLEY, C. J. 1. Waiving several questions as needless to be decided, the application for a receiver was defeated when it turned out at the hearing that one of the three original petitioners, to wit, the firm of J. J. & J. E. Maddox, was not an unsecured, but was a secured, creditor. The petition did not allege that the petitioning creditors represented as much as one-third of the whole unsecured indebtedness of the debtor corporation. This being so, in order to prevail it was necessary, under the Code, (section 3149a,) as amended by the act of 1889, that all three of the petitioning creditors should prove to be unsecured. The secured one could not be counted. This left only two, and it was impossible, under the statute on which the proceeding was based, for two to prevail, unless they represented at least one-third of the unsecured indebtedness of their debtor. There is no indication in the statute that the security which renders a creditor disqualified to petition is to be of one kind rather than another. Personal security will disqualify as effectually as would a mortgage, collaterals, or any other species. In ordinary speech, a secured creditor is one who has security for his debt, and, if he has this by reason of indorsement, guaranty, or suretyship of a third person, he would be so denominated. We think the statute contemplates anything as security which would be so regarded, according to usage and ordinary modes of expression. The statutory meaning of "unsecured" is the same as the popular meaning of that term.

2. When three unsecured creditors are requisite to inaugurate a proceeding, and only two of that class join in it at first, it is questionable whether the place of the third can be supplied by adding another unsecured creditor by amendment pending the imperfect and unauthorized proceeding. But grant that this may be done; certainly the amend-

ment should show on its face that the added creditor is unsecured. The petition was brought in the present case on the 18th of July, and on the same day a temporary restraining order was granted by the judge, who also appointed a temporary receiver. On the 3d of September thereafter, the ultimate hearing for interlocutory receiver and injunction came on, and then it was that several other creditors petitioned to be made parties plaintiff, and orders were granted making them such parties. It did not appear from these petitions or orders that any of these added creditors were unsecured. Indeed, they did not present themselves on any idea or theory of taking the place of the Maddox firm in the original suit, but as additional parties seeking to share in the fruits of that suit, treating it as well brought in the beginning. The Maddox firm remained a party, and insisted on occupying the position of an unsecured creditor. One of the firm swore to the truth of an amendment to the original petition filed on the same day the new parties were added, but sworn to and allowed previously, which amendment alleged that the debts due each of the complainants in the petition, as set out therein, are each and all unsecured. It is obvious that this amendment applied only to the claims of the three creditors who complained originally, and in nowise to the claims of the coplaintiffs who became parties after the amendment was verified and allowed.

3. By any fair construction of the evidence as a whole, it is manifest that the Maddox firm was a secured, and not an unsecured, creditor. The claim of that firm consisted of an acceptance of the corporation, indorsed by L. D. Lowe, the president of the corporation, in his personal and individual capacity. There was an effort to prove his insolvency, but this was a complete failure. There can be no doubt that his name on the acceptance, whether he be held as indorser, guarantor, or a joint acceptor, affords ample security for the payment of this debt. The facts in evidence make this perfectly clear. The case, as one requiring three unsecured creditors to begin and carry it on, broke down completely at the hearing on the merits, and, irrespective of the minor questions involved in it, the judge erred in appointing a receiver and granting an injunction. Judgment reversed.

PLANTERS' LOAN & SAV. BANK v. BERRY.

(Supreme Court of Georgia. Feb. 13, 1893.)

ACTION AGAINST NATIONAL BANK—ATTACHMENT BEFORE JUDGMENT.

The statute of the United States prohibits seizure of property belonging to national banks (irrespective of whether they be solvent or insolvent) before final judgment, by virtue of any attachment issued under a state law, and returnable to a state court. Any such seizure is therefore void, and a bond given by a na-

tional bank to dissolve such attachment, served by summons of garnishment, is also void. The giving of such bond is not an appearance in the attachment case so as to make valid a judgment entered up on the bond in that case against the bank and the sureties executing the bond. The judgment is wholly void; and an affidavit of illegality, made and filed by one of the sureties in resistance to a levy upon his property under an execution founded on the judgment, must be sustained. The judgment being wholly void for want of jurisdiction in the court rendering it, affidavit of illegality is a proper defensive remedy.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Evc, Judge.

Action by J. M. Berry against the Planters' Loan & Savings Bank. Plaintiff had judgment, and defendant brings error. Reversed.

Geo. A. Mercer, J. B. Cumming, Bryan Cumming, Francis C. Barlow, and Barlow & Wetmore, for plaintiff in error. Frank H. & Wm. K. Miller, for defendant in error.

BLECKLEY, C. J. How the statutes of the United States stand at the present time on the subject of protecting national banks against the seizure of their effects by virtue of attachments in advance of final judgment may be seen by reference to Rev. St. U. S. § 5242. The only words necessary to be now quoted are these: "And no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court." The opinion, whether professional or judicial, which construes this legislation as allowing seizure under attachment before final judgment in case the defendant bank is solvent, and prohibiting it only where the bank is insolvent, is manifestly unsound. Certainly, no such distinction is made in the letter, and we discern no necessity for it in the context or in the reason and spirit, of the legislation. The statutory policy seems to be to prevent all preference or priority in claims against these banks sought to be acquired by seizure of effects under state authority before the final adjudication of such claims, and to protect the banks from being weakened or crippled by such antecedent seizures. The national banks created by congress are to control their own assets and resources as against state interference at the instance of creditors, or of pretended creditors, until the real existence of the alleged debts has been ascertained by final judgment. Ante-judgment seizures cannot be made; a state can make post-judgment seizures only. Mesne process will not suffice for seizing by state courts; these courts can seize alone by final process. This policy may be wise or unwise, wholesome or unwholesome, but in either event it is the one established by competent legislative authority, and must be respected and enforced accordingly. In *Bank v. Mixer*, 124 U. S. 727, 8 Sup. Ct. Rep. 718, Walte, C. J.,

said: "Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether, and cannot be used under any circumstances." Whether this was obiter or not, as applied to the facts of that case, we agree with it, and accept it as a sound interpretation of the statute. And we agree with the court of appeals of New York that no aid can be derived from the act of congress of July 12, 1882, providing that the jurisdiction for suits brought against national banks shall be the same as for suits against state banks. *Raynor v. Bank*, (1882) 93 N. Y. 371. In the case at bar the attachment was issued under a law of this state, and was returnable to one of the courts of the state. It was levied, before final judgment, by the service of a summons of garnishment upon one of the debtors of the national bank, the defendant in attachment. This was a seizure of the debt, and the debt was the property of the bank. The seizure was utterly void, and the bond given by the bank to dissolve the garnishment was equally void. *Bank v. Mixer*, 124 U. S. 728, 729, 8 Sup. Ct. Rep. 718. Certainly it was void as a statutory bond, for, as there was no valid statutory authority for issuing or serving the garnishment, there could be none for taking the bond. In principle, this was ruled in the case of *Bruce v. Conyers*, 54 Ga. 678. No suit or action has been brought upon this bond, but, treating it solely as a statutory bond, and applying to it the spirit of sections 3319 and 3540 of the Code, the plaintiff in attachment caused judgment upon it to be rendered against the bank and the sureties who joined with the bank in executing it. The judgment was the outcome of the original suit brought against the bank by attachment. In that suit the sureties on the bond entered no appearance, and had no right to enter any. They were not heard, and could not have been heard had they so desired, save, perhaps, by some collateral motion. It is contended, however, that by giving the bond, the bank did what was equivalent, under section 3328 of the Code, to appearing and making defense. Grant this was so, the result would be only that "the judgment rendered against him [the bank] in such case shall bind all his property, and shall have the same force and effect as when there has been personal service." Surely this would be quite enough to follow as a necessary legal incident of giving a void bond. But to render a binding judgment on the bond against the bank and the sureties would be much more than this. It would be to change the character of the bond from void to valid, and affect the sureties by the attachment suit equally with their principal. It is manifest that, in order to reach the sureties and render them liable, mere appear-

ance, or any other act of their principal, would not suffice. Even a confession of judgment by the latter would in no wise affect the former if the bond was void. In order for anything done by him, as their representative, to affect them, the real relation, not merely the nominal relation, of principal and surety would have to exist. If there was no jurisdiction to issue the attachment or the garnishment pending the attachment, and no jurisdiction to serve the garnishment or cause it to be served, there was none to require the bond or to take it, or to enter up judgment thereon in the attachment suit, whether jurisdiction over the defendant in that suit—jurisdiction over the bank in personam—was acquired or not. To render judgment on the bond such as was rendered, it was necessary to have jurisdiction over the sureties also. This could not be acquired by taking the bond, for there was no jurisdiction to take it; and there is no pretext that it was acquired otherwise. To show that the bank did enough to subject itself to a general judgment in personam under section 3328 of the Code, even could this be conceded, would leave the want of jurisdiction over the sureties untouched. The *Planters' Loan & Savings Bank*, the party now complaining, is one of these. Its property has been levied upon under a *fi. fa.* based upon this judgment. It has filed an affidavit of illegality, and in so doing has chosen the proper remedy. It has not had its day in court; there has been no court having jurisdiction to bind it. It is not bound, and to overrule its affidavit and to order the execution to proceed was error. Let an order be entered in the superior court sustaining the affidavit of illegality. Judgment reversed.

BALLARD TRANSFER CO. v. CLARK.

(Supreme Court of Georgia. Nov. 14, 1892.)

JUSTICES OF THE PEACE—PROCEDURE—BILL OF PARTICULARS—CERTIORARI.

1. A magistrate, when not presiding in court, does not act judicially in answering questions put by counsel on a court day, whether or not a given case has that day been called; and counsel, shaping his conduct by such answer, must take the risk of its being correct.

2. By virtue of the act of October 8, 1885, a justice's court may hold from day to day until its business is disposed of. A petition for certiorari which alleges that the regular court day was on the first Monday of the month, and that the judgment in question was rendered on the 12th day of the month, without alleging that the court did not sit from day to day, or that its business was disposed of before the 12th day of the month, or that for some reason it was not in legal session, does not call upon the presiding magistrate to show by his answer that his court was legally in session on the latter day.

3. A bill of particulars attached to a summons in a justice's court is an office paper of the court, and, when lost, a copy may be established instantan. That this was done, and that the copy may not have been correct, will not be cause for reversing the final judgment in

the case, if the judgment itself was free from material error.

4. The evidence, as recited in the magistrate's answer, warranted the judgment; and the superior court committed no error in disposing of exceptions to the answer, in dismissing the traverse, or in overruling the certiorari and affirming the judgment.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Mattie V. Clark, by her next friend, against the Ballard Transfer Company. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Mattie V. Clark, suing by next friend, obtained a judgment in a magistrate's court against the Ballard Transfer Company. The defendant took the case by certiorari to the superior court. Upon the call of the case in that court, defendant (plaintiff in certiorari) excepted to the answer of the magistrate on certain grounds, and the court overruled each of the grounds of exception. It thereupon traversed the answer of the magistrate, and the court overruled each of the grounds of traverse, and, after hearing the cause, ordered that the certiorari be dismissed, and the judgment of the court below affirmed. Plaintiff in certiorari excepts to the rulings of the court as indicated above.

The petition for certiorari alleged: Mattie Clark, by next friend, sued petitioner in a magistrate's court, and judgment was rendered for plaintiff, which was set aside by the superior court on certiorari. Defendant thereafter sent regularly to the justice court, after each court day, to see if the case had been called for trial. The court day of said justice court is the first Monday in each month, and it is customary for lawyers, when otherwise occupied, to send up after the call, and if any case has been called, to agree upon a day for trial. After the call on the first Monday in September, petitioner's attorneys sent to A. A. Manning, justice of said court, and asked if they had any cases called, and he replied that no cases of theirs had been called. The messenger, by instruction, further asked about the case now in question, and the justice replied that it had not been called because the papers had not been sent back; thereby misleading and deceiving petitioner, because no cases are ever tried in a justice court, except those called upon a court day. At said time the case had in fact been called, and set for the 12th of September. On that date, plaintiff appeared, and established as a copy of the original bill of particulars, upon the ground that the bill of particulars had been lost, what was not a copy; the total amount being the same, but the original bill of particulars being more specific, and differing in some other particulars from the alleged copy. The established copy and the original were set out in the petition for

certiorari. The original bill of particulars was in the office of defendant's attorneys, they having obtained it to make their former petition for certiorari, and having given a receipt therefor. It had not been returned to the justice because it had not been asked for. Plaintiff herself then swore that she gave the defendant the trunk, (one of the items in the bill of particulars;) that the trunk had in it the things named in the bill of particulars; that they were worth the amount stated in the bill of particulars; that she had never got them back; and that she went to get the trunk, and did not get it. She introduced no other evidence. Petitioner assigns as error (1) the establishment of an incorrect bill of particulars; (2) the establishment of a bill of particulars without any proof; (3) the rendition of a judgment upon the evidence introduced, the evidence not being sufficient; (4) the evidence was specially insufficient when plaintiff or her attorney knew that the trunk was in the possession of defendant, subject to plaintiff's order; (5) it was illegal to try the case upon September 12th, without any consent, the same not being the court day for said court; (6) because defendant was deceived by the false statement of the justice, plaintiff not desiring to impute improper motives to the justice, but charging that his conduct amounted to legal fraud.

The magistrate answered: After the order of the court directing a new trial had reached him, he called the case in its order at the next term, and set it down for trial. "On the day set, plaintiff and her counsel were present, and announced 'Ready.' The bill of particulars had been lost or mislaid, and plaintiff's counsel made a substantial copy, and asked to establish it. As it had been lost from the possession of the court, I allowed it to be established, and the trial to proceed. Plaintiff swore that she placed her trunk in the possession of defendant, took its check for the same, and produced it in evidence. She also swore that the goods mentioned in the bill of particulars were in the trunk, belonged to her, and were worth \$79; that she had called several times, and asked for the trunk, and had failed to get it, or its contents, or its value. As to the original bill of particulars, I do not know where it was. It was not in the office. Defendant was not represented on the trial, or the call of the docket. If any one sent to inquire about the case, I have no recollection of it, and do not think it occurred. It is not the general practice or custom for attorneys to send after the call and find out about their cases, unless my attention is called to them, and they ask them to be set. I do so when I think of it, but never promise, as I cannot recollect all cases or requests made, but try to accommodate counsel as far as I can, they taking chances of the

same. I gave judgment against defendant for \$79."

The exceptions to the answer were as follows: "The answer is defective, in that the justice does not state positively whether or not inquiry was made of him at the conclusion of his call, on the first Monday in September, 1889, as to whether the case had been set for trial, and was further defective, in that he does not state whether or not the day upon which the case was tried was the court day for said court." The traverse to the answer was as follows: "The justice claims in his answer that, to the best of his recollection, no one was sent to his office on court day, inquiring whether the case had been set for trial. Plaintiff in certiorari denies the truth of this, and says the facts set forth in his petition are true. It further traversed the answer, and shows that the statement of the justice that it is not the general practice and custom for attorneys to send after his call to find out about their cases, except under certain conditions stated in his answer, is not true. The justice states that, if any one was sent to inquire about said case, he had no recollection of it, and did not think it occurred. Plaintiff in certiorari denies the truth of said answer, and affirms the truth of the allegations in his petition for certiorari touching this subject, [setting out what those allegations were.]"

Burton Smith and W. H. Pope, for plaintiff in error. John Clay Smith and Arnold & Arnold, for defendant in error.

BLECKLEY, O. J. From the headnotes, read in connection with the reporter's statement of the facts, this case, and the rulings of the court thereon, will be fully understood. No principle of law is involved, of sufficient importance to be discussed. Judgment affirmed.

McTYIER v. STATE.

(Supreme Court of Georgia. Nov. 21, 1892.)

SEDUCTION—PROMISE OF MARRIAGE—EVIDENCE—CHARACTER OF PROSECUTRIX—CREDIBILITY OF WITNESS—INSTRUCTIONS—IMPEACHING VERDICT BY AFFIDAVIT OF JURORS.

1. On a trial for seduction alleged to have been accomplished by persuasion and promises of marriage, promises of marriage made and letters written by the accused to the woman after the seduction, but pending the marriage engagement, are admissible in evidence. So, too, is a promise made by him to her at the time of the intercourse, or prior thereto, that if she yielded to him that time he would not make such a request again.

2. It is not competent, on examination in chief, to impeach either chastity or credibility by evidence of what a third person said to the impeaching witness touching the character or conduct of the woman sought to be impeached; and, where counsel declared his purpose to be to establish general character in this way, it was not error for the court to exclude the evidence without having heard counsel state what

he expected to show by the witness that the third person had said, notwithstanding such third person was a relative (the uncle) of the woman whose character was in question. General character cannot be proved by evidence of particular statements made by relatives.

3. On a trial for seduction, the woman seduced having testified as a witness in behalf of the state, and her chastity and credibility having been drawn in question, it was not error to charge the jury that a witness might be impeached "by proof of general bad character, or by proof of general bad character as to the subject-matter of inquiry," and that a witness "may be sustained, and his credit restored, by proof of general good character or by the proof of general character in respect to the matter or subject of inquiry;" and "whether a witness has been impeached by any of these modes is a question of fact for the jury." These propositions, applied to such a case, are correct in the abstract, and giving them in charge was not prejudicial to the accused, though the evidence was less comprehensive than the charge.

4. The testimony of an impeached witness should be disregarded by the jury unless sustained by circumstances or by other credible testimony.

5. On a trial for seduction, the legal definition of the phrase "a virtuous unmarried woman" is matter of law for the court, and not a question of fact for the jury. The presumption of the law is that a female alleged to have been seduced was virtuous, and that presumption remains until removed by the evidence. The jury should treat her as virtuous unless the evidence, direct or circumstantial, should satisfy them that she had lost her virtue by having illicit intercourse. Repeating the engagement vow at the time of the sexual intercourse may imply persuasion.

6. It was not error for the court, in its charge, to caution the jury not to be influenced by public opinion, whether for or against the accused, and to state to them that they had nothing to do with the pleasure or displeasure of the public.

7. It was not error, as against the accused, to instruct the jury to consider the prisoner's statement in connection with the evidence, the instruction as to the statement being otherwise full, complete, and correct.

8. In charging on the prisoner's statement, it is not error for the court to say that the law "permits" it to go to the jury along with the evidence, this being literally and accurately true.

9. The court having permitted certain evidence to go to the jury, not as constituting proof of seduction, it was not error so to state in the final charge.

10. A correct charge on reasonable doubts, followed by the phrase, "I charge you, however, that in legal investigations mathematical certainty is not attainable," is not rendered erroneous by the use of the word "however."

11. The verdict, being for the offense of seduction, is not vitiated by what the court may have charged touching the lesser offense of fornication.

12. On the facts disclosed in the record, the remark imputed to a juror as having been made to his fellow jurors while serving on the trial of a previous case was not cause either for declaring a mistrial or for granting a new trial.

13. Where there was no separation or misconduct of the jury, but one of them casually overheard something, such as, "We, the jury, find the prisoner guilty," said by a bystander, one of a large crowd in the street along which the jury in a body, and in charge of a bailiff, were, with leave of the court, passing during a recess of the court on their way to dinner, there is no necessary presumption that the accused, whose case was then on trial, was injured. On the facts contained in the record

the court was warranted in holding that the substantial conditions of a fair and impartial trial had not been violated; that the person who made the remark did not intend the jury to hear it, and was not aware that they were in hearing distance; that not more than one member of the jury did in fact hear it; and that none of them were influenced by it in their finding. Jurors cannot be heard to impeach their verdict. Affidavits having this object should not be received or read upon a motion for new trial.

14. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

W. E. McTyler was convicted on an indictment for seduction, and brings error. Affirmed.

The following is the official report:

Indictment charging W. E. McTyler with seduction of Miss Ida Jennings "by persuasions and promises of marriage." Verdict of guilty. Exception to denial of new trial. Besides the general grounds, the motion for new trial sets forth the following:

(1) Error in admitting the testimony of Miss Ida Jennings, over the objection of defendant's counsel, in relation to promises of marriage after the alleged seduction.

(2) Error in permitting Miss Ida Jennings to testify, over the objection of defendant's counsel, "that he told me, if I yielded to him that time, he would not ask me such a question any more,"—there being no charge in the indictment of "other false and fraudulent means;" and error in admitting a letter purporting to have been written by the defendant, after the alleged seduction, to Miss Ida Jennings.

(3) William Laney was introduced as a witness by defendant, and he testified that he knew the defendant, but did not know Miss Jennings. Defendant's counsel asked: "Ever heard of her?" Answer. "Only through Mr. Johnny Jennings. In October or November I kept the track out on the Sam road. He came out there down to where I was working, after they had arrested McTyler." Here the state's counsel objected to the witness stating what Mr. John Jennings told him. The court inquired: "How are the sayings of some one else admissible?" Defendant's counsel replied: "It is what people say about her character. That is how her character has been sought to be established by the state. What we expect to prove is what her own kinsman said." By the Court: "I don't care to hear what you expect to prove. I will hear from you as to the admissibility of the sayings of a third party. The rule, as I understand it, is this: That you can show character by general repute, but that you cannot show it, or the want of it, by specific acts. When a witness swears as to general character, then you can, on cross-examination, inquire into his knowledge by asking as to specific acts. I understand that you propose to show by

this witness what some other person said." Counsel: "I have not stated that. I propose to prove her general character by means known to this witness and myself." The Court: "You have not stated that, but the witness started to tell what he had heard some one else say." Counsel: "I expect to prove certain things by this witness going to show her general character,—what her own kinsman thought of it." The Court: "I ask you now, by statements made by some other person to this witness?" Counsel: "I will tell your honor, if you want me to, what I propose to show by this witness." The Court: "The evidence is ruled out. I asked you what you proposed to prove, and you decline to state it." Except as above stated, the court did not refuse, nor did the defendant offer, to prove the character of Miss Jennings for virtue. The motion for new trial alleges that the court erred in refusing to allow defendant to prove her general character for virtue, by showing her reputation among her own relatives; and also in making the statements above quoted, in presence of the jury.

(4, 5, 6, 7, 8.) One of the jurors who tried the case was W. R. Drane. After verdict, one Brannon made affidavit that, on Tuesday night before the trial of McTyler on Friday, Drane remarked to deponent and others, while in the investigation of another case in which they were jurors, that he believed McTyler was guilty of seduction as charged, and that, if he (Drane) was selected or put on the jury to try McTyler, he would convict him, which facts and information deponent did not make known to either McTyler or any of his counsel until after McTyler's trial. Defendant's counsel made affidavit that they knew nothing of the remark, "I believe W. E. McTyler guilty of seduction, and he should suffer the punishment of the law," made by Drane before the trial, until the trial had been gone into, and most of the evidence delivered to the jury; and that, immediately after they were informed as to the remark having been so made, they made it known to the court, and proposed to establish it by proof, moving for a mistrial, but the court refused to hear the proof, and overruled the motion. In rebuttal, Drane's affidavit is as follows: He did not say to Brannon or any one else that if he was on the jury he would find McTyler guilty of seduction, nor that he believed McTyler was guilty of seduction as charged, and that if he (Drane) was selected or put upon the jury to try McTyler he would convict him. He has not in five years spoken to Brannon, who is his personal enemy. He was with Brannon on the jury that tried Joe Duckworth for rape at the same term, and some of the jury said, "If we clear old Duck, we will be on these other two screwing cases;" whereupon deponent said, merely in jest: "If that be the case, boys, I make a move to find them all guilty now, of the offense

of rape, on the ground that they are all so ugly they can't get any unless they do rape, and recommend all to the mercy of the court, and let the court turn them loose. That will save the lawyers three or four long speeches apiece, and old man Hudson, and will save the court three or four days' work." Deponent had never heard any of the evidence under oath, had never formed or expressed any opinion about the case of McTyler, and did not express any opinion to anybody about the case. To the same effect are affidavits by seven others of the jury who tried Duckworth, in one of which occurs the additional statement that Duckworth's case had not been submitted to the jury when Drane made his remark; also that, when the remark was made, Brannon said to a juror by whom he was sitting that that looked like trying cases "before them came before us." The defendant submitted the affidavits of three persons that during the dinner recess of court, as the jury were being carried to dinner, and just as they were passing a crowd assembled in front of the courthouse, one Cosby, who was but five or six feet distant, addressed to the jury in a loud tone the words, "We, the jury, find the defendant guilty." In one of these affidavits it is stated that the affiant was bailiff in charge of the jury; that he heard Cosby's remark, whose face was turned to the jury, many of whom were nearer Cosby than affiant. In another of the affidavits the affiant says that there was a large crowd on the sidewalk which obstructed the street; that it took an effort on the part of the bailiffs in charge of the jury to make a passage for the jury through the crowd; that Cosby was speaking and conversing about the trial to affiant and others; that he heard Cosby utter to and in the presence of the jury, in a loud tone, the words, "Jury, we, the jury, find W. E. McTyler guilty;" and that affiant heard various members of the crowd say that would have an effect on the jury trying the case, and an influence over the jury. The third affiant says that he was bailiff of the court, and his account agrees with that of the bailiff first mentioned. It appears that the defendant was present at the time and place the words were said. His affidavit agrees with those of the bailiffs as to what the words were; and he further swears that the whole group of men were staring at the jury as they passed; that on the utterance of the words the jury turned and looked at Cosby and the group, and that the bailiff arrested Cosby, and placed him in charge of another officer of the court. J. M. Duckworth made affidavit that he was one of the bailiffs in charge of the jury, and was in front of them at the time in question, pushing and asking for passage through the crowd, and, his whole attention being directed to this purpose, he did not hear the words spoken by Cosby. In rebuttal are the following affidavits: By J. D. Duckworth, that he was

present with Cosby, defendant, McTyler, and others, at the time in question, and heard McTyler say to Cosby: "If I had my pistol with me, I would shoot you;" and Cosby remarked: "By the time you get through with the shooting you have done, I reckon you will be satisfied. Just wait till the jury comes down and says, 'We, the jury, find the prisoner guilty.'" That these words were said in an ordinary tone, and Cosby's back was towards the jury, who were passing about 20 or 30 feet away; that he did not use the remark to the jury, and did not address the jury, but said the words in jest, whereupon deponent told him to hush, that there went the jury,—and that there was no excitement nor loud talking in the crowd. The affidavit of Cosby is to the same effect. He further says that he was summoned as a witness in the case; that, when he made the remark to defendant, he did not know any of the jury were passing, but when Duckworth told him to hush, etc., he turned and saw the jury passing; that he did not then know a single man on the jury, and did not know who the jury was, and was astonished when arrested and told that it was for a remark he had made before a jury; that he was a friend to McTyler, had no interest in the trial for or against him, and, if his sympathy went out for anybody, it would be for McTyler; that he did not know the prosecutor, nor the lady McTyler seduced; that the affidavits for the defendant are mistaken as to his addressing those remarks to the jury, for he did not see the jury, and did not know there was a jury about, until Duckworth called his attention to it; and that he is familiar with the practice of the courts, and would not have used that remark in the presence of the jury, under any circumstances, had he known the jury was present. All of the jurors made affidavits that the verdict was based solely on the evidence and the charge of the court, and that they were not influenced by Cosby's remark. All of them save one swore that they did not hear the remark made, and this one swore that he did not know who made it, and was not influenced by it. One swore that he heard in the jury room, while the case was under consideration, that Cosby had said, in the hearing of the jury, to find the defendant guilty, and that this remark was discussed in the jury room. Drane and another juror swore that it was not discussed in the jury room in their presence; and this other swore that he never heard of it at all until Sunday morning after the trial, when he was at home. Under the above facts, the defendant alleges that a new trial ought to be granted, because the court overruled his motion to declare a mistrial; because the conduct of Cosby was an attempt to influence the jury into finding a verdict of guilty as an expression of public opinion; because Drane had prejudged the case, and had made up his mind to con-

vict without hearing the evidence; and because the jury discussed Cosby's remark in the jury room.

(9) The court charged: "It matters not to you nor to me what the public may think. It matters not with whom the public opinion is,—whether it be for the accused, or for the woman who is alleged to have been seduced. * * * Let the public be pleased, or let them be displeased, with the matter; as I have already said, you have nothing to do." This charge is assigned as error in causing the jury to presume that there was a public prevailing opinion and sentiment in the case, and that it had not come to their knowledge; and in tending to mislead and influence the jury into making their verdict unfavorable to the defendant, etc.

(10) The court charged: "Now, if you find from the evidence in this case, considering in that connection the prisoner's statement," etc. The error alleged is in restricting the statement, and leaving the jury no alternative but to consider it with the evidence, and not otherwise.

(11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21.) Errors in the charge: "The indictment is founded upon this section of the Code." (Code, § 4371, read.) "The term 'virtuous,' as used in this section of the Code, upon which this prosecution is based, has a legal meaning and significance. What is a virtuous unmarried woman is a question of law to be decided by the court, and not a question for the jury." "The presumption of the law is that the female alleged to have been seduced was virtuous, and that presumption remains until removed by proof." "But unless the evidence, direct or circumstantial, should satisfy the jury that she had lost her virtue,—had had illicit intercourse with man,—the jury should pronounce her virtuous." "The repeating of the engagement vow at the time of the sexual intercourse may imply persuasion." "Another way of impeaching a witness is by the proof of a general bad character, or by proof of general bad character as to the subject-matter of the inquiry. When it is sought to impeach a witness by the proof of general bad character in any one particular, such witness may be sustained, or his credit restored, by the proof of general good character, or by the proof of general character in respect to the matter or subject of inquiry. Whether a witness has been impeached by any of these modes is a question of fact for the jury." "And, if you should believe that a witness has been impeached, then the testimony of such witness should be set aside; you should not consider it unless it should be sustained and supported by circumstances or other testimony which you believe to be true." "Now, the court permitted some evidence to go to you as to the conduct, sayings, and declarations of the accused after the time of the alleged seduction. The court permitted the evidence to go to you, not for the purpose of consti-

tuting, of itself, proof of seduction." It is alleged that this charge tended to mislead and confuse the jury. "If you should believe, from the evidence and the principles of law applied thereto, as I have given them to you in charge, that he is not guilty of seduction, but is guilty of the offense of fornication, the lesser offense," etc. The error here alleged is in joining a felony with a misdemeanor; there being but one count in the indictment, and the charge being vague and uncertain, with no evidence to support it. "If you have that sort of a doubt resting upon your mind, it is your duty to give the prisoner the benefit of it. I charge you, however, that in legal investigation mathematical certainty," etc. The error alleged is in the use of the word "however;" it being contended that such use conveys the idea that the charge of reasonable doubt has no bearing on the question, and that there is no reasonable doubt in the case. "The prisoner has a right to make a statement to the jury, which is not under oath, and which is not, technically speaking, evidence; but the law permits it to go to the jury along with the evidence." The error alleged is in using the word "permits;" thereby leading the jury to believe the statement was only suffered to go to them, instead of being made as a right.

L. J. Blalock, W. H. Kimbrough, and J. B. Pillsbury, for plaintiff in error. C. B. Hudson, Sol. Gen., J. B. Hudson, and Harrison & Peeples, for the State.

BLECKLEY, C. J. A full discussion of the numerous points ruled in this case would require an opinion of great length and tedious minuteness. No such seems necessary; and merely to restate the points and reiterate the rulings announced in the syllabus would be unprofitable. In most instances the correctness of these rulings is sufficiently apparent on the face of them. The propositions in which they are embodied and enunciated are almost self-evident. We leave the case to stand on the headnotes, together with the facts set out in the official report. Judgment affirmed.

HENRY v. MAYOR, ETC., OF CITY OF MACON.

DOPSON v. SAME.

(Supreme Court of Georgia. Feb. 13, 1893.)

MUNICIPAL AUTHORITY — REGULATING MARKET — REASONABLENESS OF ORDINANCE — EVIDENCE OF VIOLATION.

1. Where successive statutes confer powers on a municipal corporation, they are, so far as consistent in their provisions, to be taken in *pari materia*, and construed together as one law. Thus where, by an act passed in 1866, the authorities of the city of Macon were empowered to prohibit by ordinance the sale of certain marketable articles in the city elsewhere than in the city market, and by an act

passed in 1886 the authorities were authorized to construct a public market house on any one of the public streets in the city, and to pass suitable ordinances for the proper regulation thereof, the power granted by the first act could be exercised just as if the grant had been repeated in the second. Under this rule there was, after a market had been erected in a street, and established as the city market, no want of legislative authority to pass an ordinance prohibiting the sale of certain articles within market hours elsewhere within the city than at said market. The recital in the ordinance of the act of 1886 instead of the act of 1866 as the source of such authority did not vitiate the ordinance.

2. Where a statute grants the power to prohibit the sale of marketable commodities in a city elsewhere than in the city market, without any limitation as to time or hours, it will not be construed literally, for, if so construed, it would be void. The proper construction of it is that the legislative intent was to confer power to prohibit sales during the reasonable hours appropriated for selling at the market, and to leave the privilege of selling elsewhere open for exercise during the rest of the day or night. An ordinance which fixes market hours from daylight till 10 o'clock A. M. in the winter, and from 3 o'clock till 9 A. M. in the summer, with the addition of an afternoon service on Saturdays, extending from 3 P. M. to 8 P. M. in the summer, and 9 P. M. in the winter, is reasonable as to hours, and such an ordinance may be passed and enforced under the general legislative grant above referred to.

3. Evidence that the shop of the accused was open, and that he and his employes were "proceeding to sell beef and other meats," is sufficient, *prima facie*, to prove that he sold beef and other meats, or offered to sell them.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

W. L. Henry and Walter Dopson were convicted of violating an ordinance regulating the market in the city of Macon, and each brings error. Affirmed.

Dessau & Bartlett, for plaintiff in error Henry. S. A. Reid and Washington Dessau, for plaintiff in error Dopson. R. W. Patterson, for defendant in error.

BLECKLEY, C. J. 1. The acts of 1866 and 1886, conferring powers on the municipal corporation of Macon in respect to markets, are, so far as consistent in their provisions, to be taken *in pari materia*, and construed together as one law. The former act empowers the municipal authorities to prohibit by ordinance the sale of certain marketable articles elsewhere in the city than in the city market. The latter act authorizes the construction of a public market house in any one of the public streets in the city, and empowers the authorities to pass suitable ordinances for the proper regulation thereof. If the power conferred by the first act had been repeated in the second, there could be no doubt that after a market was constructed in a street of the city, and established as the city market, there would have been no want of legislative authority to pass such an ordinance as the first act contemplated. By construing the two acts together as one law,

we reach the same result. When the new market in the street had been erected and established as the city market, the act of 1866 applied to it just the same as it had previously applied to any city market which the city may have had. The ordinance which was in fact passed referred to the act of 1886, by recital, as the source of authority for passing it; but this did not vitiate the ordinance, for the recital was unnecessary, and may be treated as surplusage. See Acts 1866, p. 283; Acts 1886, p. 224.

2. As the act of 1866 grants power to prohibit sales elsewhere than in the city market, without any express limitation as to time or hours, must we conclude that the legislature intended to be taken literally, and must we hold that on that account the grant of power is void? We think not. It is more reasonable to construe the statute as intending to confer power to prohibit sales during the reasonable hours appropriated to selling at the market, and leave the remaining hours open for selling elsewhere during the day or night. So construed, the act is valid. There is not the least reason for thinking that the legislature intended to confer any larger power than they could confer. They simply omitted, by inadvertence, to qualify and limit their language so as to express the meaning accurately which was in their minds. They knew by a prior decision of this court (*Bethune v. Hughes*, 28 Ga. 560) that they could not confer authority to pass any ordinance which would be wholly prohibitory upon sales elsewhere than in the city market. What they really intended was to confer a power as large as they could confer, but no larger; and this construction was conformed to by the municipal authorities of the city in framing the ordinance which is alleged to have been violated. That ordinance fixes market hours from daylight till 10 o'clock A. M. in the winter, and from 8 o'clock till 9 A. M. in the summer, with the addition of an afternoon service on Saturdays, extending from 3 o'clock P. M. to 8 o'clock P. M. in the summer, and to 9 o'clock P. M. in the winter. This is a reasonable ordinance as to hours, and it may be enforced under the general legislative grant above referred to. It does not prohibit, or undertake to prohibit, any sale within the city, except during these market hours.

3. There was no controversy that the terms of the ordinance, as well as the act of 1866, were broad enough to cover fish and meats, the particular articles involved in these two cases; but in one of the cases under consideration it was contended that the proof was insufficient to establish any violation of the ordinance. The evidence showed that the shop of the accused was open, and that he and his employes "were proceeding to sell beef and other meats." We think the *prima facie* meaning of this phraseology is that he sold beef and other meats, or offered them for sale, in his shop. When a man has his

shop open, and is proceeding to sell an article, he is engaged in selling it; and to be so engaged he must have a customer present, and a bargain must have been just consummated, or in progress, or about to be begun. The ordinance would be violated by either selling or offering to sell. The proof was ample that it was within market hours. Judgment affirmed.

MANN et al. v. POOLE et al.¹

(Supreme Court of South Carolina. Nov. 10, 1893.)

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PREFERENCES—WEIGHT OF EVIDENCE.

Defendant allowed notes to go to protest, and judgment to be taken against him by default, in January; was consciously insolvent in February, when he executed mortgages for \$12,000 to members of his family to secure previously incurred debts; denied the execution of the mortgages in April, but put them on file a few days before making an assignment for the benefit of creditors, in May; and his liabilities were \$38,000, his assets, \$26,000, and his preferred debts, including the mortgages, were \$23,000. *Held*, that defendant contemplated the assignment when he executed the mortgages, and that the assignment and mortgages, together, constituted an assignment with preferences.

Appeal from common pleas circuit court of Laurens county; J. J. Norton, Judge.

Action by Jacob Mann, Henry Mann, and Leon Mann (as partners under the firm name of J. & H. Mann & Co.) against J. T. Poole, as an individual, and as guardian of J. Ralph Martin, Annie Louise Martin, and Leonora Martin, N. B. Dial, (as assignee of J. T. Poole,) Anna W. Poole, J. Ralph Martin, Annie Louise Martin, and Leonora Martin, on promissory notes, to set aside mortgages and a deed of assignment, and for the appointment of a receiver. Judgment for plaintiffs on the notes, setting aside the assignment, and appointing a receiver. Both parties appeal. Modified.

Ball, Simkins & Ball, Simpson & Barksdale, Ferguson & Featherstone, and Johnson & Richey, for plaintiffs. W. H. Martin and F. P. McGowan, for defendants.

POPE, J. The plaintiffs commenced their action against the defendants on the 21st June, 1892, in the court of common pleas for Laurens county, in this state. The complaint, substantially, alleged that the defendant J. T. Poole, who was a merchant in the town of Laurens, was indebted to the plaintiffs, a mercantile firm, for goods and merchandise sold and delivered to the defendant J. T. Poole during the months of March and September, 1891, amounting in value to \$531.50, and as an evidence of this said indebtedness the defendant had made and delivered to them his two promissory notes, due in 60 and 90 days, respectively, from the 28th January, 1892,—the date of said notes,—

less the sum of \$50, which he had, previous to the last date, paid on such indebtedness; that the said J. T. Poole, who is the grandfather of the defendants J. Ralph Martin, Annie Louise Martin, and Leonora Martin, and with whom said defendants reside, is the general guardian of said defendants, all of whom are infants under the age of 14 years; that the said J. T. Poole, on the 2d day of February, 1892, executed a mortgage on four tracts of land, aggregating more than 1,300 acres, and situate in the county of Spartanburg, unto his wife, the defendant Anna W. Poole, to secure two promissory notes aggregating \$3,559, dated, respectively, 16th September, 1891, and 10th October, 1891, and due 60 days and 1 day after date, respectively; that on the 9th of February, 1892, the defendant executed unto the infant defendants, J. Ralph Martin, Annie Louise Martin, and Leonora Martin, two mortgages,—one covering all his stock of goods in the town of Laurens, and the other covering all the lands situate in Spartanburg county, which had been previously mortgaged to his wife, the said Anna W. Poole,—and that the alleged consideration of said mortgages to his three grandchildren was the securing the three bonds, each for \$5,000, he had executed to the judge of probate of Laurens, as the guardian of the three said grandchildren, in January and February, 1891; that on the 18th May, 1892, the said J. T. Poole executed a deed whereby he conveyed unto N. B. Dial, the defendant, as assignee to pay his debts, all his property, real and personal, enumerated in said deed of assignment; that said N. B. Dial accepted such trust, and thereafter, on the 19th May, 1892, such deed of assignment was duly recorded in Laurens county, and on the 29th May, 1892, was recorded in Spartanburg county; that said Dial has possessed himself of the assigned estate, and is disposing of the same under said deed. The complaint charges that the said J. T. Poole has withheld certain property from the operation of the terms of said deed of assignment, in fraud of the rights of his creditors; that the mortgages to his wife and grandchildren were a fraud upon his creditors, in that thereby the said J. T. Poole, who was then insolvent, and being largely indebted to many persons and firms, intended to secure an advantage to himself and different members of his family. Wherefore, the plaintiffs pray judgment (1) for a judgment against J. T. Poole for their debt; (2) setting aside, as null and void, the mortgages to the wife and grandchildren of the said John T. Poole, and also the deed of assignment to N. B. Dial, as assignee; (3) for an injunction against N. B. Dial, restraining him from collecting and selling any of the assets of the assigned estate, and from distributing the same, and also enjoining J. T. Poole from disposing or interfering with his property; (4) for the appointment of a receiver. The answers denied any impropriety

¹ For opinion on rehearing, see 18 S. E. 889. v.188.E.no.7—10

or fraud in any of the transactions, as set out in the complaint, denied the right of plaintiffs to any of the relief sought, and prayed that the complaint be dismissed.

Testimony was taken before a special referee, and reported to the court. The cause came on to be heard before the Honorable J. J. Norton, as presiding judge in the court of common pleas for Laurens county, at February term, 1893, on the pleadings and testimony already taken. By his decree rendered on the 2d May, 1893, he held: (1) That the mortgages by J. T. Poole to Anna W. Poole, and to Leonora Martin, Annie Louise Martin, and J. Ralph Martin, both joint and several, are not parts of the general assignment of J. T. Poole for the benefit of his creditors, but are valid, subsisting liens upon the property embraced in them, respectively. The last three are entitled to payment out of the funds in the hands of N. B. Dial, the proceeds of the stock of goods which were mortgaged therein. (2) That the paper purporting to be a general assignment by J. T. Poole for the benefit of his creditors, dated 18th May, 1892, be set aside. (3) That Harvey W. Anderson be appointed receiver of all the real and personal property embraced in the deed of assignment. (4) That Harvey W. Anderson, before entering upon the discharge of the duties of his office as receiver, do enter into a bond, in the penal sum of \$20,000, conditioned to secure the performance of his duties as receiver, before the clerk of court for Laurens, with sureties to be approved as sufficient by said clerk. (5) That N. B. Dial shall turn over to such receiver all the property of the assigned estate; the proceeds derived from sale to be in lieu of the property sold. Reserving the question whether N. B. Dial is entitled to any compensation, and, if any, how much, to the further order of court. (6) That the plaintiffs pay the costs to date of defendants Anna W. Poole, and the three minor grandchildren. (7) That plaintiffs have judgment against J. T. Poole for the sum of \$481.50, with interest from 1st March, 1892, and also some additional interest and costs up to date. (8) That the clerk advertise for six consecutive weeks for creditors of J. T. Poole to present and establish before him their respective demands, on pain, upon failure to do so, of being barred of all benefit under this decree. (9) That, J. T. Poole's real estate, situate in Spartanburg county, not having been embraced in his purported assignment, the mortgagees thereof may enforce their mortgages thereon, as they may feel advised, both as to that portion dealt with by N. B. Dial in his supposed character as assignee, and also those portions of such real estate with which said Dial has not interfered. Anna W. Poole will, however, remain a party to this action, for the purpose of adjusting her equities in regard to any surplus or deficiency.

Both plaintiffs and defendants have appealed from this decree.

The grounds of such appeal by the plaintiffs are: First. Because the circuit judge erred in finding (1) that the note executed by J. T. Poole to his wife, Anna W. Poole, on the 10th day of October, 1891, was due 90 days after date, the same being really due one day after date; (2) that the Spartanburg lands, 1,356 acres, were omitted by J. T. Poole from his assignment; (3) that J. T. Poole, at the time of giving the mortgage to his wife, and the mortgage to his wards, had no intention of making a general assignment afterwards; (4) "that the mortgages in favor of Anna W. Poole and of the minors are valid, and not obnoxious to chapter 72 of the General Statutes of this state, prohibiting an insolvent debtor from giving a preference to any creditor in an assignment for the benefit of creditors, but are within the provision [allowing] an insolvent debtor to make such preference at any time more than ninety days prior to the making of such assignment;" (5) that the mortgage from J. T. Poole to his wife, and the mortgages from him to his wards, are not parts of his general assignment for the benefit of his creditors, but are valid and subsisting liens upon the property embraced in them; (6) that the mortgages to the wards are entitled to payment out of the proceeds of the stock of goods in the hands of N. B. Dial, Esq.; (7) that Mrs. Anna W. Poole may proceed to foreclose her mortgage over the Spartanburg lands, independent of this action, and of the receiver appointed herein. Second. Because the circuit judge erred in not holding (1) that J. T. Poole, when he made the mortgages to his wife and to his wards, intended following them, after 90 days, with his assignment for the benefit of his creditors; (2) that the mortgages of J. T. Poole to his wife and to his wards were intended to be, and are, in effect, parts and parcels of his general assignment, and, with said assignment, are void, as operating to give his said wife and wards preferences; (3) that the mortgages to Poole's wards were in fact mortgages to himself, whereby he undertakes to secure for himself the use of the money, and commissions thereon, for many years; (4) that the Spartanburg lands should be taken in charge by the receiver, and by him disposed of under the orders of this court. Third. Because the circuit judge erred in adjudging plaintiffs to pay the costs of the defendant mortgagees.

The defendants set up these grounds of appeal: (1) Because his honor erred in finding that J. T. Poole omitted from his schedule and assignment his lands in Spartanburg county, containing 1,356 acres. (2) Because his honor erred in holding that, under the terms of the deed of assignment, no property was conveyed, except that embraced in the schedule. (3) Because his honor erred in holding that the construction of the deed of

assignment was not affected by subsequently setting apart as a homestead the personal property omitted from the schedule, when such construction was based upon testimony aliunde. (4) Because his honor erred in holding that the omission of property from the schedule, combined with the requirement of releases from creditors, made the assignment fraudulent, and voidable by creditors. (5) Because his honor erred in holding that J. T. Poole intentionally omitted any personal property from his schedule, and that there was no testimony explaining such omission. (6) Because his honor erred in holding that the terms of the deed of assignment necessarily implied that the homestead and exemption were reserved out of the property conveyed. (7) Because his honor erred in holding that the defendant J. T. Poole was consciously insolvent at the time of, or subsequent to, the execution of the mortgage to Anna W. Poole. (8) Because his honor erred in directing N. B. Dial, the assignee, to turn over the gross proceeds of sale, and the assigned property, to H. W. Anderson, as receiver. (9) Because his honor erred in rendering a personal judgment against J. T. Poole in favor of the plaintiffs—First, because such judgment was not within the scope of this action; second, because the decree did not ascertain the amount alleged to be due the plaintiffs. (10) Because his honor erred in setting aside the deed of assignment, and appointing a receiver.

We will consider the grounds of appeal of the plaintiffs in their order:

(1) There is no difficulty in sustaining this ground of appeal. The circuit judge, for the moment, disregarded the pleadings and the proof. The note of J. T. Poole to his wife, Anna W. Poole, for \$1,200, and dated 10th of October, 1891, was really due 1 day after that date, and not 90 days after date, as found by the circuit judge.

(2) Nor is there any difficulty in sustaining the second ground of appeal. However, justice to the circuit judge requires us to say that it was admitted in the argument before us that this error arose from a defective copy of the assignment deed furnished by counsel to the court. This was not intentional on the part of counsel here engaged, but, as we shall see later on, serious results have followed from this unintentional oversight. The 1,356 acres of land situated in Spartanburg county were included in the deed of assignment executed by J. T. Poole on the 18th day of May, 1892.

We will next consider the remaining grounds of appeal, (being those numbered, respectively, 3, 4, 5, 6, 7, under the first branch of these grounds of appeal, presented by plaintiffs:)

To do justice to all parties concerned, it may be well to group the facts that bear upon this branch of the controversy: J. T. Poole was not only a practicing physician at Laurens, but he conducted a large mercan-

tile establishment there. Not only so, but he was the owner of a handsome dwelling house there. Besides all these, he owned 1,356 acres of land in Spartanburg county, and some farming lands in Laurens county. It seems that he had been a partner, prior to 1890, with his son-in-law, Mr. Jordson Martin, who died before 1890, and that this mercantile firm had lost money in their business. To protect two sureties on an indebtedness to the National Bank of Laurens, he had mortgaged his dwelling house in Laurens up to its full value. He also had placed a mortgage upon his real estate in Spartanburg county, to Shattuck & Huffman, to secure a debt that, 22d November, 1892, amounted to \$2,700. In the first months of the year 1891, he had become the general guardian for his three grandchildren,—J. Ralph, Annie Louise, and Leonora Martin,—and on the 1st January, 1892, he owed them \$7,500. He also owed his wife, Anna W. Poole, \$3,559, that he borrowed in September and October, 1891. Not only did he owe these sums, but he was indebted to others for more than \$15,000. On the 19th January, 1892, he accepted service of summons and complaint, and consented that judgment be taken against him for about \$1,000 for two commercial creditors. His affairs, so far as payment to his creditors were concerned, were in such shape that he allowed notes and drafts through the two banks at Laurens, during the months of December, 1891, and January, 1892, to be presented and returned for nonpayment. He answered attorneys who presented demands for payment that he was unable to pay them. On the 2d February, 1892, he gave his wife, Mrs. Anna W. Poole, a mortgage of his lands in Spartanburg to secure the debt of \$3,559 that he owed her. This mortgage was recorded in Spartanburg in March, 1892. On the 9th of February, 1892, he executed a mortgage to his three grandchildren, who were his wards, on his lands in Spartanburg county, to secure them from loss at his hands as guardian. This mortgage was recorded in May, 1892. On the same day, 9th February, 1892, he executed to each of his three wards a mortgage upon his stock of goods in Laurens to secure them against loss by reason of his guardianship of their estates. In April, 1892, he denied, in effect, that he had executed these mortgages to his wife and three grandchildren. On the 9th May, 1892, these mortgages on his stock of goods were marked as filed for record, although Mr. L. W. Simkins, an attorney for creditors, could find no trace of them in the clerk's office on the 16th May, 1892, when he searched that office for liens upon Poole's property. On the 18th May, 1892, he executed a deed of assignment. This last deed was duly recorded on the 19th May, 1892, and under it Mr. N. B. Dial was the assignee. The object of the plaintiffs is to set this assignment aside—First, because the assignor, Poole, did

not include all his property in the assignment; and, second, because prior to the assignment, and in contemplation thereof, mortgages for large sums were executed by the assignor to members of his own family for the purpose of preferring the mortgagees, and that such mortgages and assignment were parts and parcels of one transaction, and constitute an assignment giving preferences, in violation of the assignment act. We will pass over, for the present, the question of the omission from the assignment of certain property of the assignor. Really, the grounds of appeal we are now considering embody the second ground of attack upon the validity of this deed of assignment. It is no longer profitable, in the light of the repeated adjudications of this court on the subject, to consider the right of an insolvent debtor to give a mortgage to one or more of his creditors, when it is intended that such a mortgage or mortgages shall operate as mere securities to secure such creditor or creditors, bona fides. In the light of our decisions, whenever it becomes necessary to canvass the transactions of insolvent debtors with their creditors who are preferred by receiving a lien upon such insolvent debtor's property to the exclusion of all other creditors, so as to determine whether such preferences are obnoxious to the provisions of chapter 72 of our General Statutes, the crucial test is this: Was it the intention of the insolvent debtor to honestly secure the debt of one or more of his creditors by giving a judgment or a mortgage or an assignment of certain choses in action, or was it his purpose thereby to give one or more of his creditors a preference over other creditors? Thus, the intention of the insolvent debtor must be ascertained, and this presents a question of fact. The circuit judge, in this action, has found as a fact that John T. Poole, at the time he executed these mortgages to his wife and three grandchildren, was consciously insolvent, but his honor would not go any further in this direction. The appellants ask this court to examine the facts, as proved, and see if their charges as to these mortgages are not true. The settled rule of this court is that the findings of fact by a circuit judge will be accepted here, unless they are without any testimony to sustain them, or are manifestly against the weight of the testimony. We cannot say that there is an absence of testimony here, because he has found that the indebtedness of J. T. Poole to his wife and three grandchildren, respectively, was a bona fide indebtedness, and it is admitted that the mortgages were executed at their respective dates, and there is not a scintilla of testimony, respecting the conduct of Mrs. Poole or the grandchildren, to impeach their good faith. It remains to see if the conclusions of the circuit judge are manifestly against the weight of the testimony. Granted, that, if there are ties in human life that

appeal to the heart of man, it is the marital tie, that bids a man protect the wife of his bosom, or the sacred duty he owes to the prattling babe,—the offspring of a dead child. Delicate and tender as are all these, yet the laws require that, when the property of the wife or the grandchildren pass under the control and custody of the husband and grandfather, the time to be most careful is the moment when such property comes into his hands. If J. T. Poole had executed a mortgage to his wife at the time he borrowed her money, or had executed a mortgage to the sureties on his guardianship bonds when he became guardian, that would have been one thing. To wait months in one case, and a year in the others, presents a more serious question. The deed of assignment, in the inventory of property attached thereto, values his estate at \$43,415.58, and his indebtedness at \$32,473.68. If this was a correct estimate, Poole was solvent, but what does the testimony disclose? N. B. Dial, in his testimony, states that debts against the assigned estate for between \$33,000 and \$34,000 have been presented to him. The costs and fees connected with the assignment will not be less than \$2,500. Thus, his liabilities range at about \$36,000. Mr. Dial, in his testimony, thus places his estimate upon Poole's property:

Stock of goods sold for.....	\$ 8,757 81
His choses in action, \$9,815.15, worth $\frac{1}{4}$	3,271 71
The Whitmire place and the Davis place	1,800 00
4 other tracts in Spartanburg, (home place, 60 acres; Garrett place, 60 acres; $\frac{1}{2}$ Montgomery place,)....	2,407 00
The bal. of Montgomery tract and the Ferguson tract.....	1,000 00
Mrs. E. Poole tract, 60 acres.....	400 00
Sexton place, 317 acres.....	1,500 00
The Bolton place.....	500 00
Phelson place, (testimony of L. A. Langston,) Laurens.....	200 00
The Judge Martin place, in Laurens	2,550 00
Home place	5,000 00
	<hr/>
	\$27,386 52

Deduct from this sum his home- stead	1,000 00
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Total available assets.....	\$26,386 52
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Compare this sum with his debts, \$36,000, and his estate will not pay his debts, in full, by \$10,000.

Now, the home place is mortgaged, virtually, to National Bank of Laurens	\$ 5,000 00
The judgments obtained in February	1,000 00
The mortgage of Shattuck & Huffman is	2,700 00
The mortgage of Mrs. Anna H. Poole is (and interest).....	3,800 00
The mortgage of the grandchildren is \$7,500 and interest.....	8,500 00
The costs and expenditures of assigned estate are.....	2,500 00

Amount of preferred debts is..	\$23,500 00
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Deduct this from available assets, \$26,386.52, leaves \$2,886.52 left of this estate for

all other creditors. When the interest and costs account are accurately stated, there will not be the sum of \$2,866.52 for general or unpreferred creditors. Of \$23,500 of preferences, over \$12,000 is to his own family,—to his wife and grandchildren. Courts of justice cannot be expected to sanction such bald-faced wrong. Whether such sanction is expected or not, the proof should not be wanting that they will not. To expect any man to believe that Dr. Poole did not systematically contrive this result is asking too much of human credulity. Every step makes a design. See the judgments, unresisted, for \$1,000. See how quick he is to pay off claims under \$100, when suit is brought in the court of trial justice. See the vigilant care to have the mortgages to his grandchildren marked "Filed" 9th May, 1892, in the clerk's office, when the assignment is made on the 18th May, 1892. These mortgages are from himself to himself, virtually, for, as general guardian, he could collect and control every dollar of this more than \$8,500. And there is a clause in these mortgages to his grandchildren, who are his wards, wherein there is a covenant in which he seems to look forward to such a step as an assignment. To our minds, the weight of the testimony is manifestly against the conclusions of the circuit judge, and these grounds of appeal are sustained. But, as to the seventh, it is necessary to explain that the circuit judge was innocently led into this mistake, as has already been explained under subdivision 2 of the first general division. The conclusions just announced render it unnecessary to do more than announce that we sustain all the remaining grounds of appeal presented by the plaintiffs.

Let us next consider the grounds of appeal presented by the defendants:

(1) We sustain the first exception of these appellants. As we have before remarked, this was an innocent error on the part of the circuit judge.

(2) As to the second exception, we do not feel that it is necessary for us to pass upon this nice question, for we have already decided that the assignment was void for another or other reasons; but it is well to remark that, under the circumstances of this case, we would not feel at liberty to canvass the decision of the circuit judge, when it relates to the invalidity of the deed of assignment on the ground that the assignor failed to include therein all his property, for it must be remembered that the circuit judge found as facts that assignor had omitted 1,356 acres of land situate in Spartanburg, and \$218.25 of personal property, from the inventory attached to the deed of assignment, and as a part thereof. Now, this court could not undertake to say whether the circuit judge would have vacated and annulled the deed of assignment if only \$218.25 of personal property was omitted from such deed, or not, for he certainly had in his mind

the omission of the Spartanburg lands being 1,356 acres. Hence, while we have been pleased with the ability of the counsel for the respective parties to this appeal in arguing this proposition, we must decline to consider it, in justice to the circuit judge. Indeed, but for our conclusion on the other branch of the case, we fear our duty would have required us to send the cause back for a rehearing in the circuit court. The third exception, for the reasons just given, cannot be sustained. And so, also, for similar reasons, we cannot sustain the fourth exception. The fifth exception, under our views of the conduct of J. T. Poole, could not be sustained.

We think the decision of the circuit judge was correct, in holding that the terms of the deed necessarily imply that the homestead and exemption were reserved out of the property conveyed. The very terms of the instrument seem to demand this construction. Hence, the sixth exception is overruled. We do not think it necessary to repeat the testimony relied upon by us to support the consciousness of J. T. Poole that he was insolvent at the time of, or subsequent to, the execution of the mortgage to Anna W. Poole. How any other conclusion could have been reached by Dr. Poole, in his mind, we cannot conjecture.

As to the eighth ground of appeal, we are somewhat perplexed. The deed of assignment has been declared by us to be invalid, and it would seem that N. B. Dial, having gained his connection with the assigned estate under that invalid deed, would not be able to do otherwise than surrender all connection with said property, under the terms of Judge Norton's decree; yet we are confronted, in the case, with an order, consented to by all the parties to this controversy, that Mr. Dial should use at least \$2,700 of the assigned estate in his hands to pay a preferred creditor of the assigned estate. It does seem that to this extent, at least, he is entitled to his fees, as fixed by law, without any regard to what other compensation shall attach, under the orders of court in this case, to the services rendered the assigned estate by Mr. Dial. The decree should be so modified that, in paying over the assigned estate, Mr. Dial should be allowed the usual commissions on this \$2,700 received and paid out to Shattuck & Huffman. And to this extent, alone, we sustain the eighth exception, the remainder thereof being overruled.

As to the ninth ground of appeal, we apprehend it will not be seriously considered necessary for us to say much. The claim of plaintiffs had to be established, in order to entitle the plaintiffs to successfully maintain their action under section 2016 of the General Statutes of this state. The only mode of establishing it here was to give judgment thereon.

The tenth ground of appeal is very general,—too much so, we fear, to be seriously urged

for our consideration. It possibly might have been necessary, if we had taken a different view of this case. We have already sustained the judgment of the circuit court in annulling the deed of assignment, but upon a different basis than that pointed out by his honor, the circuit judge. The appointment of a receiver was the logical consequence of annulling the deed of assignment. This exception must be overruled. It is the judgment of this court that the judgment of the circuit court be modified in accordance with the principles herein announced, and the action is remanded to the circuit court for such further proceedings as may be necessary.

McIVER, C. J., and McGOWAN, J., concur.

ARMSTRONG et al. v. HURST et al.
(Supreme Court of South Carolina. Nov. 3, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—ACCEPTANCE AND RELEASE—SUFFICIENCY.

1. An assignment by a copartnership of all the firm's property, for the benefit of its creditors, and containing provisions requiring releases by such as accept the assignment, is not void, as a partial assignment, though it does not include the individual property of the partners. *Trumbo v. Hamel*, 8 S. E. Rep. 83, 29 S. C. 520, followed.

2. The fact that one of the partners, several months afterwards, confesses judgment in favor of an individual creditor, which is made a lien on such partner's individual property, does not, in the absence of fraud, render such assignment void.

3. Where an assignment requires an acceptance and a release within a time specified, an acceptance, with a mere "offer" to release, made by a creditor within such time, is insufficient, but both must be executed within such time. *Jaffray v. Steedman*, 14 S. E. Rep. 632, 35 S. C. 35, followed.

4. Attorneys for creditors, who are not attorneys in fact, cannot execute releases for their clients.

5. The execution of a release after the expiration of the time fixed in the assignment, taken in connection with an offer to release made within the time, is not a sufficient compliance with the requirements of the assignment to entitle a creditor to the benefit of its provisions.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Action by Armstrong, Cator & Co. and others against Hurst, Purnell & Co. and others, for the purpose of obtaining a construction of an assignment by N. C. Dacus and M. M. Jordan, copartners under the name and style of Dacus & Jordan, and ascertaining the rights of creditors thereunder. From the judgment entered, defendants appeal. Affirmed.

The following is the decree of Judge Fraser, referred to in the opinion:

"This case came before me at the term of the court held in July and August, 1892, on a report of the master, and exceptions thereto by plaintiffs, and by several of the

defendants for themselves and others. It will be better to take up the exceptions in their order:

"(1) Plaintiffs' exceptions: First. I do not see how the fact that J. C. Rogers is the assignee of Dacus & Jordan, or that he was a party to the same action in the United States court in reference to the assignment in this case, and in which there was no judgment against his claim, can deprive him of any rights he may have acquired under the assignment. This exception is overruled. Second. I think that some of the creditors of Dacus & Jordan have taken proper steps to acquire preference under the assignment, and this exception is overruled. Third. I think that J. C. Rogers, the assignee, is entitled to be paid in full the sum of \$23.60, the account of the Enterprise Soap Works, purchased by him before the assignment, and to the sum of \$248.84 paid by him for the account of Harvey, Blair & Co. for \$622.02, if the pro rata share amounts to so much in these cases, which I suppose to be the 'certain claims' referred to in this exception. It must therefore be overruled. Fourth. The release of J. B. Lewis was executed by his attorneys in this case,—Messrs. Furman & Furman. There is no evidence of any written authority, in writing and under seal, for the attorneys to execute any release under seal, and none can be presumed from the relations of the parties. This exception is therefore well taken, and must be sustained.

"(2) Defendants' exceptions,—Smith & Stoughton: First. The evidence as to this claim has not been furnished to me, and I am unable to say whether the amount is correctly found by the master. It is ordered that this claim be recommitted to the master for his report thereon. Second. I see no good reason why the assignment should be set aside, and as it would be necessary to do this, in order to distribute the fund without regard to the preferences acquired under the releases in pursuance of the terms of the assignment, this exception must be overruled.

"Hurst, Purnell & Co., for themselves and others: First. Creditors who have not filed, not only notices of acceptance of the terms of the assignment, but releases in writing and under seal, within the time limited, are not entitled to preference under this assignment, and therefore this exception must be overruled. Second. The paper referred to in this exception as a notice from Perry & Heyward, attorneys for certain creditors, is not a release, under the acts and under this assignment. This exception must be overruled. Third. Having come to the conclusion that J. C. Rogers, A. M. Dacus, and R. B. Ligon have accepted the terms of the assignment, and filed releases, in proper form, within the time limited in the assignment, and therefore entitled themselves to preferences, this exception is overruled. Fourth. This is a case in which there are various

conflicting claims arising under the deed of assignment, and a large number of creditors have established their claims under the order of this court. It is a proper case for the order and direction of the court in the construction of the terms of the deed of trust, and the administration of the trust fund. The good faith of Hurst, Purnell & Co., in bringing an action in the United States court can in no way affect the rights of creditors to bring another action like this. This exception is overruled. Fifth. A general exception, like this, does not bring to the attention any particular error complained of, and raises no question for the court, and is therefore overruled. The master is correct in charging Hurst, Purnell & Co. with the \$200 ordered to be paid out of this fund, or their interest therein, in the proceedings in the United States court.

"It is therefore ordered and adjudged that in all respects, except as indicated above, the report be confirmed, and that parties have leave to apply for proper orders to carry out the same. Questions not herein passed upon reserved. It is further ordered that the time for creditors to come in and establish their claims under the previous order of this court be extended to the 1st day of October next."

Perry & Heyward, for appellants. Earle, Orr & Mooney, for respondents. Haynsworth & Parker, for assignee.

McIVER, C. J. On the 27th of November, 1891, N. C. Dacus and M. M. Jordan, copartners in trade under the name and style of Dacus & Jordan, executed an assignment to J. C. Rogers of all their partnership property for the benefit of their partnership creditors. The deed of assignment provided, among other things, after providing for the payment of all proper costs and charges incurred in preparing and executing said assignment, as follows: "And then, if the money so realized be insufficient to pay all the creditors of the said Dacus & Jordan, then, in trust, first to pay debts due the public, and the debts of such of the creditors of the said Dacus & Jordan as may, within sixty days from the date hereof, accept the terms of this assignment, and execute a release of their claims against the said Dacus & Jordan, and that the balance, after paying said debts, be distributed among the other creditors of the said Dacus & Jordan, pro rata, without preference or priority." It appears from the report of the master to whom it was referred to hear and determine the issues of law and fact, and to call in all the creditors of Dacus & Jordan to prove their demands before him, that, within the prescribed time, some of the creditors, to wit, J. C. Rogers, A. M. Dacus, R. B. Ligon, and J. B. Lewis, duly accepted the terms of the assignment, and filed releases of their claims with the assignee, and that on the 26th of January,

1892, Messrs. Perry & Heyward, as attorneys for certain of the creditors therein named, filed with the assignee a notice, of which the following is a copy: "To Mr. J. C. Rogers, Assignee, Greenville, S. C.: Take notice that the creditors whose names appear upon the list hereto attached, with their respective claims against the firm of Dacus & Jordan, hereby accept the terms of the assignment made to you by the firm of Dacus & Jordan—N. C. Dacus and M. M. Jordan—on the 27th day of November, A. D. 1891, and offer releases of their said claims, respectively, as required by said assignment,"—and that none of the other creditors had attempted to comply with the terms of said assignment. It should be here stated that about 10 days after the service of the notice just set out, but after the expiration of the 60 days, the creditors therein mentioned executed and delivered formal releases of their claims against Dacus & Jordan. It also appeared that at March term, 1892, of the court of common pleas for Greenville county, Smith & Stoughton, and others of the creditors of Dacus & Jordan, brought actions against Dacus & Jordan, to which no answers were filed, and they recovered judgments by default, which were duly entered on the 11th of April, 1892; and transcripts thereof were duly filed on the same day in the county of Anderson, where, it seems, N. C. Dacus, one of the members of the firm of Dacus & Jordan, individually owned certain property,—real estate. In the mean time, however, N. C. Dacus, on the 7th of April, 1892, confessed judgment in favor of J. C. Rogers for the sum of \$635, and a transcript of the same was duly filed in the county of Anderson on the same day. This does not seem to be one of the claims proved against Dacus & Jordan under the call for creditors, as it does not correspond in amount with either of the claims so proved; and hence we suppose that it was a claim held by Rogers against N. C. Dacus individually, and not a claim against the partnership, though, under the view which we take, it is a matter of no consequence whether our supposition be well or ill founded. It further appeared that on the — day of December, 1891, the appellants Hurst, Purnell & Co. filed their bill in the circuit court of the United States to set aside the assignment, and for the appointment of a receiver, but that, after the appointment of a temporary receiver, that cause was discontinued, and by consent of the parties an order was passed, directing the temporary receiver to turn over the assets in his hands to the assignee and agent, and making certain provisions for the payment of the costs of the case and the compensation allowed the receiver, the particulars of which need not be stated, further than to say that \$200 of the compensation allowed the receiver should be paid out of the pro rata share of Hurst, Purnell & Co. in the assets of the assigned estate.

The master found, among other things, as matter of law, that the parties named above as having accepted and executed releases within the time prescribed were entitled to be first paid, (after expenses, etc.) and that Hurst, Purnell & Co. and the other creditors named in the notice above set out, not having executed releases within the prescribed time, could not be placed in that class. To this report, several of the parties filed exceptions, and the case was heard by his honor, Judge Fraser, upon the report and exceptions, who rendered his decree sustaining some and overruling others of the exceptions, as may be seen by reference to the exceptions and decree thereon set out in the case. The decree concluded in these words: "It is therefore ordered and adjudged that in all respects, except as indicated above, the report be confirmed, and that parties have leave to apply for proper orders to carry out the same. Questions not herein passed upon reserved. It is further ordered that the time for creditors to come in and establish their claims under the previous order of the court be extended to the 1st day of October next." To this decree the following notice of exceptions was given in due time, to wit: "For the purposes of appeal to the supreme court from the final decree in this cause, the defendants Hurst, Purnell & Co., in behalf of themselves and all others of the creditors of Dacus & Jordan who occupy the same position, except" to the decree of Judge Fraser, upon two grounds, which are set out in the record, but need not be copied here, as they raise, substantially, but two questions: (1) Whether there was error in holding that the notice given on the 26th of January, 1892, above set out, was not a sufficient compliance with the terms of the assignment to place appellants in the class of accepting creditors. (2) If not, there was error in holding that the execution of the releases 10 days after the prescribed time had expired, taken in connection with the said notice, was insufficient.

Smith & Stoughton, who, though not parties to the original record, had become so by coming in under the call for creditors, and establishing their demands, in part at least, also filed the following exceptions to Judge Fraser's decree "for the purposes of appeal to the supreme court from the final decree in this cause," to wit: "For that his honor holds that there is no good reason why the assignment should be set aside, whereas he should have held that, taking into consideration the conduct of N. C. Dacus and J. C. Rogers before and after the date of the assignment, the form of the assignment, and the confession of judgment by N. C. Dacus to the said J. C. Rogers, it was evidently the purpose of the said N. C. Dacus to give a preference to the said J. C. Rogers over other creditors, and the said assignment and confession of judgment are therefore void."

It seems that Judge Fraser, in his decree,

recommended the report of the master for two purposes, only, so far as we can discover: (1) To ascertain the correct amount due Smith & Stoughton; (2) to extend the time allowed creditors to come in and prove their claims. In accordance with this portion of the decree, the master made a second report, ascertaining the correct amount due Smith & Stoughton, and reporting other claims established. This report came before his honor, Judge Aldrich, with exceptions thereto, as we presume, though none are set out in the case; and Judge Aldrich rendered his decree, confirming the second report of the master, and directing, among other things, that the assignee and agent of the creditors do pay out the assets to the several creditors in accordance with their rights, as ascertained by the decree of Judge Fraser. Notice of appeal from this decree was given by Messrs. Perry & Heyward, as attorneys for the defendants; but the only exceptions we find in the record are those of Hurst, Purnell & Co. and others, (who the "others" are, is not stated,) and of Smith & Stoughton,—those of the former making the same points, substantially, as were made in their exceptions to Judge Fraser's decree, and those of the latter making the same points as were made in their exceptions to Judge Fraser's decree, and, in addition thereto, the further point that the assignment "being a partial assignment, requiring releases, it is void upon its face."

Before going into a consideration of the questions raised by these exceptions, it is necessary to notice certain preliminary objections to the hearing of these appeals, raised by counsel for respondents in their argument here, based upon the ground that Judge Fraser's decree was a final decree, at least so far as the rights of Hurst, Purnell & Co., and others standing in their position, are concerned, and, there being no notice of appeal from that decree, these appellants have no standing in this court, and that Smith & Stoughton's appeal cannot be considered, for the same reason, as well as for the further reason that these last-named appellants have no such connection with the record as would entitle them to appeal. But, under the view which we take of this case, we do not deem it necessary to consider these objections, of a somewhat technical character, especially as they were not taken by any formal notice of a motion to dismiss the appeals; and we shall, therefore, pass them by without expressing, or even intimating, any opinion as to whether such objections are well or ill founded. Coming, then, to a consideration of the questions presented by the exceptions, we propose to take them up in what seems to be their logical order, without regard to the order in which they are presented in the record:

First, whether there was any error on the part of Judge Fraser in holding that there was no good reason why the assignment

should be set aside. This involves two inquiries: (1) Whether it was void, as a partial assignment requiring releases; (2) whether it was rendered void on account of the conduct of the parties—N. C. Dacus and J. C. Rogers—evincing an intention to give J. C. Rogers an unlawful preference, by the terms of the assignment, and the confession of judgment.

The first inquiry is conclusively answered by the recent decision of this court in the recent case of *Trumbo v. Hamel*, 29 S. C. 520, 8 S. E. Rep. 83, where it was held that an assignment by a copartnership of all its partnership property for the benefit of its partnership creditors, and containing provisions for releases, was not void, as a partial assignment, though it did not embrace the individual property of one of the partners. As was well said by Mr. Justice McGowan in that case: "A copartnership is a distinct entity, entirely separate from that of any of its members, and we know of no reason why it may not assign its property for the payment of its debts without including the individual property of the different partners." Here, as in that case, the assignment embraced all of the partnership property, as found by the master, to which finding there was no exception; and there is no reason why the fact that it did not also embrace individual property of one of the copartners, N. C. Dacus, should render it invalid. There was no finding of fact, and no testimony upon which such a finding of fact could have been based, either that there was any fraud intended, or that the fact that one of the copartners had individual property, was concealed from the creditors. Second, as to the second inquiry, there was a like absence of any evidence tending to show any fraud in the conduct of the parties; and surely the confession of judgment to Rogers by one of the partners, made several months after the execution of the assignment, and after an effort had been made, and abandoned, to set aside the assignment, could not possibly have the effect of bringing this case within the rule laid down in the cases from *Wilkes v. Walker*, 22 S. C. 108, down to *Putney v. Friesleben*, 32 S. C. 492, 11 S. E. Rep. 337. The act of making the assignment, and the act of confessing the judgment several months afterwards, were the acts of two different and distinct persons, in the eye of the law,—the copartnership, and one of its individual members,—and it would require much more evidence than we have been able to find in this record to bring these two acts together as parts of the same transaction. Besides, it is more than questionable whether the issues sought to be raised by the exceptions of Smith & Stoughton are not so wholly beyond the scope of the pleadings in this case as to preclude the court from considering them. The action was brought for the purpose, as we learn from the case, of construing the assignment, and ascertaining the

rights of the parties under it. This necessarily assumes the validity of the assignment; and to allow one who is not a party to the original record, and only became so by coming in under the call for creditors, to attack the assignment, would, to use no harsher term, certainly be anomalous. These exceptions of Smith & Stoughton must therefore be overruled.

It only remains to consider the questions raised by the exceptions of Hurst, Purnell & Co. and others. Here, too, we think that the first question presented by these exceptions is conclusively determined by the recent decision of this court in the case of *Jaffray v. Steedman*, 35 S. C. 33, 14 S. E. Rep. 632, adversely to the appellants. That case decides, distinctly, that there must be, not only an acceptance of the terms of the assignment, but also a release. Here the paper relied upon, a copy of which is set out above, is simply a notice, signed by the attorneys of said creditors, that such creditors "hereby accept the terms of the assignment * * * and offer releases of their said claims, respectively, as required by said assignment." But no releases were executed, either by the creditors or their attorneys, within the prescribed time. The fact that the paper contained, not only an acceptance of the terms of the assignment, but an offer to release, cannot avail these appellants, for as is said in *Burrill*, Assignm. § 485: "Where a release is required by the assignment, it must be actually executed by the creditor. A mere offer to execute is not sufficient." And the author cites in support of this proposition the case of *Pearpoint v. Graham*, 4 Wash. C. C. 232, which was a much stronger case than this, for there the trustee—or "assignee," as he is called here—under the assignment gave public notice that a release would be prepared by him for the signature of the creditors, and one of the creditors called upon the trustee before the expiration of the 60 days, and offered to execute the release, but was informed by him that the instrument had not been prepared; and yet it was held that the offer was not tantamount to a release, and that the creditor was, nevertheless, bound to execute a release in due form within the prescribed period. The reason of this ruling, doubtless, was that, the object being to fix the rights of the parties at the time specified, a mere offer, which might be withdrawn before it was accepted and acted upon, would not be sufficient. But, in addition to this, it appears that this paper was signed by the attorneys of the creditors,—attorneys at law, not attorneys in fact,—and it is settled that an attorney at law has no power to execute a release of his client's claims. *Gilliland v. Gasque*, 6 S. C. 406; *Kirk's Appeal*, 87 Pa. St. 243.

The only remaining inquiry is whether the execution by the creditors, themselves, of formal releases, 10 days after the expiration of the time limited, would not have the effect

of ratifying and confirming the previous action of their attorneys, so as to give such action effect from the day when it was taken. It seems to us very obvious that such cannot be the effect of the subsequent so-called ratification. The object being, as we have said, to fix a specified time when the rights of the parties shall become vested by a compliance with the prescribed conditions, it is very clear that, when the rights of some of the creditors have thus become vested, no subsequent act of other creditors can be permitted to divest or disturb such vested rights. If the attorneys had the right to execute releases, then no subsequent ratification would be necessary; but, if they did not have such right, then their action could not bind their clients until ratification was made. But this becomes unimportant, under the view which we have taken, that, even if the attorneys had the power to execute releases, they did not in fact exercise such supposed power; and hence, in no view of the case, could these appellants come within the class of creditors who had accepted and released within the prescribed time. The judgment of this court is that the judgments both of Judge Fraser and Judge Aldrich be affirmed.

McGOWAN and POPE, JJ., concur.

CORNWALL v. STATE.

(Supreme Court of Georgia. Feb. 20, 1893.)

BURGLARY—ARTICLES STOLEN AS EVIDENCE—CONFESSIONS—INSTRUCTIONS—IMPEACHING VERDICT BY JURORS—COMPETENCY AND CONDUCT OF JURORS.

1. There was no error in admitting in evidence the bag which contained the silver when stolen from the broken building, and which bag was afterwards found in the prisoner's possession; and, though the tools admitted in evidence were new ones, and had not been used, this did not exclude them, there being evidence of the prisoner's admission that he had thrown away or concealed the tools used in the burglarious enterprise, and also evidence tending to show that the new ones were adapted to a like use as well as many other uses.

2. The bag in which silver money was when taken from a safe in the burglarized building, though of little or no value in itself, is such an article of property as the rule with reference to accounting for the possession of stolen goods applies to, this bag having been found in the prisoner's possession within four days after the burglary was committed.

3. A detective having arrested the accused, and being about to turn him over to other custodians, told him he knew where he came from, and what he had done, which was false, and said to him privately: "When I turn you over to these people you have my handcuffs on, and if you get away I want you to send my handcuffs back. If you get away you may need this money," giving him two dollars,—admissions in the nature of a confession which followed immediately without other inducement than this were admissible in evidence; nor would the fact that the confession was indirect, rather than direct, render it inadmissible.

4. The jury may consider a confession if it was freely and voluntarily made, though the detective to whom it was made used artifice,

trick, or deception in order to impose on the accused, and induce him to confide in his good will and friendly feeling.

5. None of the witnesses who testified in the case being impeached by evidence introduced for that purpose, it was not error to charge the jury thus: "The law presumes all witnesses who testify under oath are credible and worthy of belief. The law presumes *prima facie* that no witness will willfully, knowingly, and absolutely swear to what is false. The law does not impute perjury to a witness, nor are you at liberty to do so. The law presumes that a witness will not testify falsely; that is a *prima facie* presumption only; it is not a conclusive presumption. The defendant is permitted by law to make a statement in his own behalf not under oath, and it is your right and duty to weigh and consider that statement. The law says that you may believe that statement in preference to the sworn evidence in the case. If you believe it, then you may accept the unsworn statement of the defendant in preference to the sworn evidence. Not capriciously and arbitrarily, but in search of the truth, you have a right to believe it in preference to the sworn evidence. There is no presumption touching the defendant's statement, no presumption that it is true, nor any presumption that it is untrue. In other words, it goes to you without presumption either for it or against it."

6. It was not error to charge the jury thus: "There are two kinds of evidence known to the law: one known as 'direct evidence,'—that is, that which immediately points to the question in issue. There is also known to the law indirect or circumstantial evidence; that is, that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. If you find there is no sufficient positive evidence to authorize a conviction in this case, then ascertain whether or not there is sufficient circumstantial evidence to authorize a conviction. If you find the evidence acceptable to you is of a circumstantial character only, then determine whether that evidence removes all reasonable doubts of the defendant's guilt. When testimony relied on to convict is entirely circumstantial it should be so strong as to exclude every reasonable hypothesis save that of the defendant's guilt. It must be sufficient to remove all reasonable doubt. If there is no reasonable hypothesis upon which it could be placed, that would remove any reasonable doubt, if there is a reasonable doubt. But whether the testimony be positive or circumstantial, if it removes from the mind of the jury all such reasonable doubt, it would be sufficient to authorize a conviction. If you find from the evidence in the case, whether positive or circumstantial, that it is sufficient to remove all reasonable doubt of the defendant's guilt, then evidence of either character—if it removes from your mind all reasonable doubt—would legally authorize a conviction."

7. Though it was not accurate to charge the jury thus: "And if you find there was a burglary committed, and that goods were stolen from the house burglarized, and the defendant was found in possession of such articles under such circumstances as to make it incumbent on him to show that he obtained the articles honestly and legally, and he does not do so, then you would be authorized to find him guilty on that proof,"—yet this inaccuracy is no cause for a new trial in the present case, the evidence as a whole showing beyond any reasonable doubt that the verdict was correct.

8. Jurors will not be heard to establish facts which go or tend to impeach the verdict which they have united with their fellow jurors in rendering.

9. Where the expression imputed by one witness to a juror as made by him before the trial was, "If they take me on the jury in that

burglary I will convict them fellows sure," and by another. "If I am caught on that jury I will convict him sure," and the juror in explanation testifies that all he said was addressed to one of the prisoner's counsel, and was, "That if the evidence warranted it, he would hang the defendant;" also that he said this without any prejudice whatever against the prisoner, and was rather in hopes that he would be rejected as a juror, there was no error in treating the explanation as sufficient, and in holding that the juror had not rendered himself incompetent. He was most probably endeavoring to evade service as a juror. He testified also that he was perfectly impartial, and only wished the prisoner, who was an entire stranger to him, might have a fair trial.

10. That one of the jurors repeated aloud to the attending bailiff a message which he requested the bailiff to deliver to his, the juror's, son, touching the conduct of some work which was to be done at the juror's home, and that the son was near enough to hear the message as his father dictated it, would not vitiate the verdict.

11. That 2 of the jury left the room in charge of a bailiff to attend a call of nature, and were absent 15 or 20 minutes, and that the 10 who remained in the room with the door and windows closed in the mean time were unguarded by an officer, and not locked in, will not vitiate the verdict where it appears that neither those who went out nor those who remained in had any intercourse with any one during the absence of the bailiff with the two who thus retired.

12. If the attending bailiff remained all night in the same room occupied by the jury at the hotel, where they were lodged under instructions from the court, this would not vitiate the verdict, unless it appeared that the jury were there for the purpose of deliberating, or that something was said or done touching the case, more especially as the affidavits in the record strongly indicate that the room was occupied by the jury merely as a place of repose for the night, and that the case was not under discussion or immediate consideration at any time when the bailiff was present, or during that night. Nor does it appear that he remained in the room, or was in the room at all, save by the affidavit of one of the jurors.

(Syllabus by the Court.)

Error from superior court, Jones county; W. F. Jenkins, Judge.

James Cornwall was convicted of burglary, and brings error. Affirmed.

W. D. Stone and J. C. Barron, for plaintiff in error. H. G. Lewis, Sol. Gen., H. T. Lewis, and Richd. Johnson, for the State.

BLECKLEY, C. J. The storehouse of J. D. Anchors was entered burglariously at night, his safe blown open, and money to the amount of about \$225 was stolen therefrom. This money was mostly in silver; probably a small amount of it was gold; perhaps some was paper; all of it being contained in a small sack, which is designated in the evidence as a "shot sack." The commission of the burglary by some one was put by the evidence beyond question. The only real problem which the jury had to solve was whether Cornwall was the burglar, or one of the burglars. The motion for a new trial complains of the admission of certain evidence, the charge of the court, refusal to

charge as requested, disqualification of one of the jurors, separation and misconduct of the jury, and misconduct of the bailiff who had the jury in charge. It complains also of the verdict as being unwarranted by the evidence, contrary to the same, contrary to law, etc. The motion was overruled.

1. The shot sack was found in Cornwall's possession four days after the burglary. It was empty. Its admission in evidence was objected to because it was not sufficiently identified, and it was contended that, if admissible at all, it should have come in "only as a circumstance," and not as stolen property. An examination of the evidence satisfies us that it was identified with sufficient certainty. On principles both of law and common sense it was admissible as evidence tending to connect Cornwall with the burglary, although the sack was empty when it was found on his person. Certain implements, such as drills, were found in his possession at the same time. They were new, and had the appearance of never having been used, but the evidence showed they were adapted to use in opening safes as well as in other mechanical work. One of the witnesses had seen similar tools used for getting into safes. Cornwall professed to be a traveling mechanic, engaged, when he could get employment, as a marble cutter. Moreover, there was evidence of his admission that he had concealed the tools used in committing this burglary. If he had done so, this might account for the purchase of a new set, as parting with the old ones would likely give occasion to procure a new outfit, whether he designed to commit more burglaries or simply to ply his vocation as a marble cutter.

2. It was contended that a small shot bag made of cloth was such a trifle and of so little value as not to be on the footing of stolen property with reference to accounting for the recent possession of it after the crime was committed. The court took a different view, and in so doing was correct. It is not solely the element of value which gives probative force to the possession of an article of property which disappeared when a crime was committed. The main consideration is that the possession must have had some origin, and, as it could have originated by committing the crime, there is, or may be, some presumption, though often very slight, of its having so originated, unless a different origin appears to be probable; and, inasmuch as the person having the possession best knows how his possession did in fact originate, and has the best means of accounting for it, it is reasonable and proper that the burden of so doing should rest upon him. If any inanimate thing be at a particular place, and shortly thereafter is found in the possession of some one at a different place, that he was the person who removed it, unless a different agent is pointed to, is in some degree probable. Here, on the 20th

of January, 1891, a small shot sack was in a certain safe, locked up in a storehouse situated in the county of Jones, and four days thereafter the same article was found in the possession of Cornwall, in the city of Savannah, in the county of Chatham. Why should there not be some accounting for this removal and change of possession by Cornwall, no matter whether the sack was of much or little value or of no value at all?

3, 4. The admissions in the nature of a confession made by Cornwall to the detective were competent evidence notwithstanding they were obtained by artifice, trick, or deception, and they could be considered by the jury. The means used to obtain them did not prevent them from being free and voluntary. Doubtless Cornwall was misled and deceived as to the detective being his friend, and in sympathy with any effort he might make to effect his escape from custody. But the hope and belief that he had found a friend would not render it the least probable that an admission or confession made to the supposed friend was untrue, and the reasons why confessions made under the influence of hope are excluded is the danger of their being false. The detective made no suggestion that he would aid in effecting an escape, nor did he suggest the making of any admission or confession. What he said and did are fairly indicated in the third headnote. He sealed his pretended friendship by handing Cornwall two dollars, and thereupon the latter said, "Now I will talk to you," and proceeded thus: "These are new tools. They are not the tools I was using; they are buried underneath some old cross-ties at the Central Railroad wharf. Yes, I can find the place. * * * I told that big son of a bitch to throw that bag away, and he didn't do it. Those fellows treated me damned mean. They might have gone to a lawyer, and got me out for a few dollars." All this is pregnant with the implication that Cornwall participated in the burglary. The confession was indirect, rather than direct; but certainly this would not render it inadmissible.

5, 6. The court charged as set out in the headnotes 5 and 6. Applied to the facts and circumstances of the particular case, we consider these instructions as substantially correct. None of the witnesses were impeached by evidence introduced for that purpose. We think there is a prima facie presumption that all witnesses not impeached tell the truth, and that there is no presumption, one way or the other, respecting the truth of the prisoner's statement. Upon the truth of that the jury are to pass, unaided by any preliminary presumption for or against him. The charge was correct on direct and circumstantial evidence and on reasonable doubt.

7. It was not accurate to charge the jury as set out in the seventh headnote. It is never incumbent on the accused to show that

he obtained stolen articles honestly and legally. A guilty mode of acquiring them will be as effectual as an innocent one. Their acquisition by any means whatever other than by participating in the offense involved in the trial will be a sufficient accounting for the possession to neutralize the effect of that possession as evidence tending to prove guilt. Furthermore, the proposition, "You would be authorized to find him guilty on that proof," should have been qualified by adding something to this effect: "provided, under all the circumstances in evidence, your minds are satisfied beyond a reasonable doubt of his guilt." In view, however, of instructions given in other parts of the charge, and as the evidence, taken as a whole, shows beyond any reasonable doubt that the verdict was correct, the inaccuracy in this part of the charge may be treated as affording no cause for a new trial. Why should a conviction which was undoubtedly right and proper in itself be set aside on a verbal criticism of the court's charge. The possession of the shot sack was not only unaccounted for, but the prisoner virtually admitted that he obtained it by reason of his connection with this burglary, and not otherwise.

8-12. The remaining points are left to stand on the headnotes. Judgment affirmed.

BROWN v. ROBINSON.

(Supreme Court of Georgia. Feb. 2, 1893.)

APPEAL FROM COUNTY COURT—WHEN LIES.

Where the parties are at issue in a county court on the declaration and plea in an action involving more than \$50, the losing party is entitled to appeal to the superior court from the final judgment rendered against him. Code, §§ 286, 3610a.

(Syllabus by the Court.)

Error from superior court, Elbert county; Hamilton McWhorter, Judge.

Action by J. T. Robinson against I. K. Brown. Plaintiff had judgment in the county court, and defendant appealed to the superior court. From a judgment dismissing the appeal, defendant brings error. Reversed.

H. J. Brewer and McCurry & Proffitt, for plaintiff in error. Jos. N. Worley, for defendant in error.

BLECKLEY, C. J. It would seem impossible to doubt that by the express terms of the Code, §§ 286, 3610a, the right of appeal existed in this case. The former section declares that, "If either party is dissatisfied with the judgment of the county judge, and the principal sum claimed, or damages claimed, exceeds fifty dollars, said party may enter an appeal from such judgment, within four days, under the same rules and regulations as are provided for appeals in this Code;" and the latter declares that "in all civil cases tried and determined by a county judge, or a justice of the peace, or a notary

public who is ex officio a justice of the peace, and on all confessions of judgment before either of said officers, where the sum claimed is more than fifty dollars, either party may, as a matter of right, enter an appeal to the superior court." The principal sum claimed was more than \$50. The case was tried and determined by a county judge, who rendered judgment for the plaintiff, and with that judgment the defendant was dissatisfied, his dissatisfaction being manifested by duly entering an appeal. The contention is that, as the plaintiff introduced evidence to prove his account, and the defendant introduced none to support his plea, or to raise a conflict of evidence, no question of fact was involved, but that the sole question was as to the legal sufficiency of the plaintiff's evidence to establish the account. But the defendant did not concede the truth of this evidence. He did not demur to it, or move for a nonsuit, so as to narrow down the case to any mere legal question whatever. If, when the trial began, there was a question of fact to be decided, that question remained in the case until judgment was rendered, and it was decided by that judgment, if it was disposed of at all. If it was ever in, how else did it get out? And who can even imagine that it was not some time in, the suit being founded on an open account, and the plea being the general issue? But, were the contention we have mentioned sound, that would not defeat the right of appeal, though it might entitle the defendant to waive appeal, and have the judgment reviewed by the superior court on certiorari. In order to bring certiorari, he would have to eliminate questions of fact and reduce the case to one or more questions of law; but the right of appeal would not be lost by so doing, unless he elected not to appeal, but to proceed instead by certiorari. He could not have both remedies, but he might have either, at his election. He can appeal in any case provided for in the quotations made above from the Code, and he can do this irrespective of any classification of the question or questions which the case involves, and irrespective of whether certiorari could be brought or not. Questions of fact will restrict his remedy to appeal, but questions of law will not restrict his remedy to certiorari. By overlooking this distinction, the court erroneously dismissed the appeal. Judgment reversed.

MCDONALD v. McCALL.

(Supreme Court of Georgia. Feb. 27, 1893.)

CONSTRUCTION OF WILL—LIFE ESTATE—RIGHTS OF REMAINDER-MEN.

A devise made in 1858 to a named person, and to a married granddaughter of the testatrix, for equal division between them, "the share going to my said granddaughter to be held by her husband in trust for her sole and

separate use during her life, and at her death to be equally divided between her children, which she may have," created a trust which extends to the life estate in the granddaughter, only, and does not embrace the remainder devised to her children. The remainder is a legal, not an equitable, estate in the children. Consequently, a conveyance in fee made by the trustee in 1860, under an order of the chancellor granted in vacation, passed no title, save as to the life estate of the granddaughter, and would be no obstacle to a recovery of the premises by her children after her death. She being still alive, they are not barred by the statute of prescription, although she and her trustee may be barred.

(Syllabus by the Court.)

Error from superior court, Floyd county; John W. Maddox, Judge.

Action by D. T. McCall against Luke McDonald to rescind a contract for the purchase of land. From a verdict for plaintiff, and an order denying a new trial, defendant brings error. Affirmed.

The following is the official report:

McCall, by his petition, alleged: On February 27, 1891, he purchased of Luke McDonald the property described in a bond for title attached, and for the sum payable at time therein stated, giving McDonald his notes for the sums so stated as the purchase price, which notes McDonald now holds. Upon examination of the titles to the property, he finds that McDonald has not, and cannot convey to him, good and sufficient title to that portion of the property which is part of lot 208 in a certain district and section of Floyd county; and without the possession of this property the tract is valueless, owing to its size and shape; and the purchase was an entire contract, and, legally, not severable. The defect in the title mentioned is as follows: The portion of lot 208 is part of a 70-acre tract bequeathed in the fourth item of the will of Elizabeth Cabiness, by which item it appears that only an estate for the life of E. Louisa Anderson was bequeathed to John J. Anderson, trustee, and the remainder, after Mrs. Anderson's death, was bequeathed to her children, unincumbered with the trust. Elizabeth Cabiness died seised and possessed of these 70 acres, and McDonald, by direct claim, claims title to that portion of the lot 208 mentioned above, his claim for title being: By the will mentioned, to Anderson, trustee, one-half interest, and to Merritt, one-half interest; deed from Anderson, trustee, and Merritt, to Cothran, (Anderson, trustee, was authorized to make the sale by an order of the judge of the ——— circuit, sitting at chambers;) Cothran, by deed to Scanlan; and so on, by various conveyances, down to McDonald. By reference to the will, it appears that Anderson could and did only convey the life estate, which he held as trustee, and therefore those holding under said trustee having only a life estate, which expires upon Mrs. Anderson's death. Mrs. Anderson has three children now living, who will take said half interest at her death. Petitioner pray-

ed that the sale might be set aside, that his note be delivered to him, and the bond for title canceled. The jury found for plaintiff, and, defendant's motion for new trial being overruled, he excepts. The motion was upon the grounds that the verdict was contrary to law, the principles of justice, and equity, contrary to the evidence, and without evidence to support it, and because the court erred in instructing the jury to find for plaintiff under the proof submitted. Upon the trial, plaintiff introduced the will of Elizabeth Cabiness, the item in question being as follows: "I will and bequeath to my granddaughter E. Louisa Anderson, wife of John Anderson, and James W. Merritt, all the balance of said lot, not heretofore and above disposed of, [portions of lot 208 had been devised by preceding items to others,] to be equally divided between them, the share going to my said granddaughter to be held by her said husband, John Anderson, in trust for her sole and separate use during her life, and at her death to be equally divided between her children, which she may have." Plaintiff also introduced deeds, as mentioned in his petition, showing how the title to the property in question came into McDonald, and further testimony to the effect that E. Louisa Anderson was still living, and has children living; that the land in dispute was part of the land mentioned in item fourth; and that Elizabeth Cabiness had possession of it up to her death. There was no evidence for defendant.

E. P. Treadaway, for plaintiff in error.
Dran & Smith, for defendant in error.

BLECKLEY, C. J. The facts appear in the official report. From the briefs of counsel, and their arguments here, we understand the controversy between the parties to be confined to a construction of the fourth item in the will of Mrs. Cabiness, and to the effect of the sale and conveyance made by Anderson, as trustee, in 1860, by which he undertook to pass the fee, not merely Mrs. Anderson's life estate, in premises embraced both in the will and his deed. It does not appear whether the children of Mrs. Anderson were in being when the will took effect, or whether or when, if at all, they attained their majority. All we know of them is that they, as well as their mother, were living when the case was tried. Nor is there anything disclosed as to the possession of the premises by any person at any time, except that the testatrix, Mrs. Cabiness, had possession before and at the time of her death. The court below construed the will properly, and we have indicated and indorsed that construction in the headnote. *Bull v. Walker*, 71 Ga. 195; *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. Rep. 866. There is nothing in the facts on which to predicate any direct decision as to the effect of prescription, but we have indicated at the conclusion of the

headnote the general rule on that subject. *Bagley v. Kennedy*, 81 Ga. 721, 8 S. E. Rep. 742. Judgment affirmed.

SIMS et al. v. CLARK et al.

(Supreme Court of Georgia. Feb. 27, 1893.)

MISJOINDER OF PARTIES—VENUE—SEVERALTY OF CONTRACT—GUARANTY.

1. Debtors by open account are not subject to suit jointly with one who has guarantied, in writing, payment of the account. Residence of the latter in the county in which the suit is located gives the court no jurisdiction over the former.

2. Against one who has, before goods were sold and delivered, guarantied, in writing, payment therefor, on the faith of which guaranty the sale was made, a recovery may be had upon a declaration which sets forth the account, a copy of the contract of guaranty, and alleges refusal to pay the account, and notice by the creditor of acceptance of the guaranty, as follows: "Plaintiffs first stating to said V. B. McGinnis, (the guarantor,) that his guaranty would be accepted, and that it was accepted."

3. The court erred in overruling the demurrer of the primary debtors to the declaration, but did not err in overruling that of the guarantor. Let the action be dismissed as to the primary debtors, and the verdict stand as to the guarantor.

(Syllabus by the Court.)

Error from city court of Cartersville; Shelby Attaway, Judge.

Action by R. G. Clark & Co. against Sims & Auchmuty and V. B. McGinnis. Plaintiffs had judgment, and defendants Sims & Auchmuty bring error. Reversed in part.

M. R. Stansell, for plaintiffs in error. Akin & Harris, for defendants in error.

BLECKLEY, C. J. 1. The suit was in Bartow county, where McGinnis, the guarantor, resided, and the declaration showed on its face that Sims & Auchmuty, the debtors by account, resided in Polk county. The latter demurred because there was no jurisdiction as to them. This point was well taken. These debtors were entitled to be sued in the county of their residence, and there was no jurisdiction over them elsewhere. Code, §§ 5172, 3402, 3404. Debtors by mere account are not joint makers or promisors with one who has, by a separate contract, guarantied payment of the account. The two contracts are several, not joint, and the liability on each is several. Those who contracted the account are not liable at all on the guaranty, and he who made the guaranty is not liable at all on the account.

2. The facts necessary to recover of the guarantor, including acceptance of the guaranty, were sufficiently set forth; and, as there is no complaint of the finding, we must assume that they were duly proved.

3. The result is that the court erred in overruling the demurrer of Sims & Auchmuty, but correctly overruled the separate demurrer of McGinnis. As to the latter, the verdict should

stand; but, as to the former, let the action be dismissed. Judgment reversed in part, and in part affirmed.

HUFBAUER et al. v. JACKSON.

(Supreme Court of Georgia. Feb. 27, 1893.)

POWER OF TRUSTEE TO SELL LAND—RES JUDICATA—JURISDICTION OF COURT—DIRECTING VERDICT.

1. Unless expressly authorized by the instrument creating the trust, or by judgment of a court of competent jurisdiction, a trustee of a married woman and minor children has no power to sell land, except by virtue of an order of a judge of the superior court. Code, § 2327.

2. Where a suit was brought by a trustee, in a county court, for the purchase money of land, and was appealed to the superior court, though the appeal was by consent of parties, the court had no jurisdiction to render a decree requiring a conveyance of the land to be made upon the payment of the purchase money; and the beneficiaries of the trust, not being parties to the decree, and not having assented to or ratified the same, are unaffected thereby.

3. Where the defense set up by plea and established by evidence is plainly an insufficient answer to the plaintiff's action, it is error for the court to direct a verdict for the defendant.

(Syllabus by the Court.)

Error from superior court, Houston county; A. L. Miller, Judge.

Action by Juliette B. Hufbauer and others against E. W. Jackson to recover land. Defendant had judgment, and plaintiffs bring error. Reversed.

M. G. Bayne, for plaintiffs in error. C. C. Duncan, for defendant in error.

BLECKLEY, C. J. 1. There can be no doubt that, unless expressly authorized by the instrument creating the trust, a trustee has no power, without the voluntary consent of all the beneficiaries, to sell and convey the corpus of the trust property. He must obtain an order of sale from a court of competent jurisdiction, or from the judge of the superior court, upon a proper application. Code, § 2327. The deed which constituted Goff trustee for his wife and children was silent as to any sale or power to sell; and there is no suggestion that any order of sale was applied for or granted, and no proof that the beneficiaries consented. The case turns, therefore, at its present stage, altogether upon the plea of former recovery.

2. That plea sets up a judgment or decree by the superior court in a case brought in the county court, and carried by appeal to the superior court, the appeal being founded on consent of parties. These parties were Goff, as trustee for his wife and children, on the one side, and Jackson on the other. The wife and children of Goff were not parties, and were not before the court. The purpose of the suit was to recover of Jackson a sum as purchase money of the land now in controversy. Pending the appeal in the superior court, Jackson filed an equitable plea, in which he offered to pay the amount claimed, upon good

and sufficient title to the land being decreed to him as against the trustee and the beneficiaries of the trust, and prayed that the title be decreed to be in him on compliance with this offer. A verdict was rendered confirming the sale by Goff, as trustee, to Jackson, and declaring that on the payment of \$250, with interest and costs, the title be decreed to be in Jackson, free from the trust deed, and from the title of the trustee and the beneficiaries. On this verdict a decree was entered and signed in substantial conformity to the terms of the verdict, and this is the decree pleaded as a former recovery. There was evidence that Jackson had complied, substantially, with the decree on his part, but none whatever showing that the beneficiaries of the trust had ever received or enjoyed any of the money, or had assented to the decree, or in any manner ratified it. So far as evidence went, it was directly to the contrary. We need not say whether this adjudication would have been binding upon the beneficiaries of the trust, had it been made in an action brought by the trustee originally in the superior court. We are clear that, as the suit went by appeal from the county court to the superior court, the jurisdiction of the latter over it, as to subject-matter, was no larger than was the jurisdiction of the former; and it is certain that a county court could not, upon an equitable plea, or upon any other pleading, determine and control the title to land, or confirm a sale made by a trustee, and fix title in the purchaser, by mere force of the adjudication. In trying an appeal from a county court, the superior court can deal with no question of merits, except such as could have been raised in the county court, and can render no final judgment, except such as the county court had jurisdiction to render. Greer v. Burnam, 69 Ga. 734.

3. The plea, construed in the light of the record attached to it as an exhibit, was obviously insufficient as an answer to the present action. This being so, whether the evidence sustained it or not, the court should not have directed a verdict for the defendant. Though the proper practice was for the plaintiffs to demur to the plea, and have it stricken, their failure to do this would not justify directing a verdict manifestly wrong, and finally disposing of the case on an issue which should not control it. Judgment reversed.

HARRIS v. CENTRAL RAILROAD & BANKING CO. OF GEORGIA.

(Supreme Court of Georgia. March 3, 1893.)

PRINCIPAL AND AGENT—UNAUTHORIZED CONTRACT BY AGENT—LIABILITY OF PRINCIPAL FOR BREACH.

Where it affirmatively appears that, by a general rule of the railway company, demurrage and storage were chargeable to all patrons, and that the special contract declared upon was made, not with the authorities which promulgated the rule, but with subordinate agents,

and for the express purpose of avoiding the application of the rule in the given instance, a breach of the contract by one of the same agents who co-operated in making it affords no cause of action against the company. Thus, where the rules of the company required payment of demurrage on goods not removed within 48 or 60 hours after their arrival, and also provided for the storage in warehouses of goods not removed within a certain time, the storage and drayage to be at the expense of the consignee, and these rules were known to the plaintiff, who contracted with the defendant's station agent and soliciting agent that, in consideration of a large shipment of freight over the defendant's railway, no demurrage, drayage, or storage would be charged against him, a breach of the contract as to storage gave the plaintiff no right of action against the company to recover the money paid, and it was not error to grant a nonsuit.

(Syllabus by the Court.)

Error from city court of Macon; John P. Ross, Judge.

Action by Iverson L. Harris against the Central Railroad & Banking Company of Georgia for breach of contract. From a judgment of nonsuit, plaintiff brings error. Affirmed.

Harris & Harris, for plaintiff in error. R. F. Lyon, for defendant in error.

BLECKLEY, C. J. The railroad company had general rules declaring that, under certain circumstances, demurrage and storage would be chargeable to all patrons. These rules were known to Harris, who combined with two subordinate agents of the company—one of them a soliciting agent, the other a station agent—to shun the rules, and prevent their application to a large shipment of freight which Harris contemplated making. On account of the volume and magnitude of the shipment, these agents agreed that the rules should not be enforced against Harris as to that shipment; and, on account of the exemption thus granted him, he agreed to make, and did make, the shipment over the line of this railroad, instead of making it over the line of some other company. It is not to be presumed that soliciting and station agents have been invested with any suspending power over general rules which the company has adopted and promulgated, and the evidence affords no indication that any such power existed or had been conferred in this instance. The stipulations between the two subordinate agents and Mr. Harris did not bind the company, and for this reason he was properly nonsuited in the present action. Judgment affirmed.

NATIONAL BANK OF AUGUSTA v. RICHMOND FACTORY et al.

(Supreme Court of Georgia. Feb. 27, 1893.)

RECEIVER OF CORPORATION—APPOINTMENT—SEPARATE PETITIONS FOR.

1. Where, upon a petition in the nature of a bill in equity, a receiver is appointed by the superior court to administer the assets of

an insolvent corporation, and one of the creditors, not a party to the petition, but who has a right to make himself a party if he desire to do so, applies for equitable relief in an independent suit commenced by himself on his own petition in the same court after the other petition was filed, the relief should generally be denied, because, while a creditor having a legal lien may stand out and be allowed to prosecute his legal remedies against the assets, his claim for equitable remedies should be asserted in the original suit under which the seizure was made.

2. That a business corporation is not a trader will not prevent creditors from proceeding against it under section 3149a et seq. of the Code, these sections being applicable to all corporations not municipal, as well as to traders generally.

(Syllabus by the Court.)

Error from superior court, Richmond county; H. C. Roney, Judge.

Action by the National Bank of Augusta against the Richmond Factory and others for the appointment of a receiver and other relief. From the judgment rendered, plaintiff brings error. Affirmed.

The following is the official report:

The National Bank of Augusta filed its petition against the Richmond Factory, and Coffin, trustee. Service was made of the petition and of a temporary restraining order upon the president of the factory May 11, 1892, and upon Coffin the same day. Before the cause was heard the factory filed a demurrer, and Coffin an answer, and petitioner amended the petition. On June 7th, when the case came on to be heard, the factory filed its answer. Plaintiff proceeded to introduce evidence, when, pending the discussions of the same, the court ordered the rule to be discharged, and relief prayed for refused. Thereupon petitioner tendered a bill of exceptions, and the question arose as to whether the court had passed upon the relief prayed for under the amendment, when petitioner applied for and obtained another rule requiring the original defendants, the Union Wadding Company, Lesser individually, and Young, Stearnes & Lesser, as receivers of the Richmond Factory, to show cause why the relief prayed for under the amended petition should not be granted. A hearing being had, the court refused the relief prayed for under the original and amended petitions. Plaintiff then filed a motion that the court pass an order to protect its rights pending the writ of error about to be sued out, which motion the court refused upon the grounds that the court in the case of the Union Wadding Company, hereafter to be mentioned, passed an order which fully protected petitioner. Petitioner excepts to the order of June 7th and to the order of June 25th. It also excepts to the refusal of the court to protect its rights pending the decision, and to the ruling of the court that the passage of the order of June 7th in the case of the Union Wadding Company et al. against the Richmond Factory et al. was a sufficient protection to plaintiff, not a party to the suit under which that order was passed.

The petition of the National Bank of Augusta, in its own behalf and that of all other bondholders of the Richmond Factory who should be made parties, etc., alleged in brief: In July, 1885, the stockholders of the factory authorized the president to issue 30 bonds of \$1,000 each, dated September 1, 1885, running 20 years, and bearing interest at 6 per cent. per annum, payable semiannually on the 1st of April and October, for which coupons should be issued, with power to the president, at his election, to raise \$30,000, or such part thereof as he might deem advisable, by sale of the bonds, or upon the note or notes of the corporation and hypothecation of the bonds as security, to be used as commercial capital. The president was also authorized to make a conveyance of the property of the corporation to two trustees, to be held as security for the payment of the bonds and coupons. The bonds were issued, and a deed of trust executed and duly recorded. After the issuing of the bonds the president borrowed from petitioner on demand \$20,000, hypothecating 20 of the bonds. This indebtedness has been reduced from time to time until it now consists of a promissory note of the factory for \$5,000, maturing May 9, 1892, and plaintiff holds as security therefor \$6,000 of the bonds, upon which there are coupons which have matured since the bonds were deposited aggregating \$1,080. Upon the maturing of said note the factory defaulted in payment. Demand was made by petitioner for payment, and for payment of the past-due coupons, upon Lesser, the president of the corporation, when he failed and refused to make payment either of the note or coupons. By the terms of the deed of trust it was provided that, in the event the bonds or any of the coupons should become due, and should, after demand, remain unpaid for three months, each of the bonds outstanding should become due and payable, and the trustees or their successors were authorized to advertise the property mentioned in the deed for sale at public outcry, and, if at the end of the advertisement the bonds or coupons which had matured, and upon which default had been made, should not have been paid, should sell the property, and proceed to pay the bonds and coupons, paying any excess to the factory or its assigns. One of the trustees named in the deed has died, and Coffin is the survivor, but has no power to act except in the manner provided for in the deed. On May 5, 1892, there was filed by the Union Wadding Company against the factory an equitable petition, alleging that the factory was insolvent, and that the value of its property did not exceed \$50,000, which sum included the amount of bonds issued by it and outstanding, which petition prayed for receiver, etc. Under this petition a rule to show cause, returnable May 14th, had been granted, and in the interval the factory restrained from doing any act that would per-

mit any creditor acquiring a preference by judgment or lien, or any suit or attachment, under proceedings commenced after the filing of the petition. The act under which the petition of the Union Wadding Company was filed, now embodied in Code, §§ 3149a-3149g, has been construed to give no jurisdiction to the court where all the realty is under mortgage which would be consumed in the payment of the mortgage debt. Under the laws of this state the holders of any bonds secured by mortgage can foreclose the mortgage in equity whenever default occurs in the payment of the principal or any part of the interest. No provision is made by the mortgage in question except action by the trustees when default has occurred, in the manner and for the period hereinbefore set forth. With the factory closed and not being operated to make this provision of the mortgage available, the property would have to stand idle for many months. If the receiver is appointed under the petition of the Union Wadding Company et al., he can make no sale except subject to the mortgage, unless the mortgage creditor should come in and make himself a party to said petition, and consent thereto, which the trustee has no power to do for the bondholders, so that they must act alone for their protection. It is to the interest of all the bondholders that the property should be operated, in order to make it available, and realize its full value. It is not in the power of the trustee to do this, nor can it be done except by leave of the court, by means of its own officer, appointed and authorized so as to bind all the bondholders when consented to by them, or it is made to appear to the court manifestly necessary that this action should be had for the protection of the property. Petitioner, the National Bank of Augusta, prayed for a receiver; for an injunction against any receiver who might be appointed under the proceedings instituted by the Union Wadding Company from taking possession, controlling, using, or operating any of the property passing under the mortgage deed; for foreclosure of its mortgage, and distribution of the proceeds among the bondholders, after payment of expenses, counsel fees, etc.; and for general relief. Attached as an exhibit to this petition was a copy of the mortgage deed; also a copy of the note held by petitioner, which stated that six bonds of \$1,000 each had been pledged to the bank as collateral.

The Richmond Factory demurred to this petition of the national bank upon the ground that plaintiff had an adequate remedy at law; that plaintiff was a secured creditor, as appeared from its pleadings; that, if plaintiff's petition contemplated being made a party to that of the Union Wadding Company, then defendant says its liability to plaintiff is uncertain, if any, as it cannot be fixed until plaintiff exercises its right of selling the collateral in its hands and appropriating the

proceeds to this debt, and then, if the collateral did not bring enough to satisfy the debt, for the balance remaining defendant would acknowledge a liability, and the national bank could be made a party plaintiff to the petition of the Union Wadding Company; and that the mortgage did not mature for 60 days, and therefore no rights thereunder could accrue to plaintiff. Coffin, trustee, answered that he had no interest in the suit other than as trustee; that a receiver for the factory and all its property, including that covered by the mortgage, had already been appointed in the cause of the Union Wadding Company, and the receivers were in possession of the property; that plaintiff was not entitled to foreclose the mortgage, because by its terms the default in payment of interest must continue at least 90 days, and then only this defendant is authorized to proceed by entering upon and selling the property; and defendant prayed that, if the mortgage was to be foreclosed, he be allowed to exercise the right therein given him of receiving and disbursing the money realized from the sale by himself or by the receivers, and be allowed such compensation as the court might deem just. The Richmond Factory answered that the note held by the bank matured May 9, 1892, and that the factory did default in its payment; that the coupons attached to the six bonds held by the bank are not the property of the bank, but belong to said factory, as the indebtedness was based upon a note with the bonds attached as collateral, and the note as it matured, was reduced and renewed and the interest always paid up to the date of the maturity, etc.; that the Union Wadding Company had filed its petition, under which receivers had been appointed and authorized to dispose of the assets of this defendant,—the petition of the Union Wadding Company having been filed May 5th, while that of the bank was not filed until May 10th; that the receivers mentioned were appointed May 14th, and this defendant had turned over all its assets to them.

The amendment to the petition of the bank alleged: At the time of the filing of its petition there had been filed the petition of the Union Wadding Company, which made perfect of the mortgage in question. No service had been made of this petition and order accompanying it at the filing of the petition of the bank, under which petition the factory and Coffin, trustee, were required to show cause on May 14, 1892,—the same day upon which the rule under the petition of the Wadding Company had been made returnable,—why the relief prayed for should not be granted. On May 14th the rule granted in the case of the bank was, on motion of Coffin, trustee, adjourned over to May 21st, and the court proceeded to hear the case of the Wadding Company, in which service had been made on the same day with that

of the bank's petition, but second in order of time. In response to the rule granted in the case of the Wadding Company, the factory filed its answer, and Lesser filed an intervention, and an order was moved and granted to make Coffin, trustee, a party. Young, Stearns & Lesser were on said May 14th appointed receivers, with direction to take possession of the assets of defendant, and sell the property on the first Tuesday in July, "said sale to confer on the purchasers thereat a free and unincumbered title, free from all liens and incumbrances whatsoever, which said liens and incumbrances shall attach to the proceeds of said sale without prejudice; that said purchaser or purchasers shall have the option of paying for said property in bonds at their face value, or partly in bonds and partly in cash." On May 16th, a petition was presented by the receivers asking for authority to negotiate a loan in the nature of administration, to be a first lien upon the corporate assets. No notice was given to any one, nor was this petition sworn to, and the court granted the prayer of it. Thereafter the original petition of the bank came on to be heard, when it was adjourned over until June 4th. At this time the only cause shown by the factory was a demurrer, and by the trustee an answer not under oath, both taking the position that default in the payment of interest should continue at least 90 days, and then only was the trustee authorized to proceed, as in case of maturity of the debt. On May 26th petitioner had served upon the Wadding Company, Lesser, and the receivers a notice that upon the hearing of the case it would move if, in the opinion of the court it was necessary to grant the relief prayed for, to make parties defendant of the creditors individually and of the receivers, and to enjoin the receivers from so far acting under the order of their appointment as to make a sale as therein directed; and also from acting under the subsequent order of May 16th, to negotiate a loan, etc.; and also, if in the opinion of the court it was necessary, to consolidate the two cases, and place the case under the direction of the plaintiff and other bondholders. Thereafter there appeared in a newspaper an advertisement of the sale of the property of the factory. No objection will be urged to this sale as advertised by the trustee, who is cashier of the National Exchange Bank of Augusta, which bank is a creditor to the amount of \$10,800, the holding of which position and his failing to take any action puts him in a position antagonistic to the true interest of the bondholders. By the terms of the advertisement itself it does not state that the sale is to be made either subject to or free from the lien of the mortgage, although it gives the option to the purchaser of paying part cash and the balance at par value, with past-due and unpaid coupons on the bonds, but does not specify

what portion shall be paid in cash and what portion in bonds. The action of the court in the appointment of the receivers, with the authority specified in the orders mentioned, and the action of the receivers in the advertisement of the property, is illegal and void, because the act under which the creditors' bill is filed is one that is construed strictly, and no pre-existing lien is interfered with thereunder unless fraud or collusion is charged, or the parties holding the lien voluntarily come into the suit, and the action of the trustee was not such appearance as would give the court jurisdiction over the bondholders; because the court has no jurisdiction to pass an interlocutory order in vacation to sell realty free from liens and under any circumstances for anything other than cash, save by consent of all the parties in interest, and no such consent was given by the bondholders, or even by the trustee; because the factory and the trustee were each restrained, under the provisions of the original order in this case, from changing the status of the property while said order continued of force, and the taking possession of the property by the receivers and advertising the same for sale was a violation of this order; because the order appointing the receivers does not define what bonds of the corporation could be accepted in part payment for the property, and does not limit the authority of the receivers to such bonds as are secured by the mortgage; because the order authorizing the issuing of receivers' certificates was granted without notice to or consent by any one, was passed in vacation, and established a lien prior even to that of the mortgage. As evidence that the mortgage covers the entire assets, petitioner calls attention to the averment of the receivers that the corporation has no assets available from which said sum could be secured. Petitioner prayed that the receivers, the Wadding Company, and Lesser be made parties defendant; that the sale be restrained, and that the receivers be enjoined from paying the certificates, except out of the assets of the corporation other than those upon which the lien of the mortgage rested. Attached as an exhibit to this amendment was the petition of the Wadding Company. Among other things, this petition alleged that the assets of the corporation would not exceed in value \$50,000. That, in addition to the \$30,000 in bonds, the factory was indebted to various creditors, who held no security therefor, \$20,342; making a total indebtedness of \$50,342, as by an exhibit attached; and that petitioner, besides being a stockholder in the factory to the extent of \$20,500, was its creditor in the sum of \$8,000, evidenced by promissory note, due and unpaid, etc. That the stockholders had found it necessary to shut down the mill and suspend operations for want of funds. That the machinery was idle, and

likely to deteriorate. That there was no prospect whatever of the corporation being able to resume operations, and the creditors, especially those whose debts were unsecured, would lose their debts wholly or in a great part unless protected. The petition prayed for the appointment of receiver to collect the assets; that the assets be sold, and the proceeds applied to the payment of the indebtedness in order of respective lien and priority; that parties might be made from time to time of such persons as might be interested, etc. Also the answer made by the factory to this petition of the Wadding Company. Also of petition and order thereunder making Lesser a party to the cause of the Union Wadding Company against the factory, Lesser claiming to be a creditor in the sum of \$7,728.75. Also of an order making Coffin, trustee, a party. Also of the order appointing the receivers, dated May 14, 1892, of the petition of the receivers for an order to negotiate a loan to the extent of \$1,500, and of the order authorizing the negotiation of such loan. Also of the newspaper advertisement of the sale of the property.

To this amendment the Union Wadding Company answered: At the time of the filing of its petition the unsecured indebtedness of the factory amounted to \$20,342.40, and the secured indebtedness to \$30,000. The factory then owed and now owes it \$8,000, with interest, unsecured, which constitutes more than one-third in amount of the unsecured debts, and its petition charged that the factory was insolvent. On May 5th the judge sanctioned the petition, and issued the rule returnable May 14th, to show cause why the relief prayed for should not be granted, which rule was duly served May 11th. On May 14th, Lesser, an unsecured creditor, was made party plaintiff, making the amount of unsecured indebtedness represented by petitioners \$15,728.75. On the same day Coffin, trustee, was made party defendant and acknowledged service, etc.; and on the same day the factory filed its answer, in which, while denying the alleged causes leading to insolvency, it admitted the fact of such insolvency; and on the same day, after full consideration and argument, the court adjudged the corporation to be insolvent, appointed receivers, and instructed them to sell the property. The selection and appointment of the persons named as receivers was made by the court at the earnest solicitation and request of creditors representing a large proportion of claims, secured and unsecured, including bondholders to the amount of \$22,000, and stockholders to the amount of \$70,000, as would appear by reference to the written request attached. In pursuance of the order, the receivers advertised the property for sale, and in the terms of the order. The judge, with a view of protecting all parties in interest and preventing a sacrifice of the property, subsequently fixed a reserved bid on the same

of \$45,000. The only liens on the property are the \$30,000 of bonds. The National Bank of Augusta refused, and now refuses, to become a party to the petition of the Union Wadding Company, and, subsequently to the filing and sanctioning and service of said petition, filed a separate petition, in which the same relief, and none other, is prayed, and served respondent with notice that it would move the court to revoke the appointment of the receivers, etc. All the jurisdictional facts under the pleadings in the case of the Union Wadding Company are res adjudicata, so far as the parties thereto are concerned, and such jurisdiction cannot be attacked by one who refuses to become a party to the record, especially where the party making such attack is a bondholder represented by the trustee, who is a party to the petition first filed. Equity, having acquired and taken jurisdiction of the subject-matter and the parties interested in the litigation, will not revoke its appointment of receivers at the instance of a creditor filing a second petition, but will retain such jurisdiction, and make necessary parties to do complete equity. Wherefore respondent prayed that the National Bank of Augusta be made a party to the petition of the Union Wadding Company, etc. Among the exhibits attached to this answer was an order of June 7, 1892, modifying the order appointing the receivers and directing the sale so as to place a reserve bid of \$45,000 on the property as a whole, and directing the receivers not to sell the property for a less sum.

The amendment was also answered by the receivers, who stated, in addition to matters already hereinbefore mentioned, they are discharging their duties faithfully, and to the satisfaction of all the parties to the record, including bondholders to the amount of \$22,000. They have taken no action by which the debt of plaintiff is imperiled, but, on the contrary, the payment of plaintiff's debt is rendered absolutely sure from proceeds of sale under pending advertisement. They know of no reason why their appointment should be revoked, and others appointed in their place, or they themselves reappointed under the petition of plaintiff. Plaintiff, by attorney, was present at the hearing resulting in their appointment, and, although requested by counsel for the Wadding Company to do so, refused to become a party to said petition, or to intervene or show cause why they should not be appointed. Thirty thousand dollars of insurance on the property has been canceled by direction of the insurance companies, since their appointment, and such insurance as they have been able to continue is conditioned upon the sale of the property July 5th, and the vesting of the title in the purchaser relieved of pending litigation, and the entire insurance will be canceled should the property for any cause not be sold as now advertised, and

thus irreparable loss may result. Respondents are officers of court, acting solely under its instruction, and, while so acting, cannot be made parties to an independent bill covering the same subject-matters and none other. Their acts complained of by plaintiff are the acts of the court itself, and cannot be attacked collaterally. At the hearing there was put in evidence the originals of exhibits and notes as above indicated.

Frank H. Miller, for plaintiff in error. J. R. Lamar, C. H. Cohen, and Harper & Bro., for defendants in error.

BLECKLEY, C. J. 1. From the statement of facts in the official report it will be seen that the petition under which the receiver was appointed was filed before that which the National Bank of Augusta brought against the Richmond Factory, the common debtor, and the principal defendant in both petitions. The receivership covered all the assets of the factory company, that company being an insolvent corporation. As one of its creditors, the National Bank of Augusta had a right to make itself a party to the cause in which the receiver was appointed, and thereby obtain all the equitable relief to which it was entitled. Instead of so doing, it sought that relief in an independent suit, commenced by itself in the same court, urging the appointment of another receiver. The application for this relief and for the new receivership was passed upon and denied after a receiver in the first suit had been appointed, and a judicial seizure of all of the assets of the insolvent corporation had thus been made. The present writ of error deals alone with equitable elements and with the proper procedure applicable to the same. It is a "fast" writ, based on interlocutory rulings. Why should the same court, after having seized all the assets by one receiver, make another seizure of part of the assets by another receiver? Or why should it administer a part of them in a second suit, when it can administer the whole in the first? Why should matters be thus complicated? We are clear that, as a general, if not a universal, rule, all creditors seeking to assert equitable remedies against assets of which the court has taken charge by a receiver should become parties by intervention or otherwise to the cause in which the receiver was appointed, and prosecute their remedies in that cause alone. Creditors who stand out may be allowed to prosecute their legal remedies against the assets, if they can make them available; but, if they have to invoke the exercise of equitable powers by the same court, their legal remedies are not available, and they are in no condition to proceed by separate and independent actions.

2. It is not a sound construction of section 3149a of the Code that a corporation, not municipal, must be a trader as well as

insolvent in order for its assets to be subject to seizure under a creditors' bill, (or a petition in the nature of a creditors' bill,) as provided for by that and succeeding sections. The language is: "In case any corporation, not municipal, or any trader, or firm of traders, shall fail to pay," etc. It is evident that all business corporations are comprehended, whether their business be trading or not, though natural persons who are not traders, and partnerships which are not traders, are excluded. Traders, in general, as a class, and corporations, not municipal, as another class, are within the scheme and the words of the statute. There was no error calling for reversal. Judgment affirmed.

BRITISH & AMERICAN MORTG. CO. v. LONG et al.

(Supreme Court of North Carolina. Nov. 7, 1893.)

DESCRIPTION IN DEED—REFORMATION—ADVERSE CLAIM TO LAND—INJUNCTION PENDENTE LITE.

1. The fact that the former owners of a large body of land have sold two small parcels thereof so as to divide it into three separate tracts will not vitiate a description of the land in a subsequent deed as "those tracts or parcels of land lying in one body," where the specific boundaries, following such description, clearly show the intention of the parties to include in the deed the three tracts remaining unsold.

2. The reformation of a deed to correct an alleged misdescription therein will be denied, where the true construction of the description gives plaintiff all the land to which he claims title.

3. In an action under Acts 1893, c. 6, to determine adverse claims to land, plaintiff is entitled to an injunction, pending the action, to restrain defendant from selling the land under a judgment asserted by him to be a lien thereon.

Appeal from superior court, Halifax county; Whitaker, Judge.

Action by the British & American Mortgage Company against W. W. Long and others for a reformation of a deed, and to determine adverse claims to land. From an order continuing an injunction, pending the action, restraining defendants from selling a portion of the land claimed by them to be subject to the lien of a judgment in their favor, they appeal. Affirmed.

The plaintiff complained that in February, 1890, the defendants Long and wife made a deed of trust to secure plaintiff for money loaned, conveying certain lands in Halifax and Warren counties by the following description: "All the following described real estate lying in the counties of Warren and Halifax and state of N. C., to wit, all those tracts or parcels of land lying in one body in the counties of Warren and Halifax, of which the late Samuel A. Williams was seized and possessed at the time of his death, bounded on the north by the lands of Henry Wallelt and G. Branch Alston; on the west by the lands of John Neal, Dudley Neal,

Transberry Neal, and Lafayette Williams; on the south by the lands of W. H. Shearin, W. G. Shearin, Mrs. Ruina T. Alston, and S. W. Hamlet; and on the east by Big Fishing creek and the land of T. C. Williams,—containing, in all, 7,000 acres, more or less." That plaintiff has recently discovered, by an actual survey of the land, that the same does not lie in one body, as described in said deed of trust, but, by reason of the sale by former owners of two small tracts off of the said body, it is now divided into three separate tracts, about 4,506 acres in one, about 1,344 acres in another, and about 82 acres in the third. Plaintiff further complains that the misdescription above named occurred by the mutual mistake of all the parties to the deed of trust; that certain judgment creditors of defendant Long, who are also defendants in this action, and whose judgments had been docketed since the registration of said deed of trust, were making efforts to sell said lands under execution upon their judgments, and thereby to cast a cloud upon plaintiff's title to the land. Some of the answers admit that judgment creditors are making efforts to sell the 1,344 and 82 acre tracts, and deny that they are covered by the deed of trust to plaintiff, or subject to the same. The prayer is for a reformation of the deed, if in the opinion of the court it is necessary to be done, and for other relief, and for an injunction to prevent further proceeding on the part of judgment creditors, parties defendant, until the determination of this action. This, in brief, is the contention of the parties.

R. O. Burton, for appellants. Thos. N. Hill and E. W. Timberlake, for appellee.

MacRAE, J. We see no necessity for a reformation of the deed of trust in the manner desired by the plaintiff, because in our opinion the description of the land in the deed of trust will cover all of the land which belonged to the said Long and wife within the boundaries set out in the deed, although it should turn out that there were three tracts instead of one body of land. The rules laid down by Chief Justice Taylor in *Cherry v. Slade*, 3 Murp. 82, have been frequently quoted and approved, as will be seen by reference to the above case in *Womack's Digest*, par. 1597: "(1) That, whenever a natural boundary is called for in a patent or deed, the line is to terminate at it, however wide of the course called for it may be, or however short or beyond the distance specified." "(3) Where the lines or corners of an adjoining tract are called for in a deed or patent, the lines shall be extended to them without regard to distance, provided those lines and corners be sufficiently established, and that no other departure be permitted from the words of the patent or deed than such as necessity enforces, or a true construction renders necessary." According to

the contention of the plaintiff, all of the land—formerly in one body; now separated into three tracts by the sale of a small portion thereof—is bounded as described in the deed of trust. The lines of the adjoining tracts called for will not fit either of the three tracts, apart from the other two, but the said lines will bound the three tracts together, except as to the small tract which was sold. Here there are two descriptions, or rather a qualification of one description: "All those tracts or parcels of land * * * in the counties of Warren and Halifax of which the late Samuel A. Williams was seized and possessed at the time of his death, bounded," etc. There would be no trouble in the description embracing the three tracts, for they are described as "tracts," (plural;) but the words of qualification "lying in one body," have given rise to this contention. When a deed or will once sufficiently identifies the thing by its known name or other means, and then superadds, unnecessarily, to the description, such further description, though inaccurate, will not vitiate the previous and perfect description. *Simpson v. King*, 1 Ired. Eq. 11. But it is also a general rule that the deed shall be supported, if possible, and if, by any means, different descriptions can be reconciled, they shall be; or if they be irreconcilable, yet one of them sufficiently points out the thing so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain. *Proctor v. Pool*, 4 Dev. 370. Upon any other principle we should be at a loss to determine which tract of the three was that intended to be conveyed, for a part of the boundaries will take in either of the tracts, while all of them, if plaintiff is right in its contention, are necessary to fill the space between the different boundaries. This being the case, there being no necessity for a reformation of the deed, if plaintiff's contention be correct that all three tracts are comprehended within the boundaries set out in the deed of trust, it will be unnecessary for us to consider the effect upon subsequent judgment creditors of a reformation of the deed and correction of mistakes therein. While the action would not lie to remove a cloud upon plaintiff's title, the trustee being in possession and having adequate relief at law, (*Peacock v. Scott*, 104 N. C. 154, 10 S. E. Rep. 456, and cases there cited,) the act of 1893, c. 6, entitled "An act to determine conflicting claims to real property," provides that an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claims. The purpose of the present action, which was begun since the passage of the act above referred to, being to determine the conflicting claims of plaintiff and the defendant judgment creditors, there is no reason why the plaintiff is

not entitled to the ancillary remedy of injunction pending the action; the irreparable damage being the sale of part of the land under execution, and the consequent effect upon the sale by the trustee, and prevention of the land selling for its value at said trustee's sale. **Affirmed.**

STATE v. DRAKE.

(Supreme Court of North Carolina. Oct. 31, 1893.)

CRIMINAL LAW—CONFESSION.

Where an officer holds out a hope to a prisoner, whom he is taking before the examining magistrate, that a confession may lighten the punishment, and the magistrate, after committing the prisoner, admonishes him to tell the truth, if he tells anything, a confession made by the prisoner while being conveyed from the magistrate's office to the jail by the same officer is inadmissible in evidence, though no inducement was then held out to him, in the absence of any showing that the influence previously exerted had been removed.

Appeal from superior court, Wilson county; Shuford, Judge.

Will Drake was convicted of burglary, and appeals. **Reversed.**

Aycock & Daniels, for appellant. The Attorney General, for the State.

BURWELL, J. "Thus much is certain: That no confession by the prisoner is admissible, which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority." 1 Rose. Crim. Ev. p. 42. A witness for the state testified that while he was conveying the prisoner from the place where he and others had arrested him, to Elm City, where he was taken before a justice, he said to the prisoner, then in his charge: "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you." It seems to be conceded that this remark of the acting officer to his prisoner held out to him such an inducement to confess, that, if a confession had then been made to the officer, immediately, in response to the suggestion, such confession would have been clearly inadmissible. There was in what was then said to the prisoner a hope held out to him that a confession would make his punishment the lighter, and confessions thus induced by hope "are, of all kinds of evidence, the least to be relied on, and are therefore to be entirely rejected." *State v. Roberts*, 1 Dev. 259. But no confession came from the lips of the prisoner in answer to this advice tendered to him by his keeper, but, in its stead, an assertion of his innocence. "He said, 'I am not guilty.'" are the words of the witness. Omitting, now, any recital of what occurred during the day of this occurrence, except that the prisoner was carried before the

magistrate, and was committed to jail upon evidence adduced at the examination, we find it stated in the case that his honor, over the defendant's objection, allowed this same witness to testify to a confession made to him by the prisoner while he was conveying him from the justice's office to the jail. There was no evidence of any withdrawal by the acting officer of the inducement to confess that he had held out to the prisoner while on the way to the magistrate's office, and we now consider the admissibility of this confession as if no other inducement had been used. Viewing the matter in this way, we think there was error in admitting this confession, for the law, always most careful to ascertain if hope or fear, in any degree, influenced the prisoner, will attribute the making of the confession to the inducement held out to him by his keeper. And the fact that the inducement seemed at the time to have no effect, and only elicited the reply, "I am not guilty," makes no difference in the rule. If the inducement had been held out to him by one person, and the confession had been made to another, nothing else appearing, the confession might have been admissible, for in that case there might have appeared no connection between the two. But here we have a confession made to him who had held out the hope, and while he was in fact exercising the same authority over the prisoner. The assertion of his innocence, in reply to the proposition that he should confess, and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that, when he found himself on the way to prison, in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession? It may have proceeded from this cause,—from this hope so held out to him. If it may have proceeded from that cause, there is no guaranty of its truth, and it must be rejected. *State v. Lowhorne*, 66 N. C. 638; *State v. George*, 5 Jones, (N. C.) 233.

But there appears in this case, we think, another, and perhaps a more cogent, reason for the exclusion of this confession. It seems that "quite a crowd had come to the place where the investigation of the matter was had, and after the hearing of the evidence, and the decision of the magistrate to commit the prisoner to jail, he was told by the magistrate, Bailey, that, "if he was going to tell anything, to tell the truth; that there was evidence enough against him to jail him, anyway;" and the record proceeds as follows: "He looked as if he was going to tell something, and we took him upstairs, in the store, to get clear of the crowd. This was after the decision of the justice com-

mitting him to jail. The same four who arrested him were upstairs, and also Mr. Bailey. (The defendant objected to what was said upstairs. Objection sustained.) In about an hour, we started to Wilson with him." And no inducement being held out to him while on the way to the jail, nor any caution being given him, he made the confession which was admitted in evidence. Now, if it be conceded that we are wrong in our conclusion stated above,—that the inducement held out by the officer to the prisoner, which elicited the reply, "I am not guilty," was sufficient to exclude the subsequent confession, as heretofore stated,—still it seems very clear that that inducement, coupled with what the committing magistrate said to him after he had directed that he should be sent to jail, fully warranted his honor in excluding the confession said to have been made "upstairs." There was certainly enough said to the prisoner by the officer, when he arrested him, and by the justice, just after he committed him to jail, if considered together, to justify the conclusion that the confession then made was brought about by an influence that rendered it unfit for the consideration of the jury. His honor, therefore, was right in excluding it. It is a well-settled rule that, if promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible; and hence, it having been found that an improper influence was used to obtain the confession that was excluded, and it not having been made to appear that that influence had been in any way removed, the confession made on the journey to the jail, to one of the crowd, should also have been excluded. *State v. Drake*, 82 N. C. 592. The defendant is entitled to a new trial.

SPENCER v. HAMILTON.

(Supreme Court of North Carolina. Oct. 31, 1893.)

MEASURE OF DAMAGES—BREACH OF CONTRACT.

For breach of a lessor's covenant in a lease to clean out certain ditches on the leased premises, failure to do which caused the land to be flooded, and prevented the lessee from making a full crop, the lessee's measure of damages is not merely what it would have cost him to put the ditches in good order, but he is entitled to recover for the decrease in the net yield of his land, caused by the lessor's failure to put it in the condition he had covenanted to do.

Appeal from superior court, Hyde county; Bynum, Judge.

Action by Samuel G. Spencer against George W. Hamilton for rent. The defendant interposed a counterclaim for damages caused by plaintiff's failure to clean out certain ditches, as he had covenanted to do in

the lease. From a judgment in plaintiff's favor, defendant appeals. Reversed.

The issues submitted to the jury, and their answers, are as follows: "(1) What is the value of the crop of corn, cotton, and potatoes raised on the land leased by defendant from plaintiff for the year 1889? Answer. \$125. (2) What damage, if any, has plaintiff sustained by the wrongful detention of the property described in the complaint? A. \$100, with interest. (3) Did plaintiff perform his contract in regard to the ditches and canal? A. No. (4) What damage has defendant sustained by reason of plaintiff's failure to perform his contract? A. \$25."

The court, among other things, charged the jury as follows: "If the jury should find that the plaintiff contracted with defendant to put the ditches and canal in order, or to furnish money to have such work done, and that he failed to do so, then the measure of damages would be what it would have cost defendant to have done the work, and would not be the difference in value of the crop raised upon the land as it was, and the crop which would have been raised had such ditches and canal been put in order." To this charge the defendant excepted.

Chas. F. Warren, for appellant. W. B. Rodman, for appellee.

CLARK, J. "Where one violates his contract, he is liable only for such damages as are caused by the breach, or such as, being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in the contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application." Pearson, J., in *Ashe v. De Rossett*, 50 N. C. 209. There was evidence that defendant leased the land for \$100, and as a part of the contract of leasing the lessor was to have certain ditches cleaned out, and by his failure to do so the land was flooded, and the crop lessened. Here it was in contemplation of both parties that the cleaning out of the ditches was essential to the making a full crop, and that the failure to do so would lessen the production. The question, therefore, what effect the failure to clean out the ditches and canal had upon the crop, and to what extent it was damaged thereby, was competent as giving some light to the jury in measuring the damages sustained by defendant by breach of the contract by lessor. The difference between the crop made and what would have been made if the ditches had been cleaned out does not exactly measure the loss, as it would have cost something to house the additional yield. The true test is, how much was the net yield of defendant's cropping for the year lessened by the failure to put the land in the condition stip-

ulated for by the lessor? The decreased production was an important factor in arriving at that conclusion. The difference in profit and yield between land drained and not drained was clearly in contemplation of the parties in making the contract. In telling the jury that the difference was what it would have cost defendant himself to have cleaned out the ditches, the court below erred. It is true, the defendant might have put the ditches and canal in order, and, if so, he could have charged the lessor with the cost thereof. This would have been the better course. But perhaps he was not able. At any rate, he was not legally called upon to do this. It was the lessor who contracted to rent a drained farm, and the defendant's loss by having to work an undrained farm, instead, is the measure of damages. The case of *Sledge v. Reid*, 73 N. C. 440, is not analogous. That was a case of tort for wrongfully taking a mule. The primary loss was the value of the mule, and that the taking him hindered the plaintiff in making a crop was purely incidental, and the damage to the crop was too remote. This case is more like *Mace v. Ramsey*, 74 N. C. 11, but differs from it in that here the farm was rented and the enterprise proceeded with, but its profitability was impaired by the failure of the lessor to do the draining after the lessee had proceeded with his farming operations, relying upon the lessor's stipulation. As in *Mace v. Ramsey*, we may say: "This case is easily distinguishable from *Foard v. Railroad Co.*, 8 Jones, (N. C.) 235; *Ashe v. De Rossett*, Id. 240; *Boyle v. Reeder*, 1 Ired. 607; and *Sledge v. Reid*, 73 N. C. 440, and similar cases,—in that in those cases the damage was incidental and unforeseen, or merely vague, uncertain, and conjectural, and in this they are immediate, necessary, and reasonably certain, and such as were in the contemplation of the parties to the contract." Error.

STATE v. RILEY.

(Supreme Court of North Carolina. Oct. 31, 1893.)

CRIMINAL LAW—POWER OF COURT TO DIRECT VERDICT.

Though the evidence for the state in a criminal case is uncontradicted, the court can only instruct the jury to return a verdict of guilty if they believe the state's evidence; and it is error for it to direct the clerk to enter a verdict of guilty.

Appeal from superior court, Orange county; H. R. Bryan, Judge.

W. J. Riley was convicted of a criminal offense, and he appeals. Reversed.

C. D. Turner, for appellant. The Attorney General, for the State.

CLARK, J. The evidence for the state being uncontradicted, the court told the jury,

If they believed the evidence, to return a verdict of guilty. This was correct upon the evidence set out, and if the jury had returned a verdict there would be no ground for exception. *State v. Burke*, 82 N. C. 551. But the case further states: "After pausing for a moment or two, and the jury manifesting no disposition to retire, the court told the clerk to enter the verdict of guilty." It was not necessary that the jury should retire, but it was indispensable that the jury should agree upon and render the verdict. The court cannot direct a verdict in a criminal case. *State v. Dixon*, 75 N. C. 275; *State v. Shule*, 32 N. C. 153. In the latter case, Pearson, J., thus draws the distinction in this respect between civil and criminal actions: "When a plaintiff fails to make out a case, the judge may say to the jury, 'If all the evidence offered be true, the plaintiff has not made out a case,' and direct a verdict to be entered for the defendant, unless the plaintiff chooses to submit to a nonsuit. It is, in effect, a demurrer to the evidence. The plaintiff has no right to complain, for in reviewing the question of law he has the benefit of the supposition that the evidence offered by him and the inferences of fact are all true. So, when the plaintiff's case is admitted, the whole question turns upon the defense attempted to be set up. If, taking the facts to be as contended for by the defendant, the court is of opinion that he has made out no answer to the action, it is proper, and saves time, for the court to direct the verdict to be entered for the plaintiff. The defendant is not prejudiced because, upon appeal, the question will be presented in the most favorable point of view for him. But the present case is not like either of these, for the state had not made out a case unless the state's witness was believed, and the credibility of witness must be passed on exclusively by the jury. It is true, from the case as made out, there could be but little room to doubt that both defendants were guilty, and the wonder is why the jury should have hesitated about convicting both. Still that was a matter for the jury, and its being a plain case, although it accounts for, does not legalize, this novel mode in entering a verdict." The rule is also laid down by Mr. Circuit Judge McCrary (Mr. Justice Miller of the United States supreme court concurring) in *U. S. v. Taylor*, 3 McCrary, 500, 505, 11 Fed. Rep. 470: "In civil cases, where the facts are undisputed, and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; but the authorities which settle this rule have no application to criminal cases. In a civil case the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court

has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly." This is cited in 2 Thomp. Trials, § 2149. In short, when the court holds that the evidence, if true, fails to make out a case, it can direct a verdict against the state in criminal actions as against the plaintiff in a civil action, though usually, if a serious question is involved, a special verdict is rendered in the former and a nonsuit taken in the latter case, that the action of the court may be reviewed. In a civil case the court can direct a verdict against the defendant when the plaintiff's cause of action is admitted, and the evidence or matter set up in defense, if true, would be no defense. This cannot possibly happen in a criminal action, since to admit the state's cause of action (the indictment) is to plead guilty. In a civil case the court may direct a verdict also when "the facts are undisputed, and the case turns upon questions of law solely," (*U. S. v. Taylor*, supra;) but in a criminal case this can only happen upon a special verdict. The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is the presumption of innocence, which can only be overcome by the verdict of a jury. The furthest the court can go in a criminal action is to charge the jury that if they believe the evidence the defendant is guilty. Upon the evidence set out in the record there was a plain case against the defendant, and also against his principal as well, (who, for some unknown reason, is not on trial,) if the evidence is to be believed; but of that a jury and a jury alone can judge. By reason of his honor's inadvertence at the moment to the above essential distinction between civil and criminal actions, we must direct a new trial.

STATE v. DE KING.

(Supreme Court of North Carolina. Oct. 31, 1893.)

GAMES OF CHANCE—TENPINS.

The game of "tenpins" is not a "game of chance," within the meaning of Acts 1891, c. 29, which makes it a misdemeanor for any person to play a "game of chance at which money, property or other thing of value is bet." *State v. Gupton*, 8 Ired. 271, followed.

Appeal from superior court, Person county; G. H. Brown, Judge.

Defendant, De King, was indicted for playing and betting at a game of chance, and was acquitted. The state appeals. Affirmed.

The Attorney General, for the State. Boone & Parker, for appellee.

SHEPHERD, C. J. The defendant is indicted for a violation of chapter 29 of the Acts of 1891, which provides "that it shall be unlawful for any person to play at a game of chance at which money, property or other thing of value is bet, whether the same be in stake or not, and those who play and bet therein shall be guilty of a misdemeanor." The defendant both played and bet at a game known as "tenpins," and the manner in which such game is played is particularly described in the special verdict. The only question to be decided is whether such a game is a game of chance, and that it is not we have direct authority in the case of *State v. Gupton*, 8 Ired. 271. After an interesting discussion as to what constitutes a game of chance, Ruffin, C. J., concludes that "we take this game to be one species of the game known in England, and spoken of in her statutes, under the general term of 'Bowls;' and, if it be, there is legal authority for holding it not to be a game of chance." The attorney general, with his usual and commendable candor, yields the case under the above decision. Affirmed.

CUMMINGS v. HUFFMAN et al.

(Supreme Court of North Carolina. Oct. 31, 1893.)

CASE ON APPEAL—SERVICE—OBJECTIONS—ADMISSION IN PLEADING—EFFECT.

1. A case on appeal must be served by an officer, unless appellee's attorneys accept service otherwise.

2. An appellant has a right to disregard an objection to the case on appeal, not served on him within five days after the service of such case on appellee, as required by statute; and appellant's failure to send the case to the judge for settlement after the service of such an objection is not an admission of the facts therein stated.

3. An appeal will not be dismissed simply because there is no case on appeal before the supreme court, but the judgment will be affirmed, unless error appears on the face of the record proper.

4. Where an answer to an amended complaint denies any indebtedness from defendant to plaintiff, the fact that the original answer admitted part of the debt sued for is not conclusive, but is a mere admission against interest, to be passed on by the jury; and it is error for the judge to enter judgment for the amount admitted in the original answer, where the jury has found against any indebtedness whatever.

Appeal from superior court, Alamance county; Whitaker, Judge.

Action by J. T. F. Cummings against D. W. M. Huffman and others, as executors of Rachel Graham, deceased, for services ren-

dered deceased as a physician. From a judgment in plaintiff's favor, defendants appeal. Reversed.

The case on appeal served by defendants on plaintiff was returned to defendants indorsed as follows: "The plaintiff returns the statement of the case on appeal to the defendants with the following objections: That the action was tried at March term, 1892, which term ended on Saturday, the 19th day of March, 1892; that the defendants' case of appeal was served on the plaintiff by the sheriff of Alamance county, by copy, on the 4th day of April, 1892, being more than ten days after the adjournment of said court and the end of said term; and the plaintiff insists that the defendants have lost their right of appeal by failing to serve their case on appeal within the time prescribed by law, and he therefore returns the copy of the case served on them to defendants, and objects to the said case for the reasons aforesaid. W. P. Bynum, L. M. Scott, Attorneys for Plaintiff. April 7, 1892."

Busbee & Busbee, for appellants. J. E. Boyd, for appellee.

CLARK, J. There being a disputed question whether there was service, in time, of the case on appeal, if properly raised, it should have been submitted to the court below to find the facts. *Walker v. Scott*, 102 N. C. 487, 9 S. E. Rep. 488. The appellee contends that his objection indorsed on the case, that the service was on the 4th of April, (after expiration of the 10 days,) was admitted by the appellants' not sending the case to the judge to settle. *Owens v. Phelps*, 92 N. C. 231; *Jones v. Call*, 93 N. C. 170. Unfortunately for appellee, the exception was not served till April 11th, after the expiration of the five days allowed by statute, and therefore goes for naught. There is however, no evidence of the service of the appellants' case within the time prescribed, and it, also, must be disregarded. *Peebles v. Braswell*, 107 N. C. 68, 12 S. E. Rep. 44; *Manufacturing Co. v. Simmons*, 97 N. C. 89, 1 S. E. Rep. 923. It is true a certiorari was sent down to which the clerk returns that there is indorsed on the original case deposited in his office by appellants, "Copy served on plaintiff by W. H. Carroll, atty. for defendants, April 1, 1892." Without in any way recognizing as valid this attempt to settle the disputed question of fact by copying a written declaration of a party in his own interest instead of submitting the question to the judge, (*Walker v. Scott*, supra,) it is sufficient to say that the return does not help the appellants. Unless service is accepted, it must be made by an officer. Any other mode is invalid, and a nullity. *Allen v. Strickland*, 100 N. C. 225, 6 S. E. Rep. 780; *State v. Johnson*, 109 N. C. 852, 13 S. E. Rep. 843; *State v. Price*, 110 N. C. 599, 15 S. E. Rep. 116. There being no legal case on ap-

peal before us, it does not follow that the appeal should be dismissed. The proper course is to affirm the judgment unless error appears upon the face of the record proper. *McCoy v. Lassiter*, 94 N. C. 131, and other cases cited in *Clark's Code*, (2d Ed.) p. 580.

Upon inspection of the record it appears that by the original answer and amended answer the defendants admitted an indebtedness of one dollar; but, an amended complaint being filed, the defendants were permitted to file an amended answer thereto, in which they denied any indebtedness whatever. An issue based upon these final pleadings was submitted to the jury: "Is the plaintiff entitled to recover of the defendants? If so, how much?" to which the jury responded, "No." Thereupon his honor rendered judgment as follows: "It appearing to the court from the admission of the answer that the defendants were indebted to the plaintiff in the sum of one dollar, it is adjudged that the plaintiff recover the sum of one dollar and the costs of the action." The record shows an entry of appeal and service of notice within legal time. The appeal itself is an exception to the judgment.

There is error upon the face of the record. The indebtedness was denied in the final pleadings of the parties, and, upon the issue thus made, the jury found that the defendants were not indebted. The admission in the first two answers of an indebtedness of one dollar was simply an admission against interest, like any other. It was competent to introduce the first two answers as evidence, (*Adams v. Utley*, 87 N. C. 356); but the admission was not conclusive. It might be shown that it was made under a misapprehension, or by mistake or inadvertence. *Smith v. Nimocks*, 94 N. C. 243. The jury passed upon the issue, and upon this evidence of an admission, if plaintiff saw fit to offer it. Upon the verdict, judgment should have been rendered in favor of defendants against the plaintiff and sureties to the bond for costs. The case is remanded, that it may be so entered. Reversed.

HILL et al. v. GLENDON & GULF MIN. & MANUF'G CO.

(Supreme Court of North Carolina. Oct. 31, 1893.)

CONDEMNATION PROCEEDINGS—PARTIES—RIGHTS OF TENANT IN COMMON—FAILURE TO AGREE ON COMPENSATION.

1. Where a petition by a tenant in common for the assessment of damages for a right of way taken by a railroad company enumerates all persons who have any interest in the land, as required by Code, § 1944, and such persons voluntarily come into court, and make themselves parties, a demurrer to the petition for defect of parties will not be sustained, though such persons were not joined in the petition either as parties plaintiff or defendant.

2. A grant of a railroad right of way by

the owner of an undivided interest in land will not prevent his cotenant from instituting proceedings against the railroad for the assessment of the damages he has sustained.

3. Where the grantor of such a right of way joins in the proceedings to obtain a forfeiture of the grant and the assessment of his damages, the fact that the right of forfeiture had not accrued when the grantor's cotenant originally filed his petition is immaterial, since Code, §§ 1947, 1949, require the rights of all the parties to be ascertained and adjusted in the one proceeding.

4. Code, §§ 1698, 1699, 1943, which require a petition by a railroad company for the condemnation of land to allege that the parties are unable to agree as to the value of the land, do not apply where the landowner institutes proceedings for the assessment of damages caused by the taking of his property for a right of way by the railroad.

Appeal from superior court, Chatham county; H. R. Bryan, Judge.

Petition by T. N. Hill and others against the Glendon & Gulf Mining & Manufacturing Company for the assessment of damages caused by the taking of petitioners' land for a right of way. The clerk of the court sustained defendant's demurrer to the petition, and petitioners appealed to the superior court, where the demurrer was overruled. Defendant appeals. Affirmed.

This was a special proceeding instituted before the clerk of Chatham superior court by Thomas N. Hill and his infant children, owners of one-fourth of the tract of land in said county known as "La Grange," to have damages assessed for the petitioners against the defendant for the taking of their interest in the part of said land by defendant for right of way for its railroad, and heard at chambers in Durham, on March 31, 1893, before Bryan, J. John Manning and wife and M. A. Southerland, who together own three-fourths of the land, came into court, and made themselves parties to the proceeding, and claimed that they also were entitled to damages or compensation from the defendant, for the reason, as they allege, that the grant of a right of way over the land which they had made to the defendant had become null and void, the defendant having agreed that it should be void if the road was not constructed within two years from the date of the grant, and this had not been done. The period of two years had not elapsed when the original petition was filed, but had elapsed when they made themselves parties. The defendant filed a demurrer, which was sustained by the clerk. An appeal was taken. His honor heard the appeal, and overruled the demurrer, and the defendant appealed. The demurrer was as follows:

"The defendant demurs to the original complaint (or petition) filed in this proceeding by the petitioner Thos. N. Hill, and his children and copetitioners with him, and specifies the following objections thereto, to wit: (1) For that it appears from the face of said complaint (or petition) that there is a defect of parties in that John Manning and his

wife, Louisa J. Manning, M. A. Southerland, and A. P. Gilbert are not joined, either as plaintiffs or defendants. (2) For that the said complaint (or petition) does not state facts sufficient to constitute a cause of action, in that the said complaint alleges a conveyance by petitioners' cotenants in common, to the defendant of the right of way for its railroad through the land described in the complaint, and does set forth therein and thereby a legal justification for the alleged action of the defendant. (3) For that said complaint (or petition) does not set forth, as is provided in sections 1698 and 1699, c. 38, and in sections 1943 and 1944, c. 49, Code of North Carolina, inability of plaintiffs (or petitioners) to 'agree' with defendant for the purchase of the right of way in question, nor any effort to 'agree' about it.

"And the defendant, excepting to all orders of the court allowing interpleading prior to service of process or return day for defendants' appearance in this proceeding, demurs to the aforesaid complaint (or petition) as adopted by A. P. Gilbert on the grounds: (1) For that at the date of said A. P. Gilbert's interplea there was still a defect of parties, in that said John Manning and wife, Louisa J. Manning, and M. A. Southerland were not joined as parties, either plaintiff or defendant. (2) For that as to said A. P. Gilbert the complaint does not state facts sufficient to constitute a cause of action in his favor, in that said complaint (or petition) alleges a conveyance to the defendant by the lessors of said Gilbert of the right of way for its railroad through the land described in the complaint, and does set forth therein and thereby a legal justification for the alleged action of the defendant. (3) For that it is a misjoinder of causes of action to unite in the same proceeding the alleged cause of action of said A. P. Gilbert with that of his coplaintiffs as against this defendant. (4) For that the complaint does not state the unexpired term of said Gilbert's alleged lease. (5) For that the said Gilbert's interplea adopting the original complaint does not state inability to 'agree,' or any effort to 'agree,' with defendant about the values of his alleged interest in the right of way in question, as is provided in sections 1698 and 1699, 1943 and 1944, Code of North Carolina. And the defendant, excepting to all orders of the court allowing interpleading by John Manning and wife and M. A. Southerland, demurs to the original complaint (or petition) as affected by the interplea of said John Manning and wife and M. A. Southerland as a misjoinder of causes of action in this: That the alleged cause of action of the original petitioners, Thomas N. Hill and his children, accrued prior to December 23, 1892, (the date of the commencement of this proceeding,) and the alleged cause of action of said John Manning and his wife,

Louisa J. Manning, and M. A. Southerland accrued (if at all) subsequent to said December 23, 1892, viz. not until after March 7, 1893. (2) For that the alleged grounds of the interplea of said John Manning and his wife, Louisa J. Manning, and M. A. Southerland constitute (if at all) a new cause of action arising or accruing since December 23, 1892, the date of the commencement of this action. (3) For this: That it appears from the face of the interplea of said John Manning and his wife, Louisa J. Manning, and M. A. Southerland that under the deeds set forth as exhibits, and annexed thereto, the entry on the lands therein described, and excavations made and embankments erected, etc., therein prior to March 7, 1893, were justified thereby, and said John Manning and wife, Louisa J. Manning, and M. A. Southerland are thereby estopped to claim damages therefor, and article 5 of said interplea does not allege an entry, etc., subsequent to March 7, 1893, or after an alleged failure of the 'conditions,' as it is termed, of said deeds, and said article 5 is ambiguous and indefinite as to when plaintiffs intended to allege said entry, excavations, and embankments were made; and in this said interplea of said John Manning and wife, Louisa J. Manning, and M. A. Southerland fails to state facts sufficient to constitute a cause of action. (4) For this: That said John Manning and wife, Louisa J. Manning, and M. A. Southerland cannot maintain this proceeding against this defendant, under the provision of chapters 49 and 38, Code of North Carolina, as is shown upon the face of said interplea, and a proper construction of the said deeds, this not being such a case as is provided for by statute as falling within the class of cases in sections 1943 and 1944 and 1699 and 1698, Code of North Carolina, where parties are 'unable to agree,' etc. Wherefore defendant demands judgment that this proceeding be dismissed, and for judgment against all the petitioners and interpleaders and the surety on the prosecution bond for costs."

W. A. Guthrie, for appellant. T. B. Womack, for appellees.

BURWELL, J. The provisions of section 1944 of the Code seem clearly to indicate that in a proceeding under that section all parties "who own or have, or claim to own or have, estates or interests" in the land over which a right of way is sought to be condemned, shall be brought before the court to the end that all the persons interested in the assessment of the damages may be bound by the action of the commissioners, who will find what gross sum, if any, is due to the owners, and that they may all be heard when the court comes to apportion the sums between the several owners according to their respective interests or estates in the land. The petition, whether filed by

an owner or by the railroad company, should state the names of all persons interested, and all of them should be in court before the commissioners are appointed. The petition filed by the original petitioners, Thomas N. Hill and his children, alleged that these children were the owners in fee of one undivided fourth part of the land described in the said petition, the father having a life estate in that part; that Mrs. L. J. Manning, wife of John Manning, owned one undivided fourth part in fee, and that M. A. Southerland owned an undivided half in fee, and that A. P. Gilbert had a lease for five years on all of the tract. Here we have a careful compliance with the provisions of the statute,—a full enumeration of all those who owned any interest or estate in the premises. And this enumeration of the owners of the land was accompanied by the statement of the petitioners, made on information and belief, that Mrs. Manning and M. A. Southerland, who together owned three-fourths of the land, had conveyed to the railroad company a right of way through the premises. It thus became evident that, in order to have a complete determination of the matter, it would be necessary to bring into court not only the defendant company, from whom alone the plaintiffs sought damages, but those other owners. They might well have been made defendants originally, but they have come in and been made petitioners, and thus all parties interested are present, and will be bound by what is done in the proceeding. The position taken by the defendant company that there was a defect of parties when the petition was first filed is untenable. What the petitioners wished was to have their damages assessed and paid. It was not their concern to inquire whether or not the company had come to an agreement with their cotenants and the tenant for years, and had settled with those parties. In their petition they gave to the court and to the defendant information about the other persons who had an interest in the premises, as, under the statute, they were required to do. If the defendant had settled the matter with those other parties, it had but to say so in its answer, and ask that the commissioners should only report the sum due the petitioners; or, if it had not settled the matter with those parties, it was its privilege to ask the court to have them brought in, that a complete determination of the matter might be had. But, whatever may be thought about the propriety or necessity of their being original parties, it is surely sufficient that, before defendant's demurrer was filed, they all voluntarily came into court, and made themselves parties. No suggestion is made that there is any one who claims any estate or interest in the land that is not now, and was not when the demurrer was filed, a party. Therefore there can be no defect of parties. What the rights of

the respective individuals are is another matter, that will be hereafter determined.

The position of the defendant that the petition does not state a cause of action is equally untenable. If, as petitioners say they are informed, the defendant has acquired by agreement with the other parties a right to use and occupy for its purposes their shares (three-fourths) of the land covered by the "right of way," it will not be required by the final judgment in the cause to pay any damages to those persons. Under the ample provisions of sections 1947 and 1949 of the Code,¹ the rights of all the parties can be ascertained and adjusted in this one proceeding. The whole damage to the land may be estimated, and it may then be determined, by reference or otherwise, how much of the gross sum the defendant owes; or what proportion of the right of way has been acquired, if any, by contract, may be first ascertained, and the damages or compensation due to the parties who have not been paid may be found and reported by the commissioners.

It was argued before us that the legal effect of the deeds from John Manning and wife and M. A. Southerland to the defendant is such that the original petitioners cannot maintain this proceeding under section 1944 of the Code, and that at any rate Mrs. Manning and M. A. Southerland cannot join in this petition for the assessment of damages for the reason that at the date of the filing of the original petition, according to the statement of those parties contained in their interpleas, the defendant had not lost its title to the right of way acquired from them by it. It cannot, we think, be seriously contended that the owners of one undivided fourth of a tract of land, through which a railroad is constructed, can be deprived of their right to have the damages due to them assessed under the provisions of section 1944 by the purchase by the railroad company of the right of one of the other tenants in common. And the rights of all the parties in the damages for the taking of the land, whether those rights continue as they were

¹ These sections read as follows: "Sec. 1947. If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made." "Sec. 1949. In all cases of appraisal under this chapter where the mode or manner of conducting all or any of the proceedings to the appraisal and the proceedings consequent thereon are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders and give the proper directions to carry into effect the object and intent of this chapter, and the practice in such cases shall conform as near as may be to the ordinary practice in such courts."

at the time the petition was filed or are changed and modified by subsequent events, can all be adjusted under the provisions of sections 1947 and 1949.

As another cause of demurrer the defendant insists that the petition does not state (as it says it should) that the petitioners were unable to come to an agreement with the defendant as to the sum to be paid by it to them for the taking of their land. This was not necessary. The statute requires the railroad company, when it becomes the actor in such a proceeding, as it may be, to state that fact as its justification for summoning to court a citizen whose land it wishes to take by condemnation. But when the citizen merely seeks pay for his property that has been taken from him under a license from the state, the law does not impose upon him the necessity of asserting that he and the taker of his property have not agreed. His proceeding is in itself an emphatic asseveration to that effect. What has been said seems to us sufficient to cover all the grounds of demurrer. We find no error in the rulings of his honor, and the cause is remanded to be proceeded with according to law. No error.

ISLEY v. BOON et ux.

(Supreme Court of North Carolina. Oct. 31, 1893.)

JUDGMENT—COLLATERAL ATTACK—RETURN OF SERVICE.

1. A sheriff's return that a summons was "executed by delivering a copy to J. and his wife, R." is sufficient to show that a copy was delivered to each of them, which was the only method of service provided by law when the proceedings were instituted; and the judgment in such proceedings is not subject to collateral attack by the wife on the ground that the return does not show that a copy of the summons was personally delivered to her.

2. In a collateral attack on a judgment in a special proceeding ordering the sale of an intestate's land, the sheriff's return, showing a proper service on the heirs, is conclusive; and parol evidence is not admissible, as against a purchaser at such sale, to show that in fact no proper service was made.

Appeal from superior court, Alamance county; Bryan, Judge.

Action by Christian Isley against Rowena Boon and John Boon for the recovery of real estate. From a judgment in defendants' favor, plaintiff appeals. Reversed.

L. M. Scott, J. E. Boyd, and C. E. McLean, for appellant. J. T. Morehead and W. P. Bynum, Jr., for appellees.

SHEPHERD, C. J. The plaintiff claims the land in controversy through one John Ireland, who purchased the same at a sale made by E. S. Parker, administrator of Samuel Adams, pursuant to a decree in a special proceeding granting to the said administrator license to sell the land of said Adams for the purpose of creating assets to pay the in-

debtedness of his intestate. The plaintiff introduced a part of the record in the said proceeding, and, under a ruling in this case on a former appeal, (109 N. C. 555, 13 S. E. Rep. 795,) was permitted to prove by parol evidence such other parts thereof as were lost, and could not, after proper and diligent search, be found in their legal depository. That part of the record which had not been lost consisted of a summons dated November 27, 1875, which was returned, under the signature of the sheriff, in these words: "Executed by delivering a copy to John Boon and wife, Rowena. Fees, 60 cents." The docket of the clerk was also introduced, which showed the following entries: "Summons issued November 27, 1875. Summons executed." The defendant Rowena, who is an heir of the said Samuel Adams, contends that it does not appear from said return that she was properly served, and she insists that she can, in this action, collaterally attack the decree in the special proceeding, and thus defeat the title of the plaintiff, who, as we have stated, claims under John Ireland, who was not a party to the said proceeding, and does not appear to have had any notice of the alleged absence of service on the said Rowena.

It was undoubtedly necessary, in order to confer jurisdiction, that the summons should have been served, and, at the time of the commencement of the above-mentioned proceeding, the method of service was by the delivery of a copy of the summons to the defendant, personally. Battle, Revisal, c. 17, § 82. The courts have been very liberal in construing the returns of sheriffs, and in Alabama it was held that the word "Executed" was sufficient; the court saying that the word itself implies that the writ has been executed according to law. Mayfield v. Allen, 1 Minor, 274. The like ruling has been made in Virginia and Kentucky, the courts holding "that the word 'Executed,' ex vi termini, carries with it the idea of a full performance of all that the law requires. Com. v. Murray, 2 Va. Cas. 504; Bridges v. Ridgley, 2 Litt. 395. This principle is of very general application, except in those states where, by statute, alternative modes of serving process have been adopted, in which instances a much more stringent doctrine is held, and it is required that the return must show, not only that the process has been served, but which one of two or more statutory modes of bringing a defendant before the court has been adopted by the officer. It was in reference to provisions of this nature that some of the cases cited by defendants' counsel were decided. In this state, there was but one mode of service provided by law, and the principle referred to has been explicitly recognized by the court in Strayhorn v. Blalock, 92 N. C. 292. At that time the statute required that the summons should be served by reading the same to the defendant, (Code, § 214,) and the court

held that the return of the summons, with the indorsement "Served," implied that the officer had fully discharged his official duty, by reading the summons to the defendant. Of course, where the officer undertakes to set forth the manner of service, and it appears that he has not complied with the requirements of the law, the force of such implication is entirely destroyed; but, unless the return shows a repugnancy that cannot be harmonized, the principle applies with unimpaired vigor. The return before us states that the summons was executed by delivering a copy to the said Boon and wife, and we see nothing unreasonable in holding that this language is not inconsistent with the idea that he delivered to each of them a copy. None of the cases cited by counsel, so far as we have been able to examine them, go to the extent of deciding that such a return is void, and therefore may be attacked collaterally. The returns in those cases were either set aside upon direct proceedings, or were attacked in proceedings to enforce the judgment against the parties, or upon plea in abatement. Thus, in the case of *Versepuy v. Watson*, 12 R. I. 342, the defendants in an action of assumpsit pleaded in abatement that in fact but one copy was left at the "usual place of abode," and that the officer said it was a copy for one of the defendants, only. The court held that such a plea would be good, if established. So, in *Bugbee v. Thompson*, 41 N. H. 183, the plea was also in abatement, and it will appear, upon examination, that in none of the cases cited, either from this or other states, has language similar to this received the construction contended for by the defendants. Certainly, the fact that the sheriff received only 60 cents for making the service cannot be permitted to overcome the legal implication of the word "Executed," when, as we have seen, it is entirely consistent with the words that follow. Whatever doubt, however, that might exist upon the construction of the return, must vanish before the authority of *McDonald v. Carson*, 94 N. C. 498. In that case a notice was issued to three parties, and the return was, "Executed by delivering a copy." The language is identically the same as that in the present return, except the latter is perhaps stronger, by the addition of the "to John Boon and wife, Rowena." The court said that the "term used in the return, 'Executed by delivering a copy,'" necessarily implies a delivery to each of those to whom the notice is addressed, as otherwise it would be but a partial and uncompleted service. Such, also, seems to have been the view of his honor, but he committed an error in holding that the return was, in this action, only prima facie evidence of service, and could be rebutted by showing that in fact no such service was made. Even if the service had been apparently irregular, the judgment could not be collaterally attacked in this action. *Sumner v. Sessoms*, 94 N. C. 371; *Doyle*

v. Brown, 72 N. C. 393; and numerous other decisions in our Reports. See, also, 1 Black, Judgm. 263, and 1 Freem. Judgm. 126. Seeing the force of this position, the intelligent counsel of the defendants insisted that the decree in the special proceeding was absolutely void by reason of the insufficiency of the service, as indicated by the return of the sheriff. This is untenable, in view of our conclusion that the construction contended for should not be placed upon the said return.

It is unnecessary to review in detail the great number of cases cited on the argument. It is sufficient to say that we can find nothing in them which conflicts with the views we have taken in arriving at the conclusion that there should be a new trial.

TRINITY COLLEGE v. TRAVELERS' INS. CO. OF HARTFORD.

(Supreme Court of North Carolina. Oct. 31, 1893.)

LIFE INSURANCE—INSURABLE INTEREST.

Where no ties of blood or marriage exist, one can have an insurable interest in the life of another only when he is a creditor of or surety for such other; and a policy of life insurance procured by a religious society, supported largely by voluntary contributions, on the life of one of its members, is void as a wagering contract.

Appeal from superior court, Durham county; G. H. Brown, Judge.

Action by Trinity College against the Travelers' Insurance Company of Hartford, Conn., to recover the surrender value of a policy of insurance on the life of Edward Samuel Sheppe, in which plaintiff is the beneficiary. From a judgment sustaining defendant's demurrer to the complaint, plaintiff appeals. Affirmed.

The materials facts of the complaint are as follows:

"(3) That on August 23, 1893, Edward Samuel Sheppe, of Durham, county of Durham, state of North Carolina, applied to said defendant for a policy of life insurance for twelve hundred and fifty dollars upon his own life, for the benefit, as in said application expressed, of 'Trinity College, Durham, N. C., a religious corporation sustained and controlled by the Methodist Episcopal Church South, of North Carolina, of which church applicant is a member;' and that thereafter, to wit, on September 5, 1893, said plaintiff having paid the premium demanded therefor by said defendant, said defendant, in consideration of such premium and the application therefor by said Sheppe, issued and delivered to plaintiff its policy No. 75,658, by which it insured the life of said Sheppe for the sum of twelve hundred and fifty dollars, payable upon acceptance by said company of satisfactory proof of his death, as therein expressed, to 'Trinity College of Durham, N. C., a religious corpora-

tion sustained and controlled by the Methodist Episcopal Church South, of North Carolina, of which church the said E. S. Sheppe is a member.' (4) That in and by said policy said defendant promised and agreed that at the time of its issue, and every subsequent year from date of issue, the cash value specified in table 'cash surrender values,' indorsed thereon, would be paid for it, provided it should be in force under its original conditions, and was legally surrendered therefor to the home office of said defendant within thirty days from the close of such period. * * * (5) That before bringing this action, and within thirty days from the date of issue of said policy, and while it was still in force under its original conditions, said plaintiff surrendered said policy to the home office of said defendant at Hartford, Connecticut, and demanded of said defendant the payment to it of the sum of two hundred and seventy-five dollars, its cash surrender value according to said table of 'cash surrender values,' which was refused by said defendant. (6) That at the time of said application, and at the date of issue of said policy, said Sheppe was, and he is now, a member of said Methodist Episcopal Church South, of North Carolina, in good and regular standing. (7) That said plaintiff is supported and maintained by voluntary contributions, gifts, bequests, and devises from members of said church, and by yearly assessments levied by the conferences of said church upon the various churches composing such conferences, which are paid by the members of said churches; and that but for such contributions, gifts, bequests, devises and assessments said plaintiff would fail of that support which is necessary to its useful existence."

The defendant demurred to the complaint on the following grounds: "(1) For that it appears in said complaint that the plaintiff corporation, Trinity College, has no insurable interest in the life of the assured E. S. Sheppe, and that the said corporation has paid to the defendant all the premiums that have been paid on said policy of insurance. (2) For that it appears in said complaint that the contract of insurance sued upon was but a wagering contract, entered into by the said plaintiff and defendant; the said plaintiff having at the time the said contract was entered into, and still having, no interest in the continuance of the life of the assured E. S. Sheppe, and said contract, being such a wagering contract, is against public policy, and cannot be enforced. (3) For that while it appears in said complaint that the assured, E. S. Sheppe, filed application for the policy of insurance, it appears that the plaintiff paid the premiums, and was the real party in making said wagering contract, and therefore cannot be permitted to recover on it. (4) For that it appears in the complaint that the contract of insurance provided for the payment of the cash surrender value upon

the legal surrender of the policy, and it appears that the attempted and alleged surrender was made by the plaintiff only, and during the lifetime of the assured, which attempted and alleged surrender was not legal, the assured not joining in it."

Fuller & Fuller, for appellant. Boone & Parker, for appellee.

BURWELL, J. It is said in Mr. May's work on Insurance (section 102a) that "to have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life," and that an insurable interest in the life of another is "such an interest, arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." Accepting these definitions as those which are to be deduced from all the adjudged cases, and leaving out of consideration those cases in which the fact that there was an insurable interest was dependent upon the existence of ties of blood or marriage, we find that this author asserts substantially that, in cases where there exists no ties of blood or marriage, one can have an insurable interest in the life of another only when he is the creditor of or the surety for the assured. Under certain conditions a partner has an insurable interest in the life of his copartner. *Insurance Co. v. Luchs*, 106 U. S. 498, 2 Sup. Ct. Rep. 949. So, one who is interested peculiarly in the future earnings of another under a contract with him has an insurable interest in his life. *Bevin v. Insurance Co.*, 23 Conn. 244. These instances, and others that might be mentioned, seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a "wagering contract," and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have in view. The end will not, in the eye of the law, justify the means. No error. Affirmed.

THACKSTON v. PORT ROYAL & W. C. RY. CO.

(Supreme Court of South Carolina. Nov. 16, 1893.)

NEGLECT—PROXIMATE CAUSE—INSTRUCTIONS.

1. An instruction that if deceased died from injuries received by defendant's negligence, and said negligence was the proximate cause of the injuries, plaintiff should recover, but, if deceased died from some other cause, the verdict should be for defendant, is not erroneous as ignoring plaintiff's burden of proof, this having been already fully explained to the jury.

2. The judge refused an instruction that if deceased was as likely to have died from any other disease than one arising from his leap, (to escape a peril caused by defendant's negligence,) the verdict should be for defendant, and charged, "I cannot charge this request, but will say, before you can find for plaintiff, you must be satisfied" that deceased died from injuries caused proximately by defendant's negligence; but, if deceased died from other causes, not the direct result of injuries received through defendant's negligence, the verdict should be for "defendant. Said request ignores the evidence as to the cause of death." *Held* no ground for exception.

3. An instruction that, while the court has felt it is his duty to say so much as to the law of the case, he is persuaded that the case must turn in great measure on a question of fact, is not erroneous as permitting the jury to disregard the law as laid down, there being in the case a cardinal question of fact as to the proximate cause of the injury.

Appeal from common pleas circuit court of Spartanburg county; James F. Izlar, Judge.

Action by T. B. Thackston, administrator of the estate of W. N. Boon, deceased, against the Port Royal & Western Carolina Railway Company, for damages for injuries resulting in death of intestate. Judgment for plaintiff. Defendant appeals. Affirmed.

The judge charged:

"The plaintiff, T. B. Thackston, as administrator of W. N. Boon, brings this action against the Port Royal and Western Carolina Railway Company, to recover damages for an alleged injury to W. N. Boon while serving the defendant company in the capacity of an engineer. The complaint alleges the following facts as constituting the plaintiff's cause of action: That on or about the 4th day of October, W. N. Boon was in the employment of the defendant company as an engineer, and was running a locomotive engine belonging to the company between the cities of Spartanburg, S. C., and Augusta, Ga.; that while in the discharge of this duty, at a point near Waterloo, in Laurens county, in this state, the locomotive engine operated by W. N. Boon as engineer was run into by another locomotive and train of cars belonging to the defendant company, and a collision took place; that W. N. Boon was in no way responsible for said collision, but the same was directly attributable to the gross negligence and carelessness and the wanton recklessness of the defendant company; that at the time of the collision, and on account of the same, W. N. Boon was forced to jump from the

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locomotive run by him to save his life, and that in doing so he was severely bruised and injured, and on the 22d day of October thereafter he died from said bruises and injuries; that his death was directly attributable to the negligence and carelessness of the defendant company; that he left surviving him as his only heirs at law his wife, Eliza C. Boon, and two minor children; that plaintiff duly administered on his estate; and that the death of W. N. Boon, so caused, has resulted in great damage and loss to his wife and children, and has taken from them the aid, comfort, happiness, and support which he had furnished while living, and which he would have continued to furnish to them. Judgment is demanded in the complaint for \$25,000. The defendant company, in its answer to the allegations of the complaint which I have just recited, admits that the collision occurred on the line of road of the defendant, about the time stated in the complaint, but denies that the collision was caused by the gross negligence and carelessness and the wanton recklessness of the defendant; but, on the contrary, alleges that the collision was caused by the negligence of the plaintiff's intestate, W. N. Boon, and his fellow servants. The defendant company further denies that W. N. Boon, in jumping from his locomotive, was in any way bruised or injured, and alleges that W. N. Boon did not jump from his engine until it had come to a full stop, and that he did so before the collision occurred, and that in so jumping he escaped all injury and evil consequence, and was able to assist in removing the wreckage caused by said collision, and that he was after the collision a perfectly sound and able-bodied man. The defendant company further denies that the death of W. N. Boon was caused by the recklessness, carelessness, or negligence of the defendant, or was in any wise connected with or attributable to any act whatever of the defendant, but, on the contrary, alleges that the death of W. N. Boon was due to a congestive chill, or to malarial dysentery and congestion, or some other similar disease, the result of natural causes, and in no way connected with the collision; and denies that the defendant company is in any wise responsible for the loss or affliction which may have fallen upon the family of W. N. Boon, caused by his death, and that any legal damage has been upon them. So the issues which you are to consider and decide are clearly defined by the pleadings. You are to determine from the testimony whether there has been any negligence in the case on the part of the plaintiff or the defendant. You are made the sole judges of the facts. I am not allowed to invade your province by intimating even an opinion as to the facts, and I shall endeavor not to do so. The law, however, you are to take from the court. I will say here, in the outset, that the burden of the proof is on the plaintiff. He must satisfy you by the prepon-

derance of the evidence on all the material issues involved, before he can ask a verdict at your hands, and if he fails to do so, he cannot recover. My duty, therefore, is to explain to you what negligence is, and then leave you to say whether or not the facts which may be found by you from the evidence constitute negligence in the light of the law; in other words, whether the facts proven constitute negligence.

"Now, what is negligence? Negligence is sometimes defined to be the absence of due care; that is, the absence of that care which men ordinarily bestow in the management of their own business and affairs. It is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such person—that is, a reasonable and prudent person—would not have done under the circumstances of the situation. The existence of negligence depends upon the requirements of the occasion. To recover damages for an injury done by the defendant company in a case like the present, the plaintiff must prove to your satisfaction, by the preponderance of the evidence, two things: (1) Negligence on the part of the defendant company; and (2) that the injury complained of was the result of such negligence. The negligence complained of must be shown to have been the proximate cause of the injury. By 'proximate cause,' I mean the first direct cause producing the injury. An act is said to be the proximate cause of an event when, in the natural order of things, and under the existing circumstances, it would necessarily produce the result or event. Contributory negligence is such an act or omission on the part of the plaintiff as amounts to want of ordinary care, which, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the injury complained of. To constitute contributory negligence, there must, as I have already said, be a want of ordinary care on the part of the plaintiff, and a proximate connection between the want of ordinary care on the part of the plaintiff and the injury sustained. Where contributory negligence is the issue, there are two questions to be determined: First, was there an exercise of ordinary care under the circumstances? and, secondly, was there a proximate connection between the act or omission complained of and the injury? If the testimony satisfies you that the deceased did not, under the circumstances of the situation, exercise ordinary care, and that this want of ordinary care on his part was the direct and proximate cause of the injury complained of, then a case of contributory negligence would be made out, and the plaintiff could not recover. For the rule, as I understand it, in a case like the present, is that if the negligence of the plaintiff's intestate contributed in any degree to the cause

or occasion of the injury there can be no recovery. It would be different, however, if the negligence of the plaintiff's intestate was the remote cause of the injury. In such case there would be no contributory negligence, and he might recover. And here I may say that it is wholly immaterial when the negligence of the plaintiff's intestate operated to produce the injury, if his negligence was the proximate cause of the injury complained of. When this is the case, there is no cause of action, and there can be no recovery.

"I have frequently used the term 'ordinary care,' and it may be necessary that I should explain to you what is meant by the term 'ordinary care.' Now, ordinary care is that measure of prudence and carefulness which the average prudent man might be expected to exercise under the circumstances of the situation. The failure to exercise ordinary care amounts in law to ordinary negligence. And in this connection I would say that, even should the testimony satisfy you that there was negligence on the part of the defendant, if the deceased, by the exercise of ordinary care, could have avoided the injury, and failed to do so, he would be regarded in law as the author of his own injury, and could not recover. While, as I have said, negligence is the want of due care, gross negligence has been defined to be the want of even slight care and diligence. It is a greater want of care than is to be understood by the term 'ordinary care.' The negligence charged against the defendant is gross negligence and carelessness. You are to determine from the evidence if there was a want of that care and diligence on the part of the defendant on the occasion of the collision which was requisite under the circumstances of the situation. If you should find there was, and that this negligence was the proximate cause of the injury, then the plaintiff would be entitled to recover.

"Now, it is the duty of the court to instruct you what in law constitutes a fellow servant, and what constitutes a representative of the master. Whether or not the person in question is one or the other is a question of fact to be solved by you. Fellow servants are those who are in the same common employment, serving the same master or employer, and under the control of the master or employer. If the person is employed to do any of the duties of the master or employer, he is in law a representative of the master or employer, and not a fellow servant. A conductor in charge of a train has been held in this state to be a representative of the company. Now, if there was in this case negligence on the part of the conductor who was in charge of the train which collided with the train operated by W. N. Boon, and that negligence was the direct and proximate cause of the injury from which W. N. Boon died, the defendant company would be responsible. If, however, it was

only the remote cause of the injury, the defendant company would not be liable. As a general rule, the master or employer is not liable for damages resulting from the negligence of fellow servants in the course of their common employment. Coemployees are held in law to assume the risk of the negligence of one another. In assuming the risk incident to the common employment, a fellow servant assumes the risk of negligence by his coemployees. While I have felt it my duty to say this much in relation to the law bearing upon the issues raised by the pleadings in this case, I am persuaded that the case must turn in a very great measure upon a question of fact. Both in the testimony and in the arguments to which you have listened much has been said in regard to the cause of the death of W. N. Boon. On the part of the plaintiff it is contended that W. N. Boon died from injuries received in the collision, while on the part of the company it is contended with equal zeal and earnestness that he died from the effects of malarial fever. The main and most important question, then, for your determination is, what caused the death of W. N. Boon? It is a grave and serious question, and much depends upon the answer. In answering this question you must look to the testimony,—the whole testimony. You must reconcile it where it is conflicting, and determine its weight, truth, and sufficiency. And in the performance of this duty you should be actuated by but one motive, governed by but one desire, and have but one object in view, namely, that of arriving at the truth. The chart by which you are to be guided is contained in the oath which you, and each of you, have taken. You shall well and truly try all issues, and a true verdict give according to the evidence. Your verdict, when rendered, must be the truth, as shown by the facts presented in evidence. Outside influences, plausible inferences, eloquent appeals, personal likes and dislikes, should not enter into your deliberations or shape your conclusion. If you should conclude from the evidence that the deceased came to his death from injuries received in the collision through the negligence of the defendant, and that this negligence was the proximate cause of the injuries, then your verdict shall be for the plaintiff. If, on the other hand, you should conclude from the evidence that the deceased came to his death from the effects of malarial fever, and not from the effect of any injury received in the collision, then your verdict should be for the defendant, no matter how negligent the defendant may have been on that occasion. Should you conclude that the plaintiff is entitled to recover, you will have to fix the amount of the recovery. In an action like the present it is not necessary that the plaintiff should prove in dollars and cents the damages which the beneficiaries under the act have sustained. And in passing upon

the question of damages you are not to take into consideration the sorrow and distress caused by the death of the husband and father. Damages in cases of this kind are for the injury,—pecuniary injury, as I understand it,—and must be in proportion to the injury resulting from the death to the wife and children. The plaintiff is entitled, in the language of the act, to recover 'such damages as the jury may think proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought.' The damages, as you will observe, are to be estimated for the injury, and must be in proportion to the injury resulting from the death to the beneficiaries.

"I have been requested to charge you by defendant's counsel as follows: '(1) The burden of proof is on the plaintiff and before he can recover in this action he must satisfy the jury by the preponderance of the testimony that the death of W. N. Boon was the result of injuries caused by the negligence of the defendant company.' I have already so charged you, and so charge you now. '(2) If the testimony is evenly balanced as to the cause of the death of W. N. Boon, then the verdict must be for the defendant.' I have, in effect, charged you this, because, if the evidence is equally balanced, there can be no preponderance, and you must decide all material issues by the preponderance of the evidence. '(3) If the jury find that W. N. Boon was as likely to have died from any other disease than one arising from his leap, then their verdict should be for the defendant.' I cannot charge this request, but will say that before you can find a verdict for the plaintiff you must be satisfied by the preponderance of the evidence—that is, the weight of the evidence—that W. N. Boon died from the effect of injuries caused by the negligence of the defendant, and that this negligence was the direct or proximate cause of injury. But should you be satisfied by the weight of the evidence that W. N. Boon died from other causes, not the direct result of injuries received through the negligence of the defendant, your verdict would have to be for the defendant. This request, as I understand, ignores the evidence submitted, tending to show the cause of the death."

Joseph Ganahl and Nicholls & Moore, for appellant. Stanyarne Wilson and Bomar & Simpson, for respondent.

POPE, J. This action for damages came on to be heard before Judge Izlar and a jury at the October, 1892, term of the court of common pleas for Spartanburg county, when a verdict for the plaintiff was rendered, and a motion for a new trial on the minutes was refused. Judgment being entered, a notice of appeal was given. The following are the grounds of appeal: "The judge erred in charging the jury: '(1) If you should con-

clude from the evidence that the deceased came to his death from injuries received in the collision through the negligence of the defendant, and that this negligence was the proximate cause of the injuries, then your verdict should be for the plaintiff. If, on the other hand, you should conclude from the evidence that the deceased came to his death from the effects of malarial fever, and not from the effect of any injury received in the collision, then your verdict should be for the defendant,' etc. The error being that the causes of Mr. Boon's death, whether directly from the injury, or from the effects of disease, are in this statement placed on the same equal basis of proof, his honor ignoring and contradicting herein other portions of the charge, in which the law is stated to be that the preponderance of evidence must be that Mr. Boon died from an injury received in the collision. This charge, then, in connection with the next grounds manifestly misled the jury. (2) In refusing to charge, as requested by defendant: 'If the jury find that W. N. Boon was as likely to have died from any other disease than one arising from his leap, then their verdict should be for the defendant.' (3) In adding to his refusal to charge as above the words: 'I cannot charge this request, but will say that before you can find a verdict for the plaintiff you must be satisfied from the preponderance of the evidence that W. N. Boon died from the effect of injuries caused by the negligence of the defendant, and that this negligence was the direct or proximate cause of the injury. But if you should be satisfied by the weight of the evidence that W. N. Boon died from other causes, not the direct result of injuries received through the negligence of the defendant, your verdict would have to be for the defendant.' The error being, as with the first exception herein, of placing the cause of death, whether from injury received from his leap or whether from other causes, on the same ground of proof; his honor defining 'preponderance of evidence' to mean 'weight of evidence' when speaking of the cause as from the injury, and then stating, if the jury should be satisfied by 'the weight of evidence' that Boon died from other causes, then the verdict should be for the defendant. (4) In further adding to his refusal to charge as requested above, the following words: 'This request, as I understand it, ignores the evidence submitted tending to show the cause of the death,' when it is respectfully submitted there is nothing in the request which ignores the evidence submitted in general, or of that which showed the cause of death. (5) In refusing to grant a new trial when there is not a scintilla of evidence that Mr. Boon was injured at all by the leap which he took to avoid the collision, and not a particle of evidence that this leap was the proximate cause of his death. (6) In charging,

in substance, that the defendant must show of what disease the intestate died. (7) In charging: 'While I felt it my duty to say this much in relation to the law bearing upon the issues raised by the pleadings in this case, I am persuaded that the case must turn in a great measure upon a question of fact;' intimating that while he gave the law they were not to consider it, but simply decide a question of fact. (8) In charging the main and most important question is, 'What caused the death of W. N. Boon?' and saying nothing of their duty to consider the question of contributory negligence. (9) In charging, in substance, in several places, that if plaintiff proved his intestate came to his death from injuries caused by the negligence of the defendant, he was entitled to recover, ignoring the defense of the defendant that the deceased was guilty of contributory negligence, even if he came to his death by its act, which defendant denies."

W. N. Boon was the engineer of a train owned and operated by the defendant railroad, the Port Royal & Western Carolina Railway Company, on about the 4th day of October, 1890, and while making a trip from Spartanburg to Augusta, at about 10 and 32 minutes o'clock at night of that date, at a point on the railway near Waterloo, in Laurens county, in this state, while running strictly on the schedule prepared by defendant, another train coming from Augusta, on its way to Spartanburg, which latter train, according to the testimony of its conductor in this cause, collided with the train under the charge of Engineer Boon, because the conductor, in charge of the train from Augusta, having fallen asleep, thereby neglected to take a side track that the train under Engineer Boon might pass by in safety. To avoid the effect of a collision, the engineer, Boon, after reversing his engine, leaped from his engine. At first it was thought he was uninjured, but the next morning he limped, and on carrying his engine to Laurens he complained to a coemployee "of his heel and his back when he stood up." He lay over in Spartanburg, and then went to a small place in North Carolina, about 100 miles from Charlotte, to attend to some private business of his own, but was suffering while he was there. He returned to his work as engineer on defendant's road about 10th or 11th October, 1890, running three nights in succession. On the 17th October, 1890, while in Augusta, he had what was thought a congestive chill, and had medical advice, but on the next day returned to Spartanburg, when he took his bed, from which he never arose alive, for he died on the 22d of October, 1890. At the trial, by reason of the issues raised by the pleadings,—for the plaintiff claimed that Boon came to his death by reason of injuries received while he was forced to jump from his engine to avoid the collision that resulted from defendant's neg-

ligence, and the defendant claimed that Boon emerged from that collision "a perfectly sound and able-bodied man," and that his death "was due to a congestive chill, or to malarial dysentery and congestion, or some other similar disease, the result of natural causes, and in no way connected with the aforesaid collision,"—much testimony was given on all these matters, and a sharp contest between medical experts was had as to the cause of Boon's death. The judge's charge is unusually clear, and, inasmuch as appellant has inserted blocks of it in his ground of appeal, we desire the charge, in its entirety, reproduced in the report of this case. We will now examine the questions raised by appellant.

1. In its fifth ground of appeal it complains that the circuit judge denied its motion for a new trial, and the points upon which it relies relate to the testimony, its weight and effect. We have too often laid down the well-recognized rule that the circuit judge, in considering the force and effect of the testimony adduced at the trial, will not be interfered with by this court. It is only on questions of law wherein the circuit judge may have erred will this court interfere. Let this ground of appeal be dismissed.

2. The first ground of appeal is mainly made up of a quotation from the judge's charge to the jury. Before further consideration of this ground of appeal, we deem it proper to state that this mode of raising an objection to a judge's charge is very objectionable. This court is always pleased to have counsel to assist them by calling attention to the specific errors alleged against the court below; but surely some better method should be adopted by them than embodying a block of the judge's charge in a ground of appeal, and then associate with such quotation counsel's argument to show the judge's error. However, we will proceed to consider it. We have read the judge's charge with special care. When it is construed as a whole, it betokens unusual care on the part of the judge to have the jury apply the law governing this class of cases correctly. Of course, the propositions of law must be stated clearly, and to do this such propositions must be orderly presented. Sometimes an apparent repetition is required to do this. These propositions proceed step by step. Having once or twice made a statement of the law, the circuit judge then goes a step further, and need not repeat what he has already made clear. So it was in the case at bar. The judge had already instructed the jury that "to recover damages for an injury done by the defendant company in a case like the present the plaintiff must prove to your satisfaction, by the preponderance of the evidence, two things: (1) Negligence on the part of the defendant company; (2) that

the injury complained of was the result of such negligence." The circuit judge immediately afterwards explains that the negligence must be the proximate cause of the injury, and explains what proximate cause means. He then carefully calls the jury's attention to the effect of contributory negligence by the plaintiff, and shows how it will operate to discharge the defendant company from any negligence on their part. We might go on, and pile up the evidence as to the fidelity of the judge in this charge to the jury in refutation of this criticism, but we will not do so. We cannot sustain this ground of appeal.

3. The next error may be considered as embodied in the second, third, and fourth grounds of appeal. The defendant requested the circuit judge to charge: "If the jury find that W. N. Boon was as likely to have died from any other disease than one arising from his leap, then their verdict should be for the defendant." Although the judge declined to charge in the language prayed for, he met their issue, for he immediately instructed the jury: "I cannot charge this request, but will say, before you can find a verdict for the plaintiff, you must be satisfied from the preponderance of the evidence—that is, the weight of the evidence—that W. N. Boon died from the effect of injuries caused by the negligence of the defendant, and that this negligence was the direct or proximate cause of injury. *But if you should be satisfied from the weight of the evidence that W. N. Boon died from other causes, not the direct result of injuries received through the negligence of the defendant, your verdict would have to be for the defendant.* [Italics ours.] This request, as I understand, ignores the evidence submitted tending to show the cause of death." The sentence in this extract immediately preceding the last sentence therein virtually gives the defendant the benefit of the charge he sought, though not exactly in the form submitted in the request to charge. This right of selection by the judge must be allowed. It was not a captious or hypercritical act on his part, but, on the contrary, was intended to keep before the minds of the jury the issues raised by the pleadings and the testimony given in the cause. Let these exceptions be overruled.

4. The appellant's sixth ground of error is very general,—too much so under the rules of this court; but in overruling it we will say we fail to find any evidence in the charge of the circuit judge upon which to predicate this attack upon it.

5. In the seventh exception we fail to find any objection to the language complained of. There is no doubt that the law he had laid down would be remembered by the jury, but all the judge meant by the language used was that the case, so far as the jury was concerned, would turn upon the view they

might be led to adopt after having heard the testimony of a fact in the case, namely, the cause of Boon's death. If appellant had reproduced the language of the judge immediately succeeding that he quoted, all difficulty in his mind would have been removed.

6. As to the eighth exception, we must say that the judge was right, for the main question in the case was, "What caused the death of W. N. Boon?" It was distinctly raised in the pleadings as the pivotal question, and it was so treated in the testimony offered. Let this exception be overruled.

7. The ninth exception is not sustained by the case. The judge clearly set forth the defense of contributory negligence. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

JENKINS v. RICHMOND & D. R. CO.

(Supreme Court of South Carolina. Nov. 8, 1893.)

INJURY TO RAILWAY EMPLOYE—FELLOW SERVANTS—"SAFE PLACE."

1. An assistant fireman of one train is a fellow servant of the conductor of another train, both being in the employ of the same company.

2. Neglect of the servant in charge of a train, part of which was standing on the track, detached from the engine, to warn an approaching train, is not a breach of the master's duty to furnish a "safe place," entitling an injured employe to recover.

Appeal from common pleas circuit court of Richland county; W. H. Wallace, Judge.

Action by John H. Jenkins against the Richmond & Danville Railroad Company. A demurrer to the complaint was sustained, and plaintiff appeals. Affirmed.

Andrew Crawford and Alston & Patton, for appellant. B. L. Abney, for respondent.

McGOWAN, J. This action was brought by the plaintiff, an employe of the defendant, for the recovery of damages sustained by him through the negligence of the defendant company. The case came on for trial before his honor, Judge Wallace, and the defendant company interposed an oral demurrer that the complaint did not state facts sufficient to constitute a cause of action against the defendant. The judge, without stating his reasons, sustained the demurrer, and dismissed the complaint. From this order the plaintiff appeals to this court upon one general ground,—that the judge erred in sustaining the demurrer. Upon this state of the pleadings, the facts well alleged must be assumed to be true, and therefore it is necessary to set out the important allegations made. He complains substantially as follows: "That the

plaintiff, John H. Jenkins, on March 3, 1890, at the time of the committing of the grievances hereinafter complained of, was in the employment of the defendant as an assistant fireman upon a locomotive engine, No. 135, the property of the said defendant, driven by steam upon its road, and it was the duty of the defendant to provide an unobstructed track for said engine running upon its track, and to give warning of any obstructions thereon by placing torpedoes on the track, and signaling said engine at a distance therefrom remote enough to enable the engineer to avoid a collision therewith by the employment of the appliances used in stopping engines, trains, etc. That on the said March 3, 1890, while the plaintiff, in the performance of his duty as aforesaid, on the locomotive engine No. 135, was going north from Columbia over the defendant's road, and at a point thereon about 2½ miles from said city, there were standing on defendant's track, on the line of the Columbia & Greenville Railroad, several cars in charge of the conductor of the train from which they had broken loose, and which had preceded, by fifteen or twenty minutes, said engine No. 135, in its progress up the road as aforesaid. That the defendant, its agents and servants in charge of the loose cars as aforesaid, not regarding their duty, conducted themselves so carelessly, negligently and unskillfully that they failed to make said obstruction known to those in charge of the approaching engine No. 135, in time to stop the same, either by placing torpedoes on the track, or by signaling the engineer running said engine, at a point sufficiently removed from said obstruction wherein it was possible to stop said engine, as is required by the rules and regulations governing the running of engines on the road of the above named defendant. That for the want of due care and attention to the duty devolving upon the said defendant, its agents and servants, as aforesaid, at the time and place aforesaid, and while the said loose cars were in the use and service of said defendant, and in charge of one of its conductors, as aforesaid, on the track of the said railroad, and while the plaintiff was in the performance of his duty in the capacity as aforesaid in the service of said defendant, by reason of the carelessness, negligence, and recklessness of the said defendant, its agents and servants, in failing to give proper signals which would have stopped the approaching engine in time to avoid all possibility of a collision, this plaintiff, to save his life, was forced to leap from said engine while it was running rapidly over said track, just before it reached said obstruction, whereby his arm was broken at the wrist, causing a permanent injury, and he was for days and weeks unable to work at all, and can never perform a man's full share of manual labor, owing to said permanent injury; and his sufferings both mental and physical were intense, and

continued until his wound healed; all to his damage \$1,950.00."

The principles upon which a railroad company is responsible to a stranger or to passengers transported for a consideration are reasonably well defined and understood by the profession. But a corporation must of necessity act through agents, and the relations between the ideal existence known as the corporation and its own employees for him are not at all so clear or well defined. On the contrary, there is some confusion and much difference of opinion on the subject; so much so that the doctrines as to "fellow servants" and responsibility for their acts have been characterized by a learned judge "as a perplexing and tangled subject." Since the case of *Murray v. Railroad Co.*, 1 McM. 385, decided by our then court of errors in 1841,—the first of our cases on the subject, if not the first on the American continent,—the general rule has been considered as established on principle and policy "that a railroad company is not liable to one of its agents for an injury arising from the negligence of another competent agent." And in one of the latest and fullest publications which treats of the subject the principle is stated thus: "The general rule, resulting from considerations of justice as of policy, is that he who engages in the employment of another for the performance of specified duties and services for compensation takes upon himself the natural and ordinary risks and perils incident to the performance of such services. The perils arising from the carelessness and negligence of those who are in the same employment are no exception to this rule; and where a master uses due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the services in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service. * * * The rule thus established was almost universally followed, and the labor of the courts since has been in properly applying it, and determining its principal limitations," etc. See 7 Amer. & Eng. Enc. Law, p. 823, and numerous cases cited. The plaintiff here was an assistant fireman on train No. 2, injured, as alleged, by the negligence of "the agents and servants" (without indicating which) of the defendant company on another train (No. 1) in not giving timely notice of certain "loose cars" being on the track of the company; and he (the plaintiff) claims that the judge committed error in holding that the conductor on train No. 1 and the assistant fireman on train No. 2 were fellow servants, in the sense of the rule. The employees of a railroad are generally numerous, and necessarily divided into classes, according to the work assigned them. But all of the persons thus employed under one principal in the

conduct of one common enterprise, such as operating a railroad, are, according to the ordinary meaning of the word, servants or employees of one principal, and, as it would seem, "fellow servants" of each other. But it is said that by successive decisions of the courts the rule has been modified, and, according to the limitations imposed, the parties here were not technically "fellow servants." After some conflict, we suppose it may be regarded as settled that whether parties are "fellow servants" in the sense of the rule does not depend upon the grade, rank, or authority of the two servants. A fireman and engineer or conductor are "fellow servants." Judge Cooley states that persons are "fellow servants when they engage in the same common pursuit under the same general control." Cooley, Torts, 541. Judge Thompson, in his work on Negligence, announces as a general rule that all who serve the same master work under the same control, derive authority and compensation from the same common source, are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who take the risk of each other's negligence. Or, in the forcible view of Judge Brewer, lately appointed associate justice of the supreme court or the United States, in the case of *Howard v. Railroad Co.*, (1886,) 26 Fed. Rep. 837: "Neither can it be said that Ryan and decedent were engaged in a different class of work. * * * True, they were on different trains, and at the time of the accident had no opportunity of noticing the conduct of each other until too late to prevent the collision. But, being engaged in the same kind of service, they must naturally have been often thrown into contact, and had ample opportunities for mutual supervision. * * * He who engages in train service knows that other trains besides his will be running, and may fairly be considered as contracting to take the risk of the negligence of the employees managing such trains. He must expect to be employed now on one train and now on another, to be thus thrown into contact with the other employees in that service, to know himself what is proper care in such work, and be able to detect any evidence of carelessness on the part of those in like service." See *Howard v. Railroad Co.*, 26 Fed. Rep. 837; *Newport News & M. V. Co. v. Howe*, 3 O. O. A. 121, 52 Fed. Rep. 362; *Railroad Co. v. Donnelly*, (Va., 1892,) 14 S. E. Rep. 692. But it is said that there is one limitation to the general rule which has been well established, and that it is this: That, while the question as to whether parties are fellow servants is not to be determined by the rank or grade of the offending or injured servant, "it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law implies a contract duty on the part of the employer to perform, then the offending

employee is not a servant, but an agent, but as to all other acts they are fellow servants." As we understand it, this is the rule which has been adopted in this state. See *Gunter v. Manufacturing Co.*, 18 S. C. 270, and *Calvo v. Railroad Co.*, 23 S. C. 529. In these cases the chief justice announced the doctrine as follows: "The true question is whether the person in question is employed to do any of the duties of the master. If so, then he cannot be regarded as the fellow servant or co-laborer of the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him must be regarded as the negligence of the master." This we have held to be the true test, and the only question now is whether it is applicable to and must rule this case. Let us see what is the proper construction of this limitation. As we have seen, the employees of a railroad company are necessarily divided into classes, to each of which, in the division of labor, certain specific ordinary duties are assigned, as to which each servant, within the compass of his employment, in one sense, is the representative of the company. Is it the intention that "the duties of the master" referred to as changing the character of an employee into that of master should include those matters of ordinary regulation and management, or only those original and essential duties implied by the contract of service; such, for instance, as the duty of keeping a safe and sound track, furnishing all proper appliances, competent servants, etc.? But, be this as it may, competent authority has indicated the following as "the duties of the master" referred to, viz. to furnish suitable machinery and appliances, and keep them in repair, the selection and retention of sufficient and competent servants, and the establishment of proper rules and regulations, etc. Under the head of "appliances" is understood to be included a proper roadway, or, as it has come to be phrased, "a safe track and a safe place to work." Did the company directly or indirectly violate any of these fundamental contract duties in this case? It will be observed that there is no allegation in the complaint that the cars were "loose" on the track from any fault or negligence on the part of the servants in train No. 1, nor any distinct allegation as to the time when they were detached, or, indeed, in what manner the accident occurred; nor is there any allegation that the track was not safe or sufficient, or there was wanting suitable appliances or competent servants. As we read it, the only allegation of fact made by the complaint was one, not of commission, but of omission,—that the servants on train No. 1 did not give proper signals, which would have stopped the train approaching in time to avoid the collision. This is entirely a different case from that of *Calvo v. Railroad Co.*, *supra*, where one Wooten, a section master and supervisor of

the track-laying force, disregarding the signal carried by a preceding train, which indicated that it was to be followed by another, did not wait for that other train, but at once took up the track, making a gap in the road which derailed the engine, and inflicted the injury complained of. It thus appears that there was not only a failure to furnish a safe track, but really the destruction of it. The facts of this case are essentially different, and we may adopt as applicable to this the statement of a learned judge, lately made in one of the numerous cases on the subject: "So far as the place and machinery, both were safe. There is no pretense that the track was not in good order, or that the engines and other implements for the movement or control of the train were not sufficient. It will not do to say that because Ryan's engine was in the way, and collided with decedent's train, the track was not clear, and therefore the master had failed in his duty of providing a 'safe place' for the employees to work in and upon. The negligent use by one employee of perfectly safe machinery will seldom be adjudged a breach of the master's duty of providing a safe place for the employees. Such a construction would make any negligent misplacement of a switch, any collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a 'safe place.' The true idea is that the place and the instruments must in themselves be safe, for this is what the master's duty fairly compels, and not that the master must see that negligent handling by an employee of the machinery shall not create danger," etc. We cannot doubt that the employees of train No. 1 and the plaintiff on No. 2 were fellow servants when the plaintiff jumped and broke his arm, without such fault or negligence on the part of the company as to make them liable for damages; and therefore we think the circuit judge committed no error of law in dismissing the complaint. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

STATE ex rel. MORSE v. CORNWELL et al., County Com'rs.

(Supreme Court of South Carolina. Nov. 13, 1893.)

TOWNS—LIMIT ON BONDED DEBT.

Const. art. 9, § 17, providing that no bonded debt incurred by a county or municipality shall exceed 8 per cent. of the assessed value of the taxable property therein, appoints as standard the last tax assessment before the bond issue, and no subsequent assessment is material.

Mandamus on relation of R. M. Morse against J. D. Cornwell and others, as commissioners of York county, to levy a tax

on Broad River township to pay coupons on bonds of said township. Writ denied.

Lord & Burke, for petitioner. D. E. Finley and Wm. B. McCaul, for respondents.

McIVER, C. J. This is an application addressed to this court in the exercise of its original jurisdiction for a mandamus to compel the respondents, as the corporate agents of Broad River township, in York county, to levy a tax upon the taxable property of said township sufficient to pay certain past-due coupons on bonds issued by respondents as such corporate agents, of which the relator is the bona fide holder. Inasmuch as there is but a single question presented for the determination of the court, we need not go into any detailed statement of the pleadings, but it will be sufficient for us to state the conceded facts and admitted propositions of law out of which the question arises which we are called upon to decide. It is conceded that the amount of the bonds here in question is the sum of \$24,000, and, if the same is a valid debt of Broad River township, then such debt was incurred on the 22d day of December, 1888, on which day the act was passed purporting to fix such debt upon said township. It is likewise conceded that said township "is a municipal corporation or a political division of the said state, within the provisions of section 17, art. 9, of the constitution of the state of South Carolina." That constitutional provision, as may be seen by reference to the Acts of 1884, (18 St. 690,) reads as follows: "Any bonded debt hereafter incurred by any county, municipal corporation, or political division of this state shall never exceed eight per centum of the assessed value of all the taxable property therein." It is very obvious that the legislature had no power to fix upon this township any debt in excess of the limit prescribed by the constitutional provision just quoted; and hence, if the amount of \$24,000, purporting to be fixed upon Broad River township by the act of 1888, above cited, was in excess of 8 per centum of "the assessed value of all the taxable property therein" at the time the act was passed, it follows necessarily that said act, in so far as it purported to fix such debt upon said township, was unconstitutional and void; for it is admitted in the argument—and properly admitted—that the time when the debt purports to have been contracted is the time to which reference must be had in ascertaining whether the constitutional limit has been exceeded. The inquiry, then, is, was the sum of \$24,000 in excess of 8 per centum of the assessed value of all the taxable property in Broad River township on the 22d December, 1888? It being conceded that the assessed value of all the taxable property in said township, as ascertained by the next preceding assessment which had been made in the early part of

the year 1888, for the fiscal year of 1887-88, before the act purporting to create the debt was passed, amounted to \$271,350, while the assessed value of all such property as ascertained by an assessment made in February, 1889, for the fiscal year 1888-89, after the passage of said act, amounted to \$314,400, it is quite clear that, if the former assessment be taken as one of the elements of the calculation, the proposed debt exceeded the constitutional limit, while, if the latter assessment be adopted as one of the elements of the calculation, then there was no such excess. The real question, therefore, and the only one discussed in the argument, and the only one which we propose to decide, is, which of these two assessments should be properly taken as the basis of the calculation? In the first place, it seems to us that there is an insuperable practical obstacle in the way of adopting the assessment made after the debt purports to have been contracted, as contended for by the counsel for petitioner in this case; for, if so, it would be impossible for persons desiring to purchase the bonds, as well as for the taxpayers of the township, to know whether the bonds were valid or not, as they would have no means of ascertaining what would be the assessed value of all the taxable property in the township until after the next assessment should be made and finally completed, and it might be, and probably would be, months before one of the essential facts necessary to the determination of the question of the validity of the bonds could possibly be ascertained. Again, the construction contended for by the relator would open the door to fraud and oppression, for a majority desirous of fixing a burdensome debt upon the township might exert the power which majorities always possess to increase unduly the assessments for the fiscal year, in order to bring the amount of the debt proposed to be contracted within the constitutional limit, relying upon the same power to reduce subsequent assessments, and thus practically defeat the wise purpose of the constitutional provision; for, as was said in *State v. Tolly*, (S. C.) 16 S. E. Rep. 196: "The manifest object of this provision was to limit the power of these subordinate branches of the government to contract debts, and, like most constitutional limitations, its purpose was to protect minorities by depriving a mere majority of the power to impose what might prove to be grievous burdens upon the property of such taxpayers as might be in the minority." Indeed, the reasoning in that case goes far to support the construction contended for by respondents in this case, though we do not claim that the point there decided is conclusive of the question here presented. As was further said in that case: "The language used in the constitutional provision is not 'eight per centum of the actual or real or market value of the taxable property,' but

the language is, 'of the assessed value of all the taxable property therein.' This word 'assessed' has, and had at the time of the adoption of the constitutional provision now under consideration, a well-defined meaning when applied to taxable property, and the framers of that provision must be assumed to have used it in the same sense in which it was used in the various acts of the legislature relating to the subject of taxation. It must be regarded as meaning the value placed upon property for the purpose of taxation by officials appointed for that purpose." In all this, reference is had to the past and not to the future,—to an assessment already made and completed, and entered upon the proper record. The word "assessed," in the constitutional provision, being in the past tense, implies the same thing. But what seems to be absolutely conclusive is this: It must be assumed that the legislature, or any subordinate agency of the government invested with power to contract a debt, would be careful, in exercising such power, not to go beyond the limits prescribed by the constitution; and if the body, when contracting the debt, has no means of ascertaining whether the amount is within the prescribed limit, which could not be done until another assessment has been made, it is very obvious that such care could not be exercised, in issuing the bonds or contracting the debt, before such new assessment is made. It seems to us clear, therefore, that the words "assessed value," as used in the constitutional provision now under consideration, must be regarded as meaning the assessed value as ascertained by the next preceding assessment appearing on the tax books of the county, and cannot mean any assessment to be made subsequent to the time when the debt in question purports to be contracted. This view is directly and fully sustained by the circuit court of the United States for the district of South Carolina in the case of *Massachusetts & S. Const. Co. v. Cane Creek Tp.*, 45 Fed. Rep. 336, where the identical question here presented was distinctly decided in accordance with the view which we have adopted, as appears by a certified copy of the decree of Judges Bond and Simonton, left with us at the hearing. It seems to us, also, that our view is supported by the case of *Dixon Co. v. Field*, 111 U. S. 95, 4 Sup. Ct. Rep. 315, where the late Mr. Justice Matthews used the following language, quoted with approval by Mr. Justice Gray in *Sutliff v. Board*, 147 U. S. 236, 13 Sup. Ct. Rep. 318: "In the present case there was no power at all conferred to issue the bonds in excess of an amount equal to ten per cent. upon the assessed valuation of the taxable property in the county. In determining the limit of power there were necessarily two factors,—the amount of the bonds to be issued, and the amount of the assessed value of the

property for purposes of taxation. The amount of the bonds issued was known. It was stated in the recital itself. It was \$87,000. The holder of each bond was apprised of that fact. The amount of the assessed value of the taxable property in the county is not stated; but *ex vi termini* it was ascertainable in one way only, and that was by reference to the assessment itself, a public record equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount as fixed by reference to that record that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their functions, and the performance of their duty; but the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as it is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it." Now, while the question considered in that case was not the question presented here, but was rather a question of the force and effect of the recitals in the bonds, yet it is impossible to read the language which we have quoted without perceiving that it was assumed throughout that the assessed valuation to which reference must be had was the next preceding assessment to the issue of the bonds; and when to this is added the fact appearing in the case that, although the bonds were not issued until July, 1876, and that the assessed valuation referred to in that case was made in the spring of 1875, which continued in force until the spring of 1876, we think we are justified in citing that case in support of our view. The judgment of this court is that the petition be dismissed.

McGOWAN and POPE, JJ., concur.

BELL v. STATE.

(Supreme Court of Georgia. April 10, 1893.)
KEEPING GAMBLING HOUSE—INDICTMENT—LIABILITY OF WIFE.

1. Where the indictment covered not only the keeping of a gaming house, but knowingly permitting persons to come together and play for money at prohibited games in a house or room occupied by the accused, and where the evidence disclosed a single instance of gaming,

but no more than one, a conviction could be had, whether this constituted the house a gaming house or not. Consequently that question is immaterial, and it was not error for the court to decline a request to decide it in charging the jury.

2. Under the Penal Code of Georgia, (Code, § 4300,) a wife is not excused by the mere presence of the husband for any criminal act done voluntarily by her. In order for her to stand excused, it must appear that "violent threats, command, and coercion were used" by him.

3. When husband and wife reside together, he is the head of the house, whether it be owned by or be rented to the one or the other. When both are present, it is his duty, not hers, to prevent unlawful gaming therein, and, in order to hold her liable criminally for permitting such gaming, it must appear affirmatively that she was active in the granting of permission, not merely that she was passive in the matter, and took no measures to hinder or prevent the game.

4. While the evidence in the record seems insufficient to establish satisfactorily that the accused was a married woman, yet, as the court below appears to have so treated her in charging the jury, and the counsel for the state in the argument here having acquiesced in that view, this court is not called upon to decide upon the effect of the evidence on that question.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Hattie Bell was convicted of keeping a place for gambling, and brings error. Reversed.

Blandford & Grimes and H. C. Cameron, for plaintiff in error. Tol. Y. Crawford, for the State.

BLECKLEY, C. J. 1. While a single act or instance of gaming in a house or room will not constitute the place a gaming house or room, yet such an act, together with all the attendant circumstances and surrounding indications, may be sufficient evidence to show that the house or room is really one of that character. In this case the indictment was as broad as section 4538 of the Code. It charged not only that the accused kept a gaming house and room, but that she knowingly permitted persons to come together and play and bet for money at the enumerated games and other games played with cards, in a house and room occupied by her. On such an indictment the question embraced in the request to charge as to a single instance was immaterial, and for this reason the court was not bound to comply with the request.

2. Section 4300 of the Code is in these words: "A feme covert, or married woman, acting under the threats, command or coercion of her husband, shall not be found guilty of any crime or misdemeanor not punishable by death or perpetual imprisonment, and, with this exception, the husband shall be prosecuted as principal, and, if convicted, shall receive the punishment which would otherwise have been inflicted on the wife, if she had been found guilty; provided, it appears, from all the facts and circumstances

of the case, that violent threats command and coercion were used." Whatever may have been the common law on the subject, it is evident from this language that as to any offense, however small, in order for the wife to stand excused under the Code on the ground of the presence of her husband, it must appear that she was in fact coerced, or that he used violent threats, command, or some equivalent means of coercion calculated to overpower her will, and render her a passive instrument, rather than a voluntary agent of crime.

3. If the accused, Hattie Bell, and Harry Dillard, were husband and wife, and resided together in the house where the gaming took place, no matter which of them owned or had rented the house, he was the head of the family. It appeared that both were present when the gaming was being carried on. If so, it was his duty, not hers, to prevent it. To hold her liable criminally for permitting it while he was present, it should appear affirmatively that she was active in granting permission. If she was merely passive in the matter, although she took no measures to hinder or prevent the game, she could not be convicted. The evidence discloses nothing but passive acquiescence on her part. By whose means the gamblers were brought together, or by whose permission they engaged in and carried on the game, does not appear.

4. The only evidence of marriage was that of three witnesses, who testified that they had heard that Hattie Bell and Harry Dillard were married, and that they knew they were living together at this house as man and wife. We should be inclined to doubt whether this evidence would be sufficient to establish the marriage, but in charging the jury the court appears to have treated the accused as a married woman, and in the argument here the counsel for the state acquiesced in that view. Under these circumstances, we do not feel it incumbent upon us to decide upon the effect of the evidence as to the proof of marriage. Taking it for granted that Harry Dillard was the husband of the accused, the verdict was without sufficient evidence to justify it, and the court erred in not granting a new trial. Judgment reversed.

CENTRAL RAILROAD & BANKING CO. v. WIGGINS.

(Supreme Court of Georgia. Oct. 17, 1892.)

NEW TRIAL — MISCONDUCT OF JUROR — INSTRUCTIONS — PERSONAL INJURIES — DAMAGES.

1. It is no cause for a new trial that one of the jurors took the plaintiff by the arm, and assisted him down stairs, in the courthouse, during a recess of the court, after the trial was commenced, and before it was concluded. It is not apparent or probable that this act of civility on the part of the juror was or might have been prejudicial to the defendant, although the

cause of action on trial was an injury to the plaintiff's spine and nerves, which, as he contended, disabled him from walking without crutches or other assistance.

2. Construed in connection with the whole charge, as set out in the record, there was no error in instructing the jury thus: "Certain tables are before you. You can use them, or not, in passing on the amount to be allowed the plaintiff, if you find for him; or you may employ any method known to you, as upright and intelligent men, which is just and fair, in estimating the damages."

3. There was a verbal inaccuracy in instructing the jury on the subject of reducing to present value the probable earnings of the plaintiff during the remainder of his life, in case he had not been injured, in these terms: "You will then consult the tables, and ascertain as to the number of years and thousandth parts of years put opposite his age. You will then multiply that by the sum you find he is entitled to per year." The inaccuracy consisted in denominating the figures in the annuity table opposite the plaintiff's age as "the number of years and parts of years." But there is no indication in the verdict, as compared with the evidence, that the jury used either the wrong table or the wrong figures. The decided probability is that they used the right ones, if they calculated present value by any table. This being so, it is of no consequence that the words, "number of years and parts of years," were substituted by the court for the word "numbers" or "figures," or for the words, "present value of an annuity of one dollar, expressed in dollars and thousandth parts of a dollar." The table which the jury ought to have used was the only one of several before them which represented thousandth parts of anything.

4. The verdict, though large, is not manifestly excessive, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; I. P. Westmoreland, Judge.

Action by J. S. Wiggins against the Central Railroad & Banking Company for personal injuries. There was a verdict for plaintiff, assessing his damages at \$14,375, and, from an order denying its motion for a new trial, defendant brings error. Affirmed.

Barrow & Jackson, I. J. Pendleton, and Dorsey, Brewster & Howell, for plaintiff in error. Hoke Smith, for defendant in error.

BLECKLEY, C. J. In the headnotes, we have developed fully the views of the court upon the whole case, and no further discussion seems necessary. There was no error in denying a new trial. Judgment affirmed.

HAAS v. OLD NAT. BANK OF EVANSVILLE.

(Supreme Court of Georgia. March 3, 1893.)

EQUITABLE ASSIGNMENT — WHAT CONSTITUTES — RIGHTS OF ASSIGNEE AS AGAINST ASSIGNOR'S CREDITORS.

1. A regular customer of a bank in the state of Indiana having consigned goods by railway to a point in Georgia, and taken a bill of lading showing on its face that he was the consignor and another person the consignee, and having drawn a negotiable bill of exchange payable to the cashier of the bank of which he was a customer,—the bill being drawn on the

consignee of the goods, for the purchase price thereof,—and having deposited with the bank this bill, with the bill of lading attached, and procured the bank to enter the amount to his credit, under circumstances which would entitle him to draw upon the bank at once for the proceeds, from these facts a jury would be legally authorized to infer that the intention was to make an equitable assignment, from the consignor to the bank, of the fund representing the price of the goods, and it was not error to refer to the jury the question as to whether such was the intention or not.

2. The real owner of a fund, deriving his title through an equitable assignment, may assert his right thereto by claim, under section 3541 of the Code, against an attaching creditor of the assignor, whose attachment has been served by summons of garnishment.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonnell, Judge.

Action by Isaac G. Haas, in which summons in garnishment was served on Ehrlich & Bro. and another. The Old National Bank of Evansville appeared, and claimed the funds in the hands of the garnishees. A trial of the issues resulted in a verdict for the bank. From an order overruling his motion for a new trial, plaintiff brings error. Affirmed.

Garrard, Meldrim & Newman, for plaintiff in error. Charlton, Mackall & Anderson, for defendant in error.

BLECKLEY, C. J. 1. According to reason and justice, as well as the spirit of the best authorities on the subject, what transpired in Indiana between the Indiana bank and its customer would amount to an equitable assignment from the latter to the former, if these parties mutually intended that the bank should thereby become the substantial and beneficial owner of the particular fund which represented the price of the goods for which the bill of exchange was drawn. There was much more to indicate such an intention than the mere drawing, delivery, and discounting of the bill. Had this been all, no assignment of the fund, legal or equitable, would have resulted. But from this, together with the attachment of the bill of lading, and the entry of the amount to the credit of the consignor,—he being a regular customer of the bank, and the circumstances being apparently such as that he had a right to draw at once upon the bank for this amount, without waiting for the bill to be collected,—it could well be inferred that the intention was to make the bank the substantial owner of the fund, not only from the time it should be realized by collection, but from the time the bill was deposited, and credit for it given on the books of the bank to the depositor. Although the bill was not drawn expressly on any particular fund, but was an ordinary negotiable bill of exchange, a consideration of prime importance is that the attachment to it of the bill of lading—the latter specifying a particular consignment of goods, and the former being drawn for the

price of these goods—might serve, as matter of evidence, to specialize and identify the particular fund as the one really drawn upon according to the mutual intention of the drawer and the payee. The bill of lading could well be treated as a supplement or appendix restricting and qualifying, equitably, though not legally, the general terms of the bill of exchange, and pointing out informally the fund from which the drawee was requested and expected to make payment. Certainly, the drawee would be at no loss to understand what fund was in contemplation. Altogether, there was ample evidence to warrant the jury in finding that the intention was to establish a substantial ownership of the fund in the bank, and, consequently, to make to the bank an equitable assignment of that particular fund; and it was not error to refer the question to the jury for determination.

2. In a proceeding by garnishment, a mere formal legal title to the fund in controversy in the debtor of the garnishing creditor will not prevail over a substantial equitable title, which a third person acquired from such debtor before the garnishment was served. If the debtor himself could not hold or recover the fund, as against such third person, his creditor ought not to be allowed to do so. Whatever is not rightfully and justly the property of a debtor, though he may have the formal legal title to it, ought not to be applied to the payment of his debts. He ought, rather, to be treated as holding such title as he had in trust for the real owner, and not for the benefit of himself or of his own creditors. On the facts in evidence, this case had a right result, and is now finally disposed of. Two bills of exchange and two garnishments were involved in the litigation, but what has been said of one bill and garnishment applies equally to the other. Judgment affirmed.

MANCHESTER PAPER-MILLS CO. v. HETH.¹

(Supreme Court of Appeals of Virginia. Nov. 13, 1893.)

APPEAL—JURISDICTIONAL AMOUNT.

The defendant was sued for \$150, rent for a certain water privilege for which it had agreed to pay \$50 per annum, and pleaded the general issue and a set-off of \$550, for rents paid in previous years, through mistake, as it alleged. *Held* that, as the set-off was a mere specious pretense, the appellate court had no jurisdiction of the matter, the amount involved being only the \$150, and the minimum amount for which an appeal can be taken being \$500.

Error to hustings court of Manchester; John H. Ingram, Judge.

Action of covenant by Heth, trustee, against the Manchester Paper-Mills Company, for rent for water privilege. From a judgment for plaintiff, defendant brings error. Dismissed.

J. Saml. Parrish, for appellant. Geo. K. Macon, for appellee.

RICHARDSON, J. This is a writ of error to a judgment of the hustings court of the city of Manchester, rendered on the 27th day of January, 1892, in an action of covenant therein then pending, wherein Henry Heth, surviving trustee of himself and Walter K. Martin and C. C. McRae, trustees, was plaintiff, and the Manchester Paper-Mills Company, a corporation chartered under the laws of the state of Virginia, was defendant. This case, briefly stated, is this: In November, 1865, Thomas Vaden, Jr., of the first part, and S. C. Robinson, E. T. Robinson, and Samuel Fairbanks, partners under the style of the Manchester Paper-Mills Company, parties of the second part, entered into an agreement, under seal, wherein it was set forth that "whereas the parties of the second part are engaged in the manufacture of paper at a mill on the James river, in the town of Manchester, and are desirous of procuring pure spring water for the purposes of their business aforesaid, it is mutually agreed that the parties of the second part shall enter upon a certain tract of land in Chesterfield county, known as 'Buck Hill,' and owned by the party of the first part, and construct thereon, at a point to be selected by the parties of the second part, on or near the south side of the old abandoned railroad track, a pool not exceeding 10 feet square, the said pool to be supplied by a certain spring branch flowing thereto;" and the said parties of the second part were to have the right to lay pipes from the said pool through the lands of the said party of the first part, for the purpose of conducting water to their said mill, and the pool and pipes, when once located, were to remain fixed. The parties of the second part were to have the right of ingress and egress to keep their pool and pipes in proper condition, but were not to interfere with the agricultural or domestic use of the land. And the party of the first part received so much of the said water as might be necessary for domestic purposes; and the parties of the second part agreed to pay \$50 per annum to the parties of the second part, always payable in gold or silver, as rent; the agreement to continue in force so long as said mill is operated as a paper mill. By virtue of this agreement, the said parties of the second part entered upon the said land, located and constructed the pool, conducted the water thereto, and laid their pipes, and for a number of years used the water, and regularly paid the rent. The mill referred to in this agreement, with all its rights, privileges, easements, appurtenances, buildings, and improvements, was afterwards, to wit, on the 26th of August, 1879, sold to the plaintiffs in error by commissioners appointed in the suit of Fairbanks v. Wortendike, then pending in the chancery court of Richmond, and on the 9th of Novem-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

ber, 1880, the sale was confirmed by a decree in said chancery cause; and, in obedience to a decree entered therein on the 5th of February, 1881, a deed was made to said purchasers, and in the deed thus made to said purchasers the plaintiff in error specially enumerates as a part of the property purchased the lease from Thomas Vaden, Jr., to the Robinsons and Fairbanks, as aforesaid. By a deed dated 4th day of January, 1873, the said Thomas Vaden, Jr., and E. H. Vaden, his wife, conveyed said Buck Hill property to Henry Heth, Walter K. Martin, and Christopher C. McRae, trustees, in trust for certain purposes in said deed set forth. The right to enforce said agreement of lease became vested in said trustees, and, two of them having died, this suit was brought by Henry Heth, the survivor of them, against the plaintiff in error, the said Manchester Paper-Mills Company, to recover, under and by virtue of said agreement, three years' water rent, at \$50 per year, which said company owed and refused to pay. At a term of the said hustings court, the defendant demurred to the plaintiff's declaration and to each count thereof, and at a subsequent day of the same term the demurrer was fully argued both by counsel for the plaintiff and the defendant, and the court took time until a later day of the term to consider of its judgment, when, on the 7th day of November, 1891, the court, having maturely considered the same, overruled the defendant's said demurrer, and the cause was continued until the January term, next thereafter, for trial. At the said January term, to wit, on the 27th day of January, 1892, the defendant, by its attorney, pleaded conditions performed and conditions not broken, payment and set-off, to the plaintiff's demands, and filed an itemized account, stating the nature of the payment and set-off which the defendant desired to prove; and to the defendant's several pleas the plaintiff replied generally, and by consent of all parties, by their attorneys, a jury was waived, and the whole matter of law and fact was submitted to the court for decision, and the court, after mature consideration, adjudged and ordered that "the plaintiff recover against the defendant the sum of \$150, the amount in the declaration mentioned, with interest at the rate of six per centum per annum upon \$50, one part thereof, from the 1st day of November, 1888, until paid, and on \$50, another part thereof, from the 1st day of November, 1889, until paid, and on \$50, the balance thereof, from the 1st day of November, 1890, until paid, and his costs," etc.; and the case is here on a writ of error to this judgment.

It is insisted on behalf of the defendant in error that, inasmuch as the real sum in this case is less than \$500, this court is without jurisdiction, and that the writ of error should be dismissed as having been improvidently allowed. We think the objection is well taken. The action was on a money demand for

three years' water rent, at \$50 per year, with interest on the several annual sums from the time they respectively became due; the aggregate of said sums, with interest to the date of the judgment, being for less than the minimum jurisdictional amount prescribed by the constitution. The action was founded on the agreement under seal, the substance of which is above set out. By that agreement the lessees therein named acquired and enjoyed the rights therein specified, and were entitled, by express stipulation, to enjoy the same so long as the mill in the said agreement mentioned should be operated as a paper mill; and by said agreement they bound themselves to pay to the lessor \$50 per year so long as said mill should be so operated. It is conceded that said mill has continued to be and is now operated as a paper mill. The plaintiff in error, the Manchester Paper-Mill Company, as successor of the original lessees, and as owner of said mill, became the complete owner of said water right, to the full extent of the stipulations contained in said agreement. That agreement is specific and certain in all its points, being in no respect of doubtful import. The plaintiff in error for many years paid the rent, but, for the three years the rent for which was the subject of this suit, payment was refused, upon the shallow pretext that it had never used the water right in question, and was therefore exonerated from payment. It is, it is true, a fact agreed, that the plaintiff in error, during its ownership and occupancy of said mill, has not used said water right; but that is irrelevant, as by said agreement it is bound to pay, whether it uses the water or not.

The plaintiff below (defendant in error here) claimed in his declaration \$150, with interest, as aforesaid, and for that sum he recovered judgment, with interest on \$50, a part thereof, from the 1st day of November, 1888, and on \$50, another part thereof, from the 1st day of November, 1889, and on \$50, the balance thereof, from the 1st day of November, 1890; the principal sum and interest to the date of the judgment being less than \$500. But the plaintiff in error, (defendant below,) in addition to the general issue, pleaded payment and set-off, and filed itemized account of set-offs, the items being \$50 per year for the rents, respectively, paid for the years from 1871 to 1887, inclusive, amounting—principal—to \$850, and gave notice that the defendant claimed to set off said amount, with interest on said annual items, on the ground that said payments were through mistake. The claim thus to set off the plaintiff's demand is not only a mere colorable claim, but is obviously nothing other than a specious pretense of a claim that has no foundation either in law or conscience. To permit a party to acquire jurisdiction in this court under such circumstances would open wide the door to fraud upon

the jurisdiction of the court, and would largely tend to abrogate the constitutional provision limiting the minimum jurisdictional amount of this court. While with a plaintiff in actions of tort the rule is otherwise, in actions on money demands the amount is, in general, the claim made in the declaration. In *Gray v. Blanchard*, 97 U. S. 564, Chief Justice Waite, in delivering the opinion of the court, said: "This is a writ of error sued out by the defendant below, when the judgment against him upon a money demand was for only \$1,118.71. Prima facie, this is the measure of our jurisdiction in favor of the present plaintiff in error; but he still thinks we must retain the cause, as the record shows that, having pleaded the general issue, he gave notice of set-off, claiming \$10,000. It is true that such notice was given, but it is shown affirmatively by the record that the only dispute upon the trial under the notice was as to a single item of the amount of \$446. In short, the bill of exceptions shows distinctly that the only controversy between the parties was in respect to a claim by the plaintiff below of about \$2,000, and by the defendant (plaintiff in error) as to this item of set-off." Jurisdiction was denied. In the present case there was no controversy in the court below as to any item of the amount of set-off. The entire controversy was as to the \$150 demanded in the plaintiff's declaration. Looking to the entire record, there could, in the nature of things, have been no other controversy. It follows, therefore, that this court is without jurisdiction, and the writ of error must be dismissed, as having been improvidently awarded.

VIRGINIA FIRE & MARINE INS. CO. v. MORGAN.¹

(Supreme Court of Appeals of Virginia. Nov. 9, 1893.)

CONDITIONS OF POLICY — IRON SAFE CLAUSE — PAROL EVIDENCE.

1. A policy of fire insurance contained a clause that it was based upon a written application, the statements in which should be treated as warranties. In the application the insured was asked whether he would keep his books of account in an iron safe or secure in another building, to which the answer was, "Yes." *Held*, that this statement was a warranty, and, unless the books were kept as stated, there could be no recovery under the policy.

2. A policy of fire insurance recited that the same "shall be void if the assured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance, or the subject thereof," and also, "This policy is made and accepted subject to the foregoing stipulations and conditions." *Held*, that this clause would not permit the court to inquire into the materiality of a warranty.

3. An insured, who cannot read the English language, will not be allowed, in the absence of fraud, to testify that when he signed an application for insurance, agreeing to keep his books in an iron safe, that he was not ques-

tioned on the subject, and that it was filled up by the agent of the company, who did not read the answers and questions to him.

Error to judgment of the circuit court of Tazewell county, rendered at the August term, 1892, in an action on a policy of fire insurance, wherein Samuel Morgan was plaintiff and the Virginia Fire & Marine Insurance Company was defendant. The policy was for \$1,500 on a stock of goods. The jury found a verdict for the plaintiff for \$1,090.90, and there was judgment accordingly, to which judgment the defendant obtained a writ of error and supersedeas. Reversed.

Opinion states the case.

Chapman & Gillespie and W. W. & B. T. Crump, for plaintiff in error. Henry & Graham, for defendant in error.

LEWIS, P. This was an action on a policy of fire insurance issued by the defendant company on the plaintiff's stock of goods in his storehouse at Cedar Bluff, in Tazewell county, Va. The policy recites that it is based upon the written application signed by the assured, and that "the said application shall be treated as a part of and be incorporated in the policy, and that the statements thereof shall be treated as warranties by the assured that the facts therein stated are true." In the application the assured was asked the following, among other, questions, viz.: "State what books of account you keep. Will you keep them in an iron safe, or secure in another building?" To which the answer was: "Day book and ledger. Yes." The goods having been destroyed by fire, the company refused payment on the ground that the assured had not kept his books in an iron safe, or secure in another building, but had kept them in a wooden desk in the storehouse, where they were destroyed in the fire. This defense was also set up in bar of the action under the plea of nonassumpsit; and at the trial the court was asked in effect to instruct the jury that the answer in the application in regard to the place of keeping the books amounted to a continuing warranty, which, if broken, avoided the policy. But the court refused to so charge, and on motion of the plaintiff told the jury in effect that before they could consider the agreement in regard to the books they must believe it was material, and, further, that the company was injured by its nonobservance. This ruling was seemingly based on the idea that the agreement was not a warranty, but a representation, which is a mistaken view. The stipulation is undoubtedly a warranty, made so by the express contract of the parties, and the jury ought to have been instructed that a literal compliance with it was essential to a recovery by the plaintiff. "An express warranty," says May, "is a stipulation inserted in writing on the face of the policy,

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made and the strict compliance with some promised line of conduct upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with." May, Ins. § 156. This is the language of the decided cases and of this court in *Insurance Co. v. West*, 76 Va. 575. And the author correctly adds that whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised, and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer or the intervention of the law or the act of God, the insured can have no claim. "One of the very objects of the warranty," he continues, "is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed." Whether a statement is a warranty or not depends upon the intention of the parties, as does the nature and effect of the warranty, when there is one which is to be gathered from the language used and the subject-matter to which it relates. Parties have the right to make their own contracts, and, when the meaning of the contract is ascertained, effect must be given to it. It is not for the courts to add to or detract from it, but the contract must be enforced without regard to any hardship, real or supposed, to either party, or whether it is wise or unwise, provident or improvident. Thus in *Jeffries v. Insurance Co.*, 22 Wall. 47, where the insured was asked in the application whether he was married or single, and falsely answered that he was single, it was held that the falsity of the answer defeated the recovery, as one of the express conditions of the policy was that the statements in the application were in all respects true. And in the course of the opinion it was said: "There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise one."

According to the authorities, warranties are

of two kinds, viz.: (1) **Affirmative**, or warranties in praesenti, as they are sometimes called, which affirm the existence of certain facts pertaining to the risk at the time of the insurance; and (2) **continuing or promissory**. An instance of the first class is *Insurance Co. v. Buck*, 88 Va. 517, 13 S. E. Rep. 973. There the insured, in answer to a question in the application, stated that a watchman slept on the premises at night. On the night of the fire the watchman was absent, but it was held that the policy was not thereby avoided, because the answer related to the present, and not to the future; in other words, that the statement was manifestly intended merely as affirmative of the usual and existing state of things, and had nothing promissory as to the future. But, as was said in the same case, a promissory warranty, i. e. one which requires something to be done or omitted after the insurance takes effect and during its continuance, avoids the contract if not complied with according to its terms. The present case falls within the latter category, certainly as regards the promise to keep the books in an iron safe, or secure in another building. It is quite probable, in the nature of the case, that this stipulation was regarded as material, but whether it was or not—for with that we have nothing to do—the contract is express that the books would be thus safely kept; and if, as is conceded, the promise has not been fulfilled, there can be no recovery. A warranty may be in part affirmative and in part promissory. Thus, in an Iowa case, the building was described as "occupied for stores below, the upper portion to remain unoccupied during the continuance of this policy." In an action on the policy it was held that so much of the statement as related to the lower portion of the building was an affirmative warranty merely, but that what related to the upper portion was a promissory warranty, which was broken if at any time during the life of the policy that portion of the building was occupied. *Stout v. Insurance Co.*, 12 Iowa, 371.

The main ground upon which the plaintiff relies in support of the judgment is a provision in the policy that the same "shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof;" and further, that "this policy is made and accepted subject to the foregoing stipulations and conditions." This language, it is contended, is inconsistent with an idea of a warranty, and shows that the answers in the application were intended as representations, none of which would avoid the policy unless false and material to the risk. The answer to this is that just as a policy may contain both affirmative and promissory warranties, so it may contain both warranties and representations, and the present is a case of that sort.

in the application wherein the applicant affirms and warrants his answers to be true, and agrees that the same shall constitute the basis of the insurance, he was asked as to the dimensions of the storehouse, when it was built, etc. Now, as to the answers to these questions and the like, it would be absurd to say that they were anything more than representations, because they are merely descriptive, and were evidently so intended by the parties. *Wood, Ins. § 138.* On the other hand, looking, as we must, to the whole contract, it is equally clear that the answer in regard to safely keeping the books was intended as a warranty. It is not descriptive of anything, and related not to matters depending upon opinions or judgment, as in *Insurance Co. v. West, 76 Va. 575*, and *National Bank v. Hartford Fire Ins. Co., 35 U. S. 673*, in which cases the assured was asked as to the value of the property, but it constituted an undertaking to do a certain thing in the future, and is therefore not within the operation of the provision just quoted. To call such a stipulation a representation, or anything less than a warranty, is a misuse of terms. This being so, the only remaining question necessary to be considered arises on a bill of exceptions taken by the plaintiff, defendant in error here. At the trial the plaintiff offered, but was not allowed, to testify that the application, which he admits he signed, was filled up by the agent of the company; that he was not questioned as to his books, and did not tell the agent he would keep them in an iron safe, or secure in another building; that, being a foreigner, he could not read the English language, and that the questions and answers were not read to him. We are of opinion that in this particular the circuit court ruled rightly. There is no pretension of fraud, and to have admitted the evidence would have been an infringement of the rule which excludes parol contemporaneous evidence to contradict or vary the terms of a valid written contract. This, according to *Insurance Co. v. Yates, 28 Grat. 585*, is so clear that we need only refer to that case. There the insured in answer to a question stated that the premises were unincumbered, whereas they were in fact subject to a deed of trust. He was allowed, however, to testify at the trial that he had never read the application, and was not interrogated by the agent of the company as to incumbrances. But on appeal this court, in an able opinion by Judge Staples, in which the authorities were reviewed, held the evidence inadmissible. The plaintiff, it was said, was bound not only to answer the questions put to him correctly, but to use due diligence to see that the answers were correctly written, and that, if he signed the application without reading it, or having it read to him, that of itself was inexcusable negligence. It was also said that if the evidence were admissible it would be difficult

to imagine a case in which the legal import of a deed might not be varied by parol testimony. The only difference between that case and this is that here the plaintiff offered to prove his inability to read the language in which the application was filled up. But that is immaterial, as he could have easily ascertained the contents of the paper, and the law presumes, under the circumstances of the present case, that when he signed the paper he understood and assented to all it contained. If the rule were otherwise, there would be no certainty or safety in written contracts. For the errors, however, in regard to the instructions, the judgment must be reversed, and the case remanded for a new trial in conformity with this opinion.

HINTON and RICHARDSON, JJ., absent.

HENINGER v. HENINGER.¹

(Supreme Court of Appeals of Virginia. Nov. 9, 1893.)

DIVORCE—CRUELTY.

1. Where the husband beat his wife with a stick, inflicting a serious wound, struck her in the face with his fist, brutally assaulted her, taking her by the hair, and cursing her, drew a pistol, and so terrified her that she and her children fled, and sought refuge with a neighbor, the court is justified in decreeing a divorce, and granting to the wife the custody of the children.

2. The husband's property consisted of two farms, of 3,296 acres, only a comparatively small portion of which was cleared, the residue being unimproved, much of it wild mountain land. The value of the property and the husband's income were not shown with certainty, one of the wife's witnesses putting the income at \$800, others less, and the commissioner valuing the property at \$30,000. *Held*, that an allowance of \$1,000 alimony annually for wife's maintenance and support and education of children will not be confirmed.

3. In ascertaining the amount of alimony to which a wife is entitled, where she is granted a divorce and the custody of the children, it is proper to take into consideration the education of the children as an item of expense.

4. Under Code 1897, § 2263, providing that the court shall make "such further decree as it shall deem expedient concerning the estate and maintenance of the parties or either of them and the care and custody and maintenance of their minor children," the court may allow for alimony a sum to educate the husband's children.

Appeal from circuit court, Tazewell county.

Bill for divorce by Catherine V. Heninger against Samuel T. Heninger. From a decree in her favor granting divorce, and several decrees granting alimony, he appeals. Affirmed in part, and reversed in part.

The facts appear in the following statement by LEWIS, P.:

The bill charges that while the defendant's treatment of the complainant has at no time during their married life been pleasant or agreeable, he has of late treated both her and their children harshly and cruelly; that for some time he has continually quarreled

with her, although she has at all times tried to be to him a dutiful and faithful wife, and that he finally resorted to blows; that about two weeks before the commencement of the suit, he beat her with a large stick, inflicting a serious and painful wound, and at the same time struck her violently in the face with his fist; that he subsequently again brutally assaulted her, taking her by the hair of her head, and cursing and abusing her; that he also drew his pistol, and so terrified the complainant and her children that they fled from home, and sought shelter and protection at the house of a neighbor, where they have since remained. The circuit court, after evidence had been taken, granted a divorce, and awarded the care and custody of the children to the complainant, and, by several subsequent decrees, it made provision for the maintenance of the wife and for the support and education of the children.

Chapman & Gillespie, for appellant. Henry & Graham, for appellee.

LEWIS, P. This was a suit for a divorce from bed and board, on the ground of cruelty on the part of the husband, the defendant below and appellant here. The circuit court decreed a divorce, and gave the custody of the five infant children to the wife. It also, by a subsequent decree, ordered the defendant to provide for them a suitable home, and to pay, for permanent alimony and the support and education of the children until the further order of the court, \$1,000 a year, in two equal semiannual installments.

The evidence in support of the charges of cruelty is ample and conclusive, and there is no doubt that a divorce and the custody of the children were rightly granted to the wife. The defense set up in the answer that the complainant was persuaded by certain of her relatives, hostile to the defendant, to bring the suit merely to harass him, and get possession of his property, and that the charge of cruelty is false, is not only not sustained, but is clearly disproven.

Unfortunately, however, the record, while full enough on these points, does not contain sufficient to enable this court to satisfactorily determine what is a proper allowance for permanent alimony and the support and benefit of the children. The appellant is a farmer, and the owner of two tracts of land, one containing 596 acres, the other 2,700 acres, situate in Tazewell, only a comparatively small portion of which is cleared. The residue is unimproved, much of it being "wild mountain land." The cleared portion, however, is valuable, but what is its value, or what ought to be taken as a fair estimate of the appellant's income, is not shown with any degree of certainty or precision. One of the complainant's most intelligent witnesses, a farmer who lives in the immediate neighbor-

hood, estimates the annual value of both tracts at \$1,100, from which sum he deducts \$300 for taxes, repairs, etc., leaving \$800, in his judgment, the net annual value. Other witnesses put it lower, the estimate of one or more of them not exceeding five or six hundred dollars. It appears that, shortly before the commencement of the suit, the appellant sold the greater part of his personalty, for the purpose, as he says, of paying his debts. The value of the residue does not appear. The commissioner who was directed to make certain inquiries in the cause reported, in general terms, that the property now owned by the appellant is worth \$30,000; but he says nothing specially as to the income. In 1890, before the suit was commenced, the appellant contracted to sell the land for \$45,000, but the purchaser has refused to take it, and the matters in controversy between them in regard to the sale have not yet been settled. The case has been argued for the appellee largely on the assumption that the appellant is worth \$60,000, and that the annual value of his estate ought to be put at 4 per cent. on that sum, or \$2,400; but this assumption, whatever the fact may be, is not warranted by the record.

In respect to alimony, the general rule is that the income of the husband, however derived or derivable, is the fund from which the allowance is made. 2 Bish. Mar. & Div. (5th Ed.) § 447; *Bailey v. Bailey*, 21 Grat. 43; *Cralle v. Cralle*, 84 Va. 198, 6 S. E. Rep. 12. In his recent work on Marriage, Divorce, and Separation, (section 1006,) Bishop, in treating of the facts upon which the amount of permanent alimony is determined, amplifies the rule thus: "In exercising," he says, "the judicial discretion which regulates the amount of the permanent alimony, the judge should take into contemplation the past conduct of the parties, respectively, the source of the husband's property, what persons, if any, each is under a legal duty to support, the earnings and acquiring capabilities of each, the wife's pecuniary means equally with the husband's, the health of each, and their respective ages, and especially, but not exclusively, he should consider what sum, chargeable upon the faculties of the erring husband, will leave the financial condition of the innocent wife not inferior to what it would be if his conduct had been correct." And he adds that, as every injury is in law entitled to its pecuniary compensation, the wife should have, in addition to the maintenance thus appearing, something for her physical and mental sufferings and the loss of her husband's society. So, also, the amount for maintenance of the minor children of the parties, when, as in the present case, they are assigned to the wife, depends, not only on their needs, but on the husband's future and station in life, and all the circumstances of the particular case. As to

this matter, as in case of alimony, the court, with all the attainable lights before it, must exercise a sound discretion. *Harris v. Harris*, 31 Grat. 13; *Bailey v. Bailey*, supra.

The same considerations apply in regard to the education of the children. This, however, is denied by the appellant, on the ground that parents are not compellable to educate their children. It is true that, while the elementary writers include among the duties of parents to their children that of education, it is a duty of imperfect obligation. Nevertheless, as Blackstone observes, it is a duty pointed out by reason, and of far the greatest importance of any. Chancellor Kent takes the same view, and adds the remark that "a parent who sends his son into the world uneducated does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance." 2 Kent, Comm. 195. It would be strange, then, if the effect of a decree granting a divorce, and assigning the custody of the infant children to a suitable person, were held to relieve the offending parent of a duty he owes both to his offspring and to society, when he has the means to fulfill it. If this were the effect of the decree, the offender would take advantage of his own wrong, and the interference of the law, intended for the benefit of the children, might work an entirely different result. The statute now carried into section 2263 of the Code authorizes a court granting a divorce to make "such further decree as it shall deem expedient, concerning the estate and maintenance of the parties or either of them and the care, custody and maintenance of their minor children," etc. It is true nothing is said in express terms about education, but the evident purpose of the legislature was to give to the court the largest discretion in respect of the estates of the parties, and not to relieve the offending parent of any duty, moral, social, or otherwise. Under a statute authorizing the court to "make such disposition of and provision for the children as shall appear most expedient," the jurisdiction of the court to provide for their education in a manner suitable to the parents' means and station in life is unquestionable, and the language of our statute is little, if any, less comprehensive. 2 Bish. Mar., Div. & Sep. § 1214.

For the reasons, however, already stated, the case must be sent back for a further reference to a commissioner, in order that the court may be put in possession of all the facts and circumstances essential to an equitable determination of the rights of the parties. Meanwhile, the decree of the 9th of December, 1891, making temporary provision for the wife and children,—i. e. requiring the appellant, among other things, to pay \$80 monthly for their maintenance,—will remain in force; and, when the case shall have been

thus developed, it will be time enough to finally pass upon the question, raised here by the appellee, as to an additional allowance in the way of counsel fees. The appellant will pay the costs of this appeal. Affirmed in part, and reversed in part.

RICHARDSON and HINTON, JJ., absent.

WYTHEVILLE INSURANCE & BANKING CO. v. TEIGER.¹

(Supreme Court of Appeals of Virginia. Nov. 9, 1893.)

FIRE INSURANCE — PAYMENT OF PREMIUM — APPOINTMENT OF AGENT—DEPOSITIONS—NOTICE.

1. The defendant company insured the plaintiff against loss by fire, and delivered the policy to brokers who had placed many policies before for the company, remitting the premiums monthly, and sometimes at longer intervals. The brokers delivered the policy to the plaintiff's agent the day after its issuance, without collecting the premium. Subsequently, and before the loss occurred, the plaintiff paid the premium of \$6 to his agent, and the latter sent to the brokers \$80, taking a receipt "on account of miscellaneous companies." The agent testified that plaintiff's premium was included in the remittance, which defendant denied. The policy contained a clause that the company should not be liable "until the premium be actually paid." The court instructed the jury that, if the plaintiff's premium was included in the \$80, they should find that the same had been paid to the brokers. *Held* not error.

2. The court also instructed that, if the defendant delivered the policy to the brokers, who delivered it to the agent, who delivered it to the plaintiff, and at no time after the policy was so delivered, and before the fire occurred, did the defendant give the plaintiff notice that it wished to cancel the policy, then they must find for the plaintiff. *Held* correct.

3. Delivery of a policy without requiring payment of the premiums is a waiver of the condition of prepayment.

4. Where the premium is charged to the agent personally by the company, and the former credits the insured, it is equivalent to payment.

5. When an insurance company clothes a person with apparent authority to deliver policies and receive the premiums, it is estopped after delivery of the policy to set up the defense that the agent acted without written authority, as required by statute.

6. The fact that the plaintiff's attorneys notified the defendant that they would take depositions in Georgia on the same day as other depositions were taken by them in New York will not vitiate either deposition, where the plaintiff is connected with only one of the causes, and the objection is not made until the calling of the case.

7. A motion for continuance is addressed to the discretion of the court, and will not be reversed unless plainly erroneous.

Error to circuit court, Wythe county.

An action of trespass on the case in assumpsit, wherein Samuel Teiger was plaintiff, and the Wytheville Insurance & Banking Company, a Virginia corporation, was defendant. The jury found a verdict for the plaintiff for \$798, which the court refused to set aside, and there was judgment accordingly, to which judgment the defendant company

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

obtained a writ of error and supersedeas. Affirmed.

F. S. Blair, for plaintiff in error. Walker & Caldwell, for defendant in error.

LEWIS, P. By the policy sued on, the defendant company insured the plaintiff against loss or damage by fire to the amount of \$800 on a stock of goods in a store, at 175 Attorney street, in New York. The company sent the policy for delivery and collection of the premium to Milch, Fleisner & Co., insurance brokers of that city. This firm had placed many policies of the defendant company and received the premiums. Their custom, according to the evidence, was to remit to the company "sometimes once a month, sometimes twice a month, and sometimes once in sixty days, depending upon the amount of premiums collected." The policy sued on was issued on the 1st of December, 1891, and was delivered to the plaintiff's agent a day or two afterwards without payment of the premium. This agent was one Adler, an insurance agent, to whom the plaintiff paid the premium, and who on the 23d of December, 1891, paid to Milch, Fleisner & Co. \$80, for which he took their receipt, as follows: "Received from Edward Adler eighty dollars on account of miscellaneous companies." The premium on the plaintiff's policy was \$6, which Adler says was included in the payment above mentioned. The goods were destroyed by fire on the 13th of February, 1892. The policy recites that it is issued "subject to the stipulations and conditions of the New York standard form of policy," and, further, that "this company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." In this state of things the main ground upon which the company denies liability is that the premium was not paid.

Upon the question whether the premium was paid to Milch, Fleisner & Co. the circuit court instructed the jury as follows: "If the jury believe that the sum of eighty dollars paid by Adler to Milch, Fleisner & Co., on the 23d December, 1891, embraced the premium in the plaintiff's policy, and that said premium formed part of the said eighty dollars, then the jury will find that the said premium was paid to Milch, Fleisner & Co. on the 23d of December, 1891." Another instruction given at the instance of the plaintiff was as follows: "The court instructs the jury that if they believe from the evidence that the defendant company delivered the policy sued on to Milch, Fleisner & Co., who delivered it to Adler, who delivered it to plaintiff, and further believe that at no time after the policy was so delivered, and before the fire occurred, did the defendant company give the plaintiff notice that it wished to cancel the policy, then they must find for the plaintiff." The first of these instructions,

although both were excepted to, was clearly right. The defendant denied that the payment of \$80 to Milch, Fleisner & Co. embraced the premium on the plaintiff's policy, and the question was therefore properly submitted to the jury. Nor is there anything in the second instruction to the injury of the defendant, although it may be open to some criticism. Its meaning is clear, and the jury could not fail to understand it correctly. The evidence on both sides shows that the policy was sent to Milch, Fleisner & Co. as the defendant's agents, so that, if there was an assumption in the fact by the instruction that Milch, Fleisner & Co. were agents of the defendant, it assumed as a fact what the defendant itself had proved.

The case, on the merits, turns upon the effect of the delivery of the policy by Milch, Fleisner & Co. This firm were not only brokers, but, as just said, they were agents of the defendant. Policies were sent to them directly from the home office, the premiums on which they were authorized to receive, and they were ostensibly authorized to waive a cash payment; hence, when they delivered the policy in the present case without requiring payment of the premium, the presumption is a credit was intended, and that was a waiver of the condition of prepayment. If in such a case a waiver were not implied, the delivery of the policy would be not only an unmeaning, but a deceptive and fraudulent, ceremony. 2 May, Ins. (3d Ed.) § 360; *Miller v. Insurance Co.*, 12 Wall. 285; *Boehen v. Insurance Co.*, 35 N. Y. 131; *Insurance Co. v. Booker*, 9 Heisk. 606, 613; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. Rep. 869, and cases cited. Moreover, it is fair to infer from the fact of giving credit in the present case, and the custom of these agents to remit to the company only once or twice a month, and sometimes not oftener than once in two months, that they were in the habit of delivering policies on credit, and that this was known and assented to by the company. *Insurance Co. v. Hoover*, 113 Pa. St. 591, 8 Atl. Rep. 163; *Insurance Co. v. Norton*, 96 U. S. 234. It would seem, also, from what was brought out in the cross-examination of the vice president of the company, as a witness in the case, although he does not say so in so many words, that the practice of the company was to charge these agents personally with the premiums on policies sent to them. He says they still owe for a number of policies, some of which have expired, and if they were in fact charged with the premium on the plaintiff's policy when the policy was sent, then, as between the plaintiff and the company, the premium was paid when the policy was delivered; for the rule is well settled that where the agent gives credit, and the amount is charged to him by the insurer, the transaction is equivalent to payment. *Miller v. Insurance Co.*, 12 Wall. 285; *White v. Insurance Co.*, 120

Mass. 330; Train v. Insurance Co., 62 N. Y. 598; Bang v. Banking Co., 1 Hughes, (U. S.) 290. It is immaterial, therefore, so far as the validity of the policy is concerned, whether the \$80 paid by Adler embraced the plaintiff's policy or not. The policy having been delivered as a valid, executed contract, the only way the company could terminate its liability thereon for nonpayment of the premium, if the premium was not paid, was by exercising the reserved right to cancel it after "giving five days' notice of such cancellation," which was not done. 2 May, Ins. (3d Ed.) § 260b.

Complaint, however, is made of the refusal of the circuit court to instruct the jury that, if there was no application of any part of the \$80 to the plaintiff's premium at the time of such payment, then that the premium was not discharged; and further, that, after the fire occurred, no valid application of any part of the premium could be made for that purpose by any agreement between the plaintiff and Adler and Milch, Fleisner & Co." This instruction was rightfully refused. The latter part of it was not relevant to any evidence in the case, and, as to the first part, it is enough to say that it is virtually covered by the first instruction given for the plaintiff. Ferguson's Adm'r v. Wills, 58 Va. 136, 13 S. E. Rep. 392. Adler testified emphatically that the payment embraced the plaintiff's premium, and upon that question the jury found against the defendant.

The court was also asked, but rightly refused, to instruct the jury that, if they believed from the evidence that the brokers who delivered the policy were not appointed as agents by the defendant company in conformity with the New York standard form of policy, then it was their duty to have retained the policy until the premium was paid, and that, if they failed to pay over the premium to the company before the fire occurred, the policy was vitiated. The New York standard form of policy, subject to the stipulations and conditions of which the policy was issued, provides that, "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." But, without going more fully into the questions sought to be raised by the instruction, it is enough to say that when an insurance company clothes a person with apparent authority to deliver policies and receive the premiums, as was done in this case, it is estopped, after a policy is delivered as a valid contract, to an innocent holder, to set up the defense that the agent acted without written authority from the company. Such a defense, if sustained, would operate as a gross fraud, and can receive no continuance in a court of justice. Insurance Co. v. Wilkison, 13 Wall. 222, 235; Farnum v. Insurance Co., 83 Cal. 246, 257, 23 Pac. Rep. 860.

There are two questions of less importance

which remain to be considered. The first relates to the overruling of the defendant's motion to suppress certain depositions for the plaintiff taken in New York on the 14th December, 1892. The ground of the motion was that the defendant had been notified in another suit of the taking of depositions, in the state of Georgia, on the same day, and that the counsel who gave the notice were the attorneys for the plaintiff in this suit. The latter, however, was in no way interested in or connected with the other suit, and, besides, no objection was raised until the calling of the present case for trial, which was several months after the depositions had been taken. The motion was without merit, and was rightly overruled.

Nor was there error in overruling the defendant's motion for a continuance, on the ground of the absence of an alleged material witness. The witness formerly did business at 150 Nassau street, New York, from which place he addressed a letter to the defendant company, dated February 17, 1892. The present suit was commenced in the following August. Depositions for the plaintiff were taken in December of the same year, and yet no effort appears to have been made to find the witness, or even to communicate with him, until some time in January, 1893, when the defendant's attorney, being in New York, made, as he says, "diligent search" for him, without success. He did not, however, inquire for him at 150 Nassau street, because his former partners said he had gone out of business, and that they had not been able to find him; nor did he attempt, for aught that appears, to communicate with him through the mail, or to find him by looking in the New York city directory. We are of opinion that the record does not show due diligence on the part of the defendant to obtain the testimony of the absent witness. A motion for a continuance is addressed to the sound discretion of the court, and its ruling in the matter will not be reversed by the appellate court unless plainly erroneous. The judgment is affirmed.

RICHARDSON and HINTON, JJ., absent.

MACHIR et al. v. FUNK et al.¹

(Supreme Court of Appeals of Virginia. Nov. 9, 1893.)

TESTAMENTARY POWERS—EXECUTION.

1. E. M., by second clause in her will, devises her property equally to P. M., Catherine F. and P. M., trustee for the separate use of Harriet M. for life, remainder to her children, and in default of issue with power of appointment, and in default of appointment to said P. M. and Catherine F. Harriet died, leaving said P. M. and C. F. surviving her. She made a will, disposing of her whole estate, but made no mention either of the power above or of the property derived under E. M.'s will. Her will contained a general residuary clause. *Held*, that under section 2520, Code 1837, providing that

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

a bequest shall operate as an execution of a power, there was a sufficient appointment under the power conferred in E. M.'s will.

2. By clause 3 of said E. M.'s will it is provided that in the event of Catherine F.'s death without issue her share goes to P. M., and P. M., trustee for Harriet, with power of appointment in Harriet. *Held*, when Catherine died without issue, that her part was equally divided between P. M. and the appointee under Harriet's will, as the latter acquired title thereto under section 2526, Code 1887.

3. Where a power is authorized to be executed on a contingent event, it may, unless contrary to the intention of the party creating it, be executed before the event, though it cannot take effect until the contingency happens.

Appeal from decree of the circuit court of Shenandoah county rendered April 6, 1892, in a suit in equity wherein James W. Machir and others were plaintiffs and Noah Funk and others were defendants. The principal object of the suit was the sale of certain real estate situate in the counties of Shenandoah and Warren, which had been devised by Elizabeth Machir, deceased, with a view to a division of the proceeds among those entitled thereto. By the decree appealed from it was, among other things, held that the appellee Funk, as sole devisee of his deceased wife, Catherine S. Funk, was entitled to one-fourth of the proceeds of the sales of the said real estate, including a lot of something over nine acres, which had been previously sold for taxes, and conveyed by the purchaser to the plaintiffs, appellants here. Other facts are stated in the opinion. Affirmed in part, reversed in part.

Walton & Walton and E. E. Stickly, for appellants. John J. Williams and Williams & Bro., for appellees.

LEWIS, P. The case turns largely upon the construction of the will of Elizabeth Machir, deceased, which was admitted to probate in 1848, soon after the death of the testatrix. The second and third clauses of the will are as follows: "Second. I will and direct that all my estate, real and personal, be equally divided into three parts. One part I give and devise to my son Philip Machir, one to my daughter, Catherine S. Funk, and the other third to my son Philip A. Machir, in trust for the separate use of Harriet Machir, wife of my son Joseph S. Machir, for and during her natural life, remainder to the children of said Joseph S. Machir and said Harriet, and the descendants of any children who may be dead, such descendants taking their parents' share; and in default of such issue to such person or persons as the said Harriet by her last will and testament or by deed executed in the presence of two or more witnesses shall direct; and in default of such deed or will to the said Philip A. Machir and Catherine S. Funk equally to be divided, each of said shares to be charged with advancements made or to be made either to said Philip A., Catherine S., or Joseph S. Machir in order

to equalize them, or to P. A. Machir in trust as aforesaid. Third. In case my daughter, Catherine S. Funk, shall die without children or descendants at her death, her share is to be equally divided between my son Philip A. Machir, and my said son P. A. Machir in trust for said Harriet Machir and children, with power of appointment and limitation over as aforesaid." Harriet Machir died in 1878, leaving Philip A. Machir and Catherine S. Funk surviving her. She had no child, but left a will whereby she disposed of her whole estate. No reference however is made in the will to the power under the will of Elizabeth Machir, nor is the property comprised in it mentioned; and she had considerable property of her own, which, or the most of which, was specifically disposed of. But the will contains a residuary clause, as follows: "All the rest and residue of my estate shall be sold after my death by my executors hereinafter named, and, after paying all my just debts and the legacies aforesaid, the residue, if any, I give to Mary Ellen Jamison." By deed of the 9th of February, 1881, Charles W. Jamison and the said Mary Ellen, his wife, conveyed to Philip A. Machir and Catherine S. Funk all the title and interest derived by them or either of them under the will of Harriet Machir in and to the estate of Elizabeth Machir, deceased, situate in Shenandoah and Warren counties, in this state, from which source the funds in controversy in the present case arose. On the 29th of January, 1891, Catherine S. Funk died, she having survived both Harriet and Philip Machir. She died without children or descendants, and by her will she devised her whole estate, real and personal, to her husband, Noah Funk.

In this state of things the first question to be determined is, what is the interest in the estate of Elizabeth Machir, deceased, to which Mrs. Funk was entitled at her death? By the second clause of her will above quoted the testatrix directed her estate to be divided into three equal parts. One-third she gave to her son Philip, another third she gave to Mrs. Funk, and the residue she gave in trust for Harriet Machir for life, and in default of issue at her death then to such person or persons as the said Harriet might by deed or will appoint, and in default of such appointment to Philip Machir and Mrs. Funk in equal shares. The appellants contend that Harriet Machir died without exercising the power of appointment, and that, no child having been born to her, the interest which was devised to Philip Machir, trustee, passed at her death to Philip Machir and Mrs. Funk. The ground of the first branch of this contention is that, inasmuch as the will of Harriet Machir neither refers to the power nor to the property embraced in it, there is nothing to show an intention on her part to execute

it. But the common-law rule on this subject, which was recognized in *Blake v. Hawkins*, 98 U. S. 315; *Lee v. Simpson*, 134 U. S. 572, 590, 10 Sup. Ct. Rep. 631; *Hood v. Haden*, 82 Va. 588,—has to a certain extent been altered by statute in Virginia. That statute, now carried into section 2526 of the Code, enacts that “a devise or bequest shall extend to any real or personal estate (as the case may be) which the testator has power to appoint as he may think proper and to which it would apply if the estate were his own property and shall operate as an execution of such power, unless a contrary intention shall appear by the will.” Here, the testatrix being empowered to appoint the property as she chose, (i. e. to whom she chose,) the residuary clause in her will operates, by force of the statute, as an execution of the power; a contrary intention not appearing by the will. Under such a statute, where it is not intended to exercise a general power, the intention to exclude the property should be stated on the face of the will. 1 Sugd. Powers, 368. This being so, the property, i. e. the subject of the power, passed under the residuary clause of the donee’s will to Mrs. Jamison, and afterwards by the deed of the 9th of February, 1881, to Philip A. Machir and Mrs. Funk, each taking one-half, which was equivalent to one-sixth of the estate devised by Elizabeth Machir. We say the property passed to Mrs. Jamison as residuary devisee, because, although the will directs it to be sold by the executors, the obvious intention was to confer on the executors a naked power. 1 Lomax, Ex’rs, 218; *Mosby’s Adm’r v. Mosby’s Adm’r*, 9 Grat. 584; *Elys v. Wynne*, 22 Grat. 224. As to the interest devised by Elizabeth Machir to Mrs. Funk directly, little need be said. By the third clause of the will it is provided that in the event of Mrs. Funk’s death without leaving children or descendants, her share (i. e. the one-third devised by the second clause) is to be equally divided between Philip Machir in his own right and as trustee of Mrs. Harriet Machir and children with power of appointment on the part of Mrs. Machir in the event specified; that is to say, she (Mrs. Funk) took a defeasible fee simple with a contingent limitation over. She died without issue, whereupon “her share” was equally divided into two parts, one of which passed to the representatives of Philip Machir, according to the doctrine of *Medley v. Medley*, 81 Va. 265; the other, under the will of Harriet Machir, to her appointee, Mrs. Jamison, whose entire interest in the property, vested and contingent, was conveyed to Philip Machir and Mrs. Funk by the deed of the 9th of February, 1881.

That the power of appointment was well executed by the will of Harriet Machir, although the will was executed and the testatrix died in the lifetime of Mrs. Funk, is unquestionable. This is so in view of the

statute above quoted and the established common-law rule that where a power is authorized to be executed on a contingent event it may, unless contrary to the intention of the party creating it, be executed before (though it cannot take effect until) the contingency happens. 1 Sugd. Powers, 332. Hence the interest in the estate of Elizabeth Machir to which Mrs. Funk at her death was entitled was one-sixth plus one-twelfth, which is equal to one-fourth, except the nine-acre lot in the proceedings mentioned. It seems that some time before the commencement of the present suit this lot was sold as delinquent for nonpayment of taxes assessed against Mrs. Funk. It was purchased by one Krister, who subsequently sold and conveyed it to the appellants. The tax sale was duly reported to the county court and confirmed. A survey was also made and reported as required by the statute, and afterwards a deed was made by the clerk of the county court to the purchaser. The effect of these proceedings, which, for aught the record shows, were regular, was to divest the title of Mrs. Funk and to transfer it to Krister; and their validity cannot be collaterally assailed. The case of *Hitchcox v. Rawson*, 14 Grat. 526, is a sufficient authority on this point. Affirmed in part, and reversed in part.

RICHARDSON and HINTON, JJ., absent.

COX v. JONES et al.
(Supreme Court of North Carolina. Oct. 31, 1893.)

APPEAL—DISMISSAL—FAILURE TO PROSECUTE.

An appeal will be dismissed for failure to prosecute, where appellant has permitted two terms to pass without availing himself of the opportunity given him to remedy defects in the record.

Action by W. A. Cox against Nancy A. Jones and others. From a judgment in plaintiff’s favor, defendants appeal. On motion to dismiss appeal for failure to prosecute. Motion granted.

Batchelor & Devereux, for plaintiff. H. R. Kornegay, for defendants.

CLARK, J. This was a motion made in September, 1888, to set aside a judgment rendered in a special proceeding in 1871. The appeal was docketed here at fall term, 1891. The record of the special proceeding not being sent up, a certiorari was sent down, to which the clerk returned that, after diligent search, only fragmentary parts thereof could be found, and these he sent up. Thereupon, at spring term, 1892, the case was remanded, (110 N. C. 309, 14 S. E. Rep. 782,) to the end that the appellants might take steps to have the lost record supplied, by proper proceedings in the court below. This they have not done, and the court is

unable to pass upon the case, as presented in the voluminous, irregular, and insufficient transcript. The record is as defective as when the order of remand was made, though since then there have been three or four terms of the superior court in that county. No excuse is rendered which atones for this laches. The cause having been here two terms since, (fall term, 1892, and spring term, 1893,) the motion of appellee to dismiss the appeal, under rule 15, is allowed. *Brantly v. Jordan*, 92 N. C. 291; *Wiseman v. Commissioners*, 104 N. C. 330, 10 S. E. Rep. 481. Appeal dismissed.

STATE v. FINLAYSON.

(Supreme Court of North Carolina. Oct. 31, 1893.)

CRIMINAL LAW—SPECIAL VERDICT.

In a prosecution for violating a city ordinance imposing a license tax on various occupations, a special verdict which fails to clearly allege the trade or occupation carried on by defendant, and to set forth the specific provision of the ordinance which defendant violated, is fatally defective; and a conviction will be set aside, and a new trial granted.

Appeal from superior court, Wayne county; Brown, Judge.

H. L. Finlayson was prosecuted for failing to pay a license tax imposed by an ordinance of the city of Goldsborough. The proceeding was commenced before the mayor, and, from a judgment imposing a fine, defendant appealed to the superior court. The jury returned a special verdict, and the court directed a judgment of guilty to be entered thereon, and defendant again appeals. Reversed.

The special verdict is as follows: "(1) The said city adopted the following ordinance on June 1, 1892: 'Ordinance No. 12. Be it ordained,' etc. 'Section 1. That the following taxes are hereby levied on real and personal property, and polls, and on the business, trades, and occupations carried on within the city. Sec. 2. That all monthly license taxes shall be collected on the first day of each month, in advance.' 'Sec. 7. That any person refusing to pay the license tax assessed against him, for ten days, shall be liable to a fine of \$5.' (2) That, by another ordinance, it is made a misdemeanor to fail to take out the license above provided for. (3) That defendant is the agent of the Baltimore United Oil Company, a branch of the Standard Oil Company, having charge of its business in said city. (4) That said company keeps oil stored in said city, and sells it to merchants through a regular broker, who charges a brokerage for selling. Said broker is a general broker, and sells for many other parties besides said company, and pays the brokerage tax as required by the city ordinance. Said oil is shipped to Goldsborough from points outside the state, and is stored for convenience of delivery, shipped in bar-

rels, and sold without breaking packages. (5) In making sales, the broker keeps a ticket, which he afterwards forwards to the Norfolk office of the company, and the bills are there made out against purchasers. In rare cases, the purchaser offers cash for the oil, and the broker accepts, and charges himself on his brokerage account, there having been paid, in cash, at no time up to the present, more than was due the broker for brokerage. The Norfolk, Va., office has charge of the territory of eastern North Carolina. (6) The Standard Oil Company and the United Oil Company are corporations organized under the laws of one of the states other than North Carolina, and Jersey City, N. J., is the principal place of business for the Standard, and Baltimore, Md., for the United; and they are producers, refiners, and dealers in oils throughout the United States. (7) That it was the duty of defendant to take out license for said business in Goldsborough, and he is an actual resident of said city. (8) That defendant refuses to take out the license required by said ordinance. If, upon these facts, the court shall be of opinion that the defendant is guilty, we find him guilty; but, if otherwise, we find him not guilty."

Aycock & Daniels, for appellant. The Attorney General, for the State.

SHEPHERD, C. J. The defendant is prosecuted for refusing and neglecting to pay the license tax, as required by chapter 12, § 7, of the ordinance of the city of Goldsborough. The special verdict is fatally defective, in that it fails to clearly allege the trade or occupation carried on by the defendant, and to set forth the specific provisions of the ordinance which it is alleged were violated by the defendant. Evidently, a very important question, concerning interstate commerce, was intended to be presented, but we cannot consider it upon this verdict. According to the ruling in *State v. White Oak River Corp.*, 111 N. C. 661, 16 S. E. Rep. 331, there must be a new trial.

LOYD v. LOYD.

(Supreme Court of North Carolina. Nov. 7, 1893.)

PRESUMPTION—AS TO DATE OF MARRIAGE.

In replevin, evidence by plaintiff that the articles in controversy were given to her by defendant before her marriage to him, without stating the date of the marriage, raises the presumption that it was solemnized under existing statutes, which enable a married woman to acquire a separate estate, and not under laws in force prior to 1868, when no such right existed; and it is error for the court to order a nonsuit at the close of plaintiff's case.

Appeal from superior court, Wake county; Brown, Judge.

Action of claim and delivery by Narcissa Loyd against William Loyd. At the close of plaintiff's evidence she took a nonsuit, in

deference to an intimation by the court that she had no right of action, and appealed. Reversed.

The plaintiff, who is the wife of the defendant, testified as follows: "The articles of personal property in controversy were given me by defendant before our marriage. After our marriage we lived at my mother's. Defendant's mother also gave me some of the property. Defendant left me two years ago, and afterwards he got out a claim and delivery against my mother, and got these things from her. I was not a party to that suit. The defendant did not prepare a room for me, and tell me to come and live with him. He said I could come and live with him at his mother's if I wanted to. I have not applied for a divorce. Defendant drew a knife on me, and shut me up in a room, at my mother's, and he had a pistol in our room, and threatened me with that. I would not go and live with him at his mother's because it was agreed before we were married that we should live at my mother's. Defendant behaved so badly toward me at my mother's, while we lived together, that he left my mother's of his own motion. He was not driven off by my mother. I was afraid to go and live with him at any place other than at my mother's house." Upon this testimony his honor intimated an opinion that the plaintiff had no right to bring the suit or recover possession of the property, and thereupon the plaintiff took a nonsuit, and appealed.

J. C. L. Harris, for appellant. T. B. Parnell and Busbee & Busbee, for appellee.

AVERY, J. The appeal is from an intimation of the court below that the plaintiff's testimony did not, if admitted, establish, *prima facie*, her right to recover. This depends upon the application of the doctrine of presumptions. She did not state what was the date of her marriage,—whether before or after the constitution of 1868 was ratified. If before, all of her personal property belonged absolutely to the husband on the celebration of the marriage, though it was given to her by him while she was still a *feme sole*, and the plaintiff could not recover, certainly, the articles given her before such marriage. *Giles v. Hunter*, 103 N. C. 194, 9 S. E. Rep. 549. The duty rests, at all stages of a trial, upon the actor, to prove such allegations as are essential to his recovery. He may discharge this duty by submitting plenary testimony which, uncontradicted, entitles him to a verdict, or he may, after proving directly some of the facts that he is bound to establish, shift the burden, as to others, by offering such evidence as will raise a presumption of their truth, and resting, until the other party shall have attempted to rebut the presumption so raised. The plaintiff testifies that she was lawfully married to the defendant, and that the articles of personal property for which

the action was brought were given to her by the husband before and after marriage. If a stranger had testified that he witnessed the celebration of a marriage in some foreign country, or in this state, between the same parties, at a date not remembered, the presumption would have arisen that the rites were performed in accordance with the laws then in force in the foreign country or in this state, as the case might be. 14 Amer. & Eng. Enc. Law, 531, note; *State v. Patterson*, 2 Ired. 346. Nothing more appearing than the lawfulness of a marriage at a date unknown to, or not stated by, a witness, the courts would not refuse to adjust the rights of children or creditors of either of the parties that might be dependent, primarily, upon the marital rights of the husband growing out of the contract. The contract could not be treated as a nullity for want of proof of its actual date; and the difficulty would be met by invoking the aid of the presumption, not only that the marriage was celebrated in accordance with law, but in conformity to the statutes now in force in this state. *Durham v. Bostick*, 72 N. C. 357. In *Durham v. Bostick*, *supra*, the court declared that a sheriff was justified in assuming that the contract upon which the judgment was rendered and the execution issued was entered into since the ratification of the constitution of 1868, if nothing to the contrary appeared upon the face of the execution, and the suggestions in this case led to the enactment of a later statute, (Code, §§ 234-236.) We think that, as a general rule, a contract relating to marriage or other matters must be presumed, in the absence of specific proof, to have been entered into under the statutes now in force, as well as in full contemplation of their provisions. Moreover, there is a presumption in favor of the validity of all gifts and contracts, and we must infer, when the uncontradicted fact appears that the defendant husband gave to his wife certain articles of personal property, that the gift vested a valid title in her. *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. Rep. 452. The burden is upon him to show that the property was not given to her, or that the attempted gift was invalid. In cases where the bona fides of a gift or conveyance from a husband to his wife is drawn in question, evidence that the husband is embarrassed with debt may impose the burden of rebutting the presumption of fraud upon the wife. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. Rep. 285. But there is no allegation or proof of fraud in this case. The only question involved is whether the testimony of the plaintiff, if admitted to be true, establishes her right to the articles of property which she testifies were given to her by the defendant. We think that the court below erred in intimating that the plaintiff was not entitled to recover, if her own testimony was believed. The judgment of nonsuit must be set aside, and a new trial granted.

UNITED STATES ex rel. STATE OF
NORTH CAROLINA et al. v.
DOUGLAS et al.

(Supreme Court of North Carolina. Nov. 7,
1893.)

REMOVAL OF CAUSES—FEDERAL QUESTION—ACTION
ON BOND OF FEDERAL RECEIVER.

1. The fact that the United States is a formal party plaintiff on the record does not render a cause removable from a state to the federal court, the real controversy being between the relator and the defendant.

2. Whether the liability of the sureties on the bond of a receiver appointed by a federal court is joint or several does not involve a federal question, within the meaning of the removal acts of congress, since the liability of the sureties depends, not on any law of congress, but on the proper construction of the bond itself.

3. The construction of orders and decrees of a federal court according to their true meaning does not involve a federal question, within the meaning of the removal acts.

4. Act Cong. Aug. 13, 1888, § 3, (Stat. 436,) which provides that an action against a federal receiver shall be subject to the general equity jurisdiction of the court in which he was appointed, does not affect the jurisdiction of a state court over an action against the sureties on a federal receiver's bond, to which the receiver is not made a party.

5. The fact that the state has been improperly joined as relator in an action does not authorize a removal to the federal court.

Appeal from superior court, Wake county; G. H. Brown, Judge.

Action by the United States ex rel. state of North Carolina and Samuel McD. Tate, state treasurer, against Robert M. Douglas and others, sureties on the bond of Samuel E. Phillips as receiver of the North Carolina Railroad Company, appointed by the circuit court of the United States for the district of North Carolina. Defendant Douglas petitioned for the removal of the cause to the United States circuit court, and from an order denying his petition he appeals. Affirmed.

A. W. Haywood, for appellant. Battle & Mordecai, for appellees.

MACRAE, J. This is a petition of the defendant Robert M. Douglas to remove into the circuit court of the United States, under the provisions of chapter 866, Acts 1888, (25 Stat. 436,) a civil action brought in the superior court of Wake county against the sureties alone upon the bond of a receiver appointed by the circuit court of the United States for the eastern district of North Carolina. Is the cause removable because the United States is a party? It was held in *State of Maryland v. Baldwin*, 112 U. S. 490, 5 Sup. Ct. Rep. 278, that the state was only a formal plaintiff, the actual litigation being between other parties. "The name of the state is used from necessity when a suit on the bond is prosecuted for the benefit of a person thus interested, and in such cases the real controversy is between

him and the obligors on the bond." Here it is evident that the real controversy is between the relator Tate and the defendants, the United States being only a formal plaintiff.

2. Is there a federal question involved in this action? By these words are meant a question requiring a construction to be put upon the constitution or some law of the United States, or treaty made under its authority. The petitioner contends that five federal questions clearly appear from the complaint, and the answer of the petitioning defendant: First. The construction of the bond sued on, which was given under a decree of the circuit court of the United States, —whether the said bond is joint or several,—upon which will depend the amount of the defendant's liability if he is liable at all. Second. The construction of the order of the United States circuit court substituting the bond sued on for one that had theretofore been given. This defendant contends that the liability of the receiver accrued upon the first bond, and that the second bond is discharged. Third. The construction of the decree of said court of December 6, 1890, which only fixed the liability of the receiver, and not that of his sureties, and which was made without notice to the sureties. Fourth. The construction of the force and effect of the decretal order of said court at June term, 1891, giving the state treasurer leave to sue, and not the state. Fifth. The construction of section 3 of the act of August 13, 1888, cited above.¹ The action was brought at the instance of the state treasurer by leave of the United States circuit court for the eastern district of North Carolina against the sureties on the receiver's bond, not against the receiver. If it were an action against the principal, it seems that it might have been removed at his instance into the United States circuit court under section 3 of the act of 1888. But the liability of the receiver had already been ascertained in said court. No federal question can arise upon the construction of the bond as to whether the liability of the sureties be joint or several. Neither the constitution nor laws of the United States can afford any aid in the solution of this question. It is simply a

¹ This section (Stat. 436) provides "that whenever any party entitled to remove any suit mentioned in the next preceding section * * * may desire to remove such suit from a state court into the circuit court of the United States, he shall make and file a petition in such suit in such state court. * * * It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit." This section further authorizes suits to be brought in the state courts against a federal receiver without the leave of the court which appointed him, but further provides that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."

question of law to be determined by settled rules of construction. The form of a receiver's bond is not prescribed by any statute of the United States. The liability of the sureties thereon, like the liability upon a judgment in the United States court, or that upon a treasury note or bond of the United States, involves no construction of the laws of the United States. *Society v. Ford*, 114 U. S. 635, 5 Sup. Ct. Rep. 1104. The same is true of the question arising upon the construction of decrees and orders of the United States courts. There is nothing to show that any question of construction of these decrees and orders, other than the necessity to interpret them according to their plain meaning, will arise. If the act should receive the wide interpretation claimed for it by the petitioner, no cause could be tried in the state court if objection were raised by the defendant, where any right had been formerly determined in a federal court as a discharge in bankruptcy, or where the title to land sold under foreclosure proceedings in such court were necessary to be shown in evidence, or the like. The simple question is whether the defendants are liable upon the bond, and to what amount. It is like an "attempt to enforce an ordinary property right acquired under the authority of judgments and decrees in the courts of the United States, without presenting any question distinctly involving the laws of the United States." *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. Rep. 1030. The third section of the act referred to has no reference to an action against the sureties upon the bond, but asserts the general equity jurisdiction of the appointing court over the receiver so appointed. It might be that, upon the question whether the state court has given due effect to the judgments and decrees of the circuit court, there would be a right to review a judgment of the state court, but this question has not yet arisen, and we are not to assume that it will arise. It is to be observed that there is no separable cause of action in this case, and that there are four defendants. It is true that only the petitioning defendant has answered the complaint, and the others are all in default; but in *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. Rep. 746, it was ruled that the fact that one of the defendants did not answer, but was in default, was immaterial, and that the default placed the parties in no different position with reference to a removal than they would have occupied if that one had answered, and set up an entirely different defense from that of the other defendants. In *Telegraph Co. v. Brown*, 82 Fed. Rep. 337, *Brewer, J.*, speaking of the act of 1887, § 2, cl. 1, which is "that any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States * * * may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district," etc., says,

"Under the first clause, all the defendants or all the plaintiffs must unite to accomplish a removal."

The fact that the state of North Carolina has been made a relator in this action can have no effect. The misjoinder of unnecessary parties is a mere matter of surplusage under the Code, and not a fatal objection. *Clark's Code*, (2d Ed.) p. 161. We hold, therefore, that the defendant petitioner has shown no removable cause. Judgment affirmed.

BURWELL, J., did not sit on the hearing of this case.

MORRIS v. HERNDON et al.

(Supreme Court of North Carolina. Nov. 7, 1893.)

ESTOPPEL—SILENCE—RECORD AS NOTICE.

A junior chattel mortgagee, who is chiefly instrumental in inducing the senior mortgagee to release his mortgage, and to take another in its stead, without informing him of the existence of the junior mortgage, is estopped from asserting it as a prior lien to that of the second mortgage taken by the senior mortgagee, though the junior mortgage was duly registered.

Appeal from superior court, Durham county; H. G. Connor, Judge.

Action by W. H. Morris against J. R. Herndon to foreclose a chattel mortgage. L. C. Herndon interpleaded, and claimed the property under a mortgage prior to plaintiff's. From a judgment in plaintiff's favor, defendant and the interpleader appeal. Affirmed.

At the trial, the plaintiff introduced the following evidence: W. H. Morris, plaintiff: "I held the mortgage of March 19, 1886. There was due, in 1889, thirty dollars and interest. L. C. Herndon came and asked me to take J. R. Herndon out from under Mr. Farthing. I paid Mr. Farthing two hundred and thirty-five dollars and sixty-five cents. Two hundred was for Herndon's mother; the balance was for J. R. Herndon, (\$35.65). L. C. Herndon was present at the time the last mortgage was executed. He was present during the entire transaction. He said nothing about his lien. They did not tell me that L. C. Herndon had a mortgage. I paid Farthing the money. Farthing wrote the mortgage. I did not say that, unless I could get all of the incumbrances, I would not take anything. I got only \$12.80. I met the officer when he went to execute the warrant. He took five shoats. They were not the ones that I had a mortgage on. He (J. R. Herndon) agreed that I should take the five shoats in place of those that I had a mortgage on. I advertised the shoats in three places. They brought \$12.80. It was a fair price. I kept them up. The mule was worth seventy-five dollars. L. C. Herndon got it. It was the same mule as the one described in my mortgages of 1886 and

1889." The foregoing was all of the plaintiff's testimony, at the close of which the defendants asked the court to charge the jury that, if they believed the evidence, they should answer the issues in favor of the defendants. This was refused, and the defendants excepted on the ground that, taking the plaintiff's testimony as true, he was not entitled to recover.

The defendants introduced the following witnesses, who testified as set out: L. C. Herndon: "Farthing wrote the mortgage. Morris said that he could not take up the mortgage Farthing held against my mother unless he could get all. Morris said that he would take it on the same terms that Farthing had it. I did not urge Morris to take up the mortgage against J. R. Herndon. I paid the amount to Morris for my brother. Morris was told that I had a mortgage." J. R. Herndon says "that he was not present when the mortgage to Morris was being prepared. He signed it as prepared by Farthing." G. C. Farthing, a witness for defendants, says: "The general character of the Herndons is good. I had a mortgage against Herndon's mother. Morris had agreed to settle it if Herndon would pay him thirty dollars he owed him for some rent. Herndon fixed the thirty dollars in a mortgage. Herndon took up both mortgages. I wrote the mortgage from J. R. Herndon to Morris from a mortgage J. R. Herndon had previously given to me. L. C. Herndon was present when the mortgage was written." The foregoing was all the evidence of the defendants.

The defendants duly requested his honor to charge the jury that, upon the whole evidence, the plaintiff was not entitled to recover, and that they should answer the issues in favor of the defendants. This request was refused, and said defendants excepted.

Fuller & Fuller, for appellants. Boone & Parker, for appellee.

SHEPHERD, C. J. In *Mason v. Williams*, 66 N. C. 564, it is said by Rodman, J., that registration is not sufficient notice to prevent the operation of an estoppel in pais; but, even were it otherwise, such constructive notice would not affect the rights of an innocent purchaser, if under the circumstances it was the duty of the owner to make known his claim or title. This doctrine of constructive notice, when applied to estoppels, "if correct at all," says Mr. Pomeroy, (2 Eq. Jur. 810,) "is correct only within very narrow limits, and must be strictly confined to cases where the conduct creating the alleged estoppel is mere silence. If the real owner resorts to any affirmative acts or words, or makes any representation, it would be in the highest degree inequitable to permit him to say that the other party, who had relied upon his conduct, and had been misled thereby, might have ascertained the fal-

sity of his representation." In speaking of the same principle, Mr. Herman says, (2 Herm. Estop. § 984:) "But this is applicable only in the case where the foundation of the estoppel is in silence or acquiescence, for, when the owner concurs in a sale by participating in it at the time, it becomes his own act." So it is said in *Mason v. Williams*, supra, that "the rule is that if a man so conducts himself, whether intentionally or not, that a reasonable person would infer that a certain state of things exists, and acts on that inference, he shall be afterwards estopped from denying it." Without discussing the general doctrine as to the effect of mere silence where there is registration, and leaving it as it stands upon our decided cases, and conceding for present purposes the principle stated by the above mentioned authors, we think there was something more here than simple acquiescence, and that his honor was correct in refusing to charge that upon the whole testimony the interpleader, L. C. Herndon, was not estopped to claim the property in controversy. The instruction must be treated as if it were a formal demurrer to evidence, in which case it is well settled that the testimony must be considered in the aspect most favorable to the opposite party. *Gwaltney v. Land Co.*, 111 N. C. 547, 16 S. E. Rep. 602. Viewed in this light, it was certainly a legitimate inference that L. C. Herndon was chiefly instrumental in bringing about the transaction by virtue of which he insists that the claim of the plaintiff should be postponed to his own. The plaintiff had a first mortgage executed by J. R. Herndon, and at the instance of the said L. C. Herndon the plaintiff took another mortgage upon the same property to secure the same indebtedness. The effect of taking this last mortgage was, it is conceded, to release the first, and by this means it came about that a second mortgage held by the said Herndon acquired the legal priority. Should he be permitted to avail himself of this advantage, obtained under such circumstances? The plaintiff had no actual knowledge of the said mortgage, and we think it was the duty of Herndon to have informed him of its existence. He was not a mere silent bystander, but a participant in the entire transaction; and, as the property was insufficient to secure the claims of both, it was inconsistent with good faith and fair dealing that he should have encouraged the plaintiff, by his silence, to part with his existing security. The plaintiff had a right to infer from the conduct of Herndon that he, at least, had no claim which would necessarily or probably impair the security which was then being substituted, at his instance, for the plaintiff's prior lien. This brings the case within the principles declared in the passages we have extracted from Herman, and *Mason v. Williams*, supra, which are abundantly sustained by our own decisions, as well as other authorities. Affirmed.

WOODY v. JONES.

(Supreme Court of North Carolina. Nov. 7, 1893.)

STATUTE OF LIMITATIONS—WHEN BEGINS TO RUN—AGAINST CHATTEL MORTGAGEE—TAX SALE.

1. The statute of limitations does not begin to run on a chattel mortgage until the condition of the mortgage is broken; and the fact that the mortgagor, in whose possession the property remained, took it out of the state, and sold it there, does not start the running of the statute against the mortgagee, where the mortgage was duly recorded in the proper county.

2. A sale of mortgaged chattels to satisfy taxes due from the mortgagor does not pass title to the purchaser, divested of the lien of the mortgage, though the mortgagor was permitted to retain possession, where the mortgage was duly recorded.

Appeal from superior court, Person county; Brown, Judge.

Action by C. C. Woody against Ernest Jones for the recovery of a horse, originally brought in justice court. The case was appealed to the superior court, where the only plea was the statute of limitations. Judgment was rendered in plaintiff's favor, and defendant appeals. Affirmed.

The action was begun March 29, 1893, for the recovery of the possession of a horse which was admitted to be worth less than \$50, thus giving jurisdiction to the justice. This horse was the property of Isaac Wilson, who on December 3, 1886, conveyed it by chattel mortgage to John F. Woody, who assigned the note and mortgage to plaintiff on January 2, 1889. The mortgage was duly registered in Person county on April 15, 1887, and nothing has ever been paid upon the mortgage debt. The defendant purchased the horse in Halifax, Va., from Isaac Wilson, the mortgagor, in the fall of 1889, for full value. At the time of the purchase, the defendant was a resident of Person county, N. C., and has had the horse in his possession, in said county, ever since said purchase by him, except that the horse was seized by the sheriff of Person in July, 1890, for Isaac Wilson's taxes for 1889, and sold, and purchased by the defendant for \$7.20. The said taxes were the general taxes of said Wilson, who was also a citizen and resident of Person county, and not a specific tax upon the horse. The defendant had no actual notice of the mortgage. The court below held that the defendant had notice by registration; that there is no evidence of a demand, or that plaintiff knew of defendant's possession; that defendant's possession was not adverse, or at least did not become so until the public seizure and sale in July, 1890; and, the only question being raised by the plea of the statute of limitations, that the action is not barred. There was judgment for the plaintiff, and defendant appealed.

W. W. Kitchin and Boone & Parker, for appellant. J. W. Graham and V. S. Bryant, for appellee.

MacRAE, J. We concur with his honor in his conclusion that, upon the facts of this case, the action is not barred by the statute of limitations. The defendant has had possession of the horse for about four years. At the time when he acquired possession, the mortgage had been registered in the county of Person, where all parties to the sale resided, and the registration was notice to the world of the lien of the mortgagee. *Parker v. Banks*, 79 N. C. 480. The fact that the sale and delivery by mortgagor to defendant was in Virginia cannot affect the rights of the mortgagor, or his assignee, the plaintiff. *Hornthal v. Barwell*, 109 N. C. 10, 13 S. E. Rep. 721. When the mortgagor is left in possession, he holds it for the mortgagee, and his possession does not become adverse until condition broken. An action for the foreclosure, where the mortgagor has been in possession of the property, must be brought within 10 years after forfeiture. Code, § 152, subd. 3. A purchase from the mortgagor, the mortgage being registered, is not colorable title. *Parker v. Banks*, supra. "The rule is that the mortgagor and his vendee hold in subordination to the title of the mortgagee, not adversely to him; and the statute of limitations does not run, even after the law day is past, as in favor of the mortgagor or his vendee, without some overt act throwing off allegiance." Wood, *Lim.* 446.

The defendant claims, also, by virtue of the sale by the sheriff to satisfy the tax list which he had in his hands against Isaac Wilson, the mortgagor; but the legal title, by virtue of the mortgage, had passed out of said Wilson, and was not subject to levy, or, in any event, the property passed subject to the rights of the mortgagee. While the plaintiff is entitled to the possession, the defendant may still discharge the mortgage debt, and regain possession of the horse, if he so desire. Judgment affirmed.

ALLEN v. McLENDON et al.

(Supreme Court of North Carolina. Nov. 14, 1893.)

CERTIORARI—SUPPLYING OMITTED EVIDENCE.

A writ of certiorari will not be granted to supply evidence omitted from the case made up for appeal, when it does not appear that the judge of the lower court has intimated a readiness to make the correction desired.

Action by James M. Allen and another against S. H. McLendon and others. From a judgment against said Allen, he appeals. On petition for certiorari. Denied.

Battle & Mordecai, for appellant. R. E. Little, for appellees.

MacRAE, J. This was a petition for a certiorari filed by the plaintiff in this court upon the ground that his honor, in making up the case on appeal, had inadvertently omitted some portions of the testimony,

which were material to be set out, in order that the appellant might fairly present his exceptions; that said testimony was set out in the case tendered by appellant, and in the counter case offered by appellee, and also appeared in the notes of the presiding judge, which were attached to the affidavit of the petitioner, and that the foregoing facts are the grounds of petitioner's belief that, if an opportunity were afforded him, his honor would insert in the case the testimony referred to, in response to the certiorari. There is no allegation, however, that any application had been made to his honor, or that any intimation had been made by him that he would, upon opportunity, make the amendment desired. In *Boyer v. Teague*, 106 N. C. 571, 11 S. E. Rep. 330, the matter involved in this application was very fully considered and discussed. In that case, his honor below had, upon application to him, intimated that he would insert the testimony referred to, in response to a certiorari, and the same was granted. And in *Broadwell v. Ray*, 111 N. C. 16 S. E. Rep. 408, the petitioner gave his reason for his belief that the judge would insert the testimony to be that he has informed petitioner's counsel that he had the evidence taken down at the trial, and that he would furnish the same, if the case is again placed before him; and there the motion was granted. But it is said in *McDaniel v. King*, 89 N. C. 29: "If the judge, by inadvertence, mistake, or misapprehension, has failed to settle the case for this court correctly, we cannot doubt that he will gladly correct his error, either with or without notice to the parties to the action, as he may deem just and proper. This court will not, certainly in the first instance, resort to harsh and extreme remedies to compel courts to discharge their duties correctly, and correct their errors, in respect to cases coming to this court by appeal."

The case settled by the trial judge imports absolute verity. This court has no authority to require the judge, in settling the case, to set forth any matter of evidence alleged to have been omitted. It is entirely within his discretion to amend the case when the opportunity is afforded him by the certiorari. "The writ will not, even in such case, be granted, unless the grounds for such belief are set forth, so that the court may pass upon the reasonableness thereof." *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. Rep. 383, and cases there cited.

It seems but fair to the trial judge that he should have the opportunity presented to him to intimate whether he will make the desired correction. For the reasons stated in *McDaniel v. King*, *supra*,—that this court will not direct a certiorari to be issued in the first instance, it not being made to appear that the judge below has intimated that he will make the correction if the case is presented to him again,—the prayer of the petitioner is denied.

ALLEN v. McLendon et al.

(Supreme Court of North Carolina. Nov. 14, 1893.)

FRAUDULENT CONVEYANCE—PETITION TO SET ASIDE—EVIDENCE—REVERSAL ON APPEAL.

1. Pending a motion to confirm a sale made in a mortgage foreclosure proceeding to the mortgagee, a number of alleged judgment creditors of the mortgagor came in, and averred that the mortgage was fraudulent as to them, to which averments the mortgagor made no reply; and judgment was subsequently rendered, vacating the foreclosure, and setting aside the mortgage as fraudulent. *Held* that, as the mortgage was found fraudulent, the sufficiency of the evidence of the judgment debts did not concern the mortgage.

2. On an issue as to the bona fides of a mortgage given to secure an alleged pre-existing indebtedness, the tax lists in the township and county of the mortgagee's residence are competent to show that he had no solvent credits.

3. It is proper to instruct the jury that the law looks with suspicion on a transaction whereby one indebted to others conveys his property, or a part of it, to a brother-in-law, for an alleged pre-existing indebtedness.

Appeal from superior court, Anson county; Whitaker, Judge.

Action by James M. Allen and another against S. H. McLendon and others to foreclose a mortgage. From a judgment canceling said mortgage as fraudulent, plaintiff Allen appeals. Affirmed.

The action was brought by James M. Allen against S. H. McLendon and wife for the foreclosure of a mortgage theretofore made by defendants to plaintiff to secure the payment of a note for \$2,040.57 and interest. A complaint was filed at the return term, and, for want of an answer, judgment final, by default, was rendered at the same term, and a foreclosure sale decreed. At the succeeding term of the court, W. A. Liles, executor of Nancy McLendon, was allowed to become a party plaintiff, and file a complaint, alleging that defendants had executed another mortgage to this plaintiff's testatrix since the before-mentioned mortgage was made, and asking that his rights under the second mortgage might be protected. Upon report of sale and affidavits at a subsequent term, the sale was set aside, resale ordered, and the clerk appointed commissioner, who made sale, and reported that plaintiff Allen was the last and highest bidder, but, being the mortgagee creditor, had paid in no money. Pending the motion for confirmation of this sale, a large number of judgment creditors of defendant S. H. McLendon were allowed to come in, and make themselves defendants, and file an answer, duly verified, alleging the indebtedness to them of defendant S. H. McLendon, and, further, that in April, 1885, the defendants McLendon and wife conveyed, with other lands, the lands described in the mortgage thereafter made to plaintiff Allen, who was the clerk and brother-in-law of S. H. McLendon, and that said Allen, by deed, in May, 1885, conveyed to his sister, the fem-

defendant, L. A. McLendon, all of said lands; and they alleged that all of said conveyances, including the mortgage made by said McLendon and wife to said Allen, were fraudulent and void as to the said creditors, and that the judgment of foreclosure was obtained by fraud and collusion; and they demanded that the same be canceled, vacated, and set aside. Plaintiff Allen filed his reply, denying all fraud or collusion, admitting the conveyances and mortgage, and alleging that the same were bona fide, and for valuable consideration, and denying all knowledge or information as to the judgments alleged by defendants. McLendon and wife filed no reply. A receiver was appointed. At said May term, 1893, the following issues were submitted to the jury, and responded to as follows: "(1) Was the mortgage by S. H. McLendon and wife to James M. Allen executed with intent to fraudulently hinder or delay the creditors of S. H. McLendon? Answer. Yes. (2) If yes, did the plaintiff have knowledge of such fraudulent intent? A. Yes. (3) Was the alleged indebtedness to plaintiff, or any part thereof, bona fide? If so, what part? A. No part. (4) Was the defendant S. H. McLendon indebted to defendants, as alleged in their answer? A. Yes." Plaintiff Allen moved for a new trial. The motion was denied, and judgment was rendered, vacating the former judgment and decree of foreclosure, and setting aside and declaring void the deeds and mortgage aforementioned; directing the receiver to sell the lands named in said deeds and mortgage for cash, and report; and the cause was retained for further directions, and the distribution of the proceeds of said sale among the judgment creditor defendants and W. A. Liles, executor, pro rata, and for costs. Only James M. Allen appealed. The exceptions are stated in the opinion.

Battle & Mordecai, for appellant. R. E. Little, for appellees.

MacRAE, J. The plaintiff Allen tendered the following issues: (1) Was the mortgage executed by S. H. McLendon and wife to the plaintiff J. M. Allen made to secure a bona fide debt to the plaintiff, and has the same, or any part thereof, since been paid? (2) Was the said mortgage executed with the intent to defraud the creditors of S. H. McLendon? (3) Did the plaintiff know of, and participate in, such fraud?

The first exception was to the submission by the court of the second issue submitted, and the refusal by the court to submit the third issue tendered by the plaintiff. The issue submitted confined the question to the knowledge of the grantee, while that tendered and refused extended the inquiry to a participation in, as well as knowledge of, the fraud. The rule is that "a mortgage deed executed to secure the payment of money loaned, or of a valid pre-existing debt, but also with the intent on the part of the

mortgagor to hinder, delay, or defraud his creditors, will nevertheless be deemed valid and enforced by the courts as against the claims of creditors other than the mortgagee or cestui que trust, unless the beneficiary under the deed had knowledge of, and participated in, the fraud." *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. Rep. 482; *Hudson v. Jordan*, 108 N. C. 12, 12 S. E. Rep. 1029; *Battle v. Mayo*, 102 N. C. 413, 9 S. E. Rep. 384. But the response of the jury to the third issue, that the alleged indebtedness of McLendon to plaintiff Allen was not bona fide,—in other words, that there was no debt to be secured by the mortgage, and, therefore, that the conveyance was necessarily fraudulent as to both grantor and grantee,—relieves us of the necessity of considering the question whether the mortgage would have been vitiated simply by notice of fraud on the part of the mortgagor fixed upon the mortgagee.

The plaintiff Allen objected and excepted to the evidence offered to prove the judgment indebtedness of S. H. McLendon to the new parties defendant; but that was a matter between defendant McLendon and the other defendants, who had put in a duly-verified answer in the nature of a complaint, charging that they were judgment creditors of said McLendon in the sums set out. He made no reply, and the alleged judgment creditors were entitled to judgment against him as to the indebtedness. Besides, it appears that most of the judgments were proved by the judgment docket, which was proof of the record itself; and if there were irregularity in proof of any of the judgments rendered by justices of the peace it cannot now concern this plaintiff, by reason of the response to the first, second, and third issues.

For the purpose of showing that McLendon was not indebted to Allen, it was entirely competent to offer the tax lists for several years in the county and township of said Allen's residence, to show that he listed no solvent credits. While this may not have been absolute and convincing proof, it was surely some evidence competent to go to the jury upon the question stated.

J. M. Allen testified that he owned a tract of land in Anson county, worth \$250, which he had bought in 1886 on credit. He was then asked by his counsel what other property, if any, he owned, outside of the mortgage sued on. Defendants objected. The objection was sustained, and plaintiff Allen excepted. As the testimony is reported, there is no ground on which to base this exception.

Defendant McLendon testified, as a witness for plaintiff Allen, that he (witness) owned several tracts of land,—naming them, and their values. Witness was asked on cross-examination if this land, or a portion of it, had not been allotted to him as his homestead, and at what price. His answer

was objected and excepted to. Whatever may have been the object of the question, there could be no valid objection to it and the answer, for it was asked and answered upon cross-examination.

The defendants were allowed to amend their answer during the trial by inserting the words "not due" and "illegal," to which plaintiff Allen excepted. This was within the discretion of his honor, and not subject to review. The amendment did not change the character of the action.

We see no error in the charge of his honor that the law looks with suspicion upon a transaction of this kind, where the defendant McLendon is indebted to others, and conveys his property, or a part thereof, to his brother-in-law; that they were required to scrutinize the matter closely, in declaring their conclusion as to its validity. The language seems to follow an approved precedent in *State v. Mitchell*, 102 N. C. 347, 9 S. E. Rep. 702.

The exceptions: "(2) Because the court did not put its charge in writing, and read it to the jury; (3) because the court stated in full the contentions of the defendants, and failed and neglected to state the contention of the plaintiff Allen; and (4) because the court failed to charge the jury as requested by plaintiff,"—are met by the statement in the case that "the plaintiff Allen did not request the court to put its charge to the jury in writing. The plaintiff Allen did not tender or show to the court any requests or prayers for instructions to the jury; and the court, in its charge, did state to the jury, carefully, particularly, and fully, the contention of the plaintiff Allen as to all the questions embraced by the different issues submitted to them." These findings are binding upon us.

There was also a motion for judgment non obstante veredicto, but we have not been furnished with the grounds of the motion; and we see nothing in the plea which confesses a cause of action, nor that the matter relied on in defense is insufficient. No error.

BURWELL, J., did not sit on the hearing of the case.

TOWN OF DURHAM v. RICHMOND & D. R. CO. et al.

(Supreme Court of North Carolina. Nov. 14, 1893.)

APPEAL—AFFIRMANCE—DIVIDED COURT.

Where the appellate court is evenly divided, the judgment below stands affirmed.

Appeal from superior court, Chatham county; Winston, Judge.

Action by the town of Durham against the Richmond & Danville Railroad Company and the North Carolina Railroad Company. From a judgment, both plaintiff and defendants appeal. Affirmed.

Batchelor & Devereux, T. B. Womack, W. W. Fuller, and J. S. Manning, for plaintiff.

D. Schenck, F. H. Busbee, W. A. Guthrie, J. W. Graham, and John Manning, for defendants.

CLARK, J. In this case both the plaintiff and defendants appealed. Mr. Justice Burwell did not sit, and the court is evenly divided. The appeals have now been standing on this docket four terms. Under these circumstances, following the uniform practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case. *Marshall, C. J.*, in *Etting v. Bank*, 11 Wheat. 59; *Taney, C. J.*, in *Benton v. Woolsey*, 12 Pet. 27; and in *Holmes v. Jennison*, 14 Pet. 540; *Bridge Co. v. Stewart*, 3 How. 413, 424; *Chase, C. J.*, in *U. S. v. Reeside*, 19 U. S. (Lawy. Ed.) 391; *Durant v. Essex Co.*, 8 Allen, 103. The appellants will respectively pay the costs, each in their own appeal. Plaintiff's appeal affirmed. Defendants' appeal affirmed.

RALEIGH & W. RY. CO. v. GLENDON & G. MIN. & MANUF'G CO.

(Supreme Court of North Carolina. Nov. 7, 1893.)

FOREIGN WILLS—VALIDITY.

As Code, § 2136, requires a will to be subscribed by two witnesses, and section 2156, as amended by Acts 1885, c. 393, allowing the record in this state of a copy of a will proved in another state, provides that the will must be executed according to the laws of this state, and that such fact "must appear affirmatively in the certified probate or exemplification of the will," the fact that a will proved in another state was subscribed by two witnesses must so appear, and a mere recitation in the attestation clause of the will itself is not sufficient.

Appeal from superior court, Chatham county; G. H. Brown, Judge.

Action by the Raleigh & Western Railway Company against the Glendon & Gulf Mining & Manufacturing Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Civil action tried at September term, 1893, of Chatham superior court, before Bynum, J. The right of plaintiff to recover was admitted to depend, among other questions, upon the sufficiency of the probate of the will of Oliver Ditson, an exemplification of which was recorded in Chatham county, to pass the land in dispute. The attestation clause of the will, and the probate in Massachusetts, were as follows:

"Signed, sealed, published, and declared by the aforesaid testator as and for his last will and testament, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as witnesses hereto. Otis Norcross. Edwin Howland. Grenville Norcross."

"At a probate court holden at Boston, in and for said county of Suffolk, on the 14th

¹ Not officially reported.

day of January, in the year of our Lord 1889, on the petition of Charles H. Ditson, of the city, county, and state of New York, Reuben E. Demmon, and Charles F. Smith, both of said Boston, praying that the instrument therewith presented, purporting to be the last will and testament of Oliver Ditson, late of said Boston, deceased, may be proved and allowed, and letters testamentary issued to them, the executors therein named, without giving a surety, or sureties, on their official bonds, and the heirs at law, next of kin, and all other persons interested having been duly notified, according to the order of court, to appear and show cause, if any they have, against the same, and no party objecting thereto, and it appearing that the said instrument is the last will and testament of said deceased, and was legally executed, and that the said testator was, at the time of making the same, of full age and sound mind, and that said petitioners are competent persons to be appointed to said trust, it is therefore decreed that said instrument be proved, approved, and allowed as the last will and testament of said deceased, and letters testamentary be issued to said petitioners; they first giving bond, without sureties, for the due performance of said trust. John W. McKinn, Judge of Probate Court."

Batchelor & Devereux and T. B. Womack, for appellant. W. A. Guthrie and H. A. London, for appellee.

AVERY, J. The right of plaintiff to recover was dependent upon the competency of the will of Oliver Ditson, which constituted an essential link in its chain of title. The court intimated the opinion that the probate was defective, in that it failed to show affirmatively that the will was executed in accordance with the statutes. Code, §§ 2136, 2156. The first of the sections referred to requires, in explicit and mandatory terms, that "no will or testament shall be good or sufficient, in law, to convey or give any estate, real or personal, unless such will shall have been written in the testator's lifetime, and signed by him, or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest except as herein-after provided." The subsequent section, (2156,) as amended by Act 1885, c. 393, allows a properly authenticated copy of a will proved in another state to be recorded in this state, but provides that, "when such will contains any devise or disposition of real estate in this state, such devise or disposition shall not have any validity or operation unless the will is executed according to the laws of this state, and that fact must appear affirmatively in the certified probate or exemplification of the will." It is essential to the sufficiency of a will to pass the property, the title to which is in dispute, that

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it shall be subscribed in the presence of the testator by two witnesses, at least. Prior to January 1, 1856, the fact of subscription by both witnesses could be shown, on proof in common form, by one of them, (*Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. Rep. 522; *Moody v. Johnson*, 112 N. C. 793, 17 S. E. Rep. 578;) but since that date it must appear that at least two of the witnesses, if living, were examined, or, if one has died, the living witness must testify, not only to the handwriting of the dead witness, but to his subscription, as well as his own, in presence of the testator, (*In re Thomas*, 111 N. C. 409, 16 S. E. Rep. 226.) Such is the proof prerequisite to sufficiency, where the original record is made in this state. But, where a certified copy from another state has been recorded, we are met by the further plain provision of the statute that the fact of subscribing by at least two witnesses must appear affirmatively "in the certified probate or exemplification of the will." Code, § 2156. The mere recitation in the attestation clause is not affirmative evidence. It is not necessary to discuss or pass upon the other questions raised by the intimations of the judge, the proof of the paper writing purporting to be the will of Ditson being defective. The judgment of the court below is affirmed.

BIRD v. HUDSON et al.

(Supreme Court of North Carolina. Nov. 21, 1893.)

LIBEL—EVIDENCE—QUALIFIED PRIVILEGE—MALICE—HOW PROVED—COMMENT OF COUNSEL—OBJECTIONS NOT RAISED BELOW.

1. An alleged libelous circular charged that plaintiff, the Democratic candidate for tax collector, had requested M., one of the leaders of the Populist party, to help secure plaintiff's nomination on the Populist ticket. Plaintiff testified that he was present at the Populist meeting, but denied that he solicited the nomination, and that M. asked him if he wanted the nomination, and that he told him he would not receive it except from the Democratic party. *Held*, that such conversation was competent as corroborative of plaintiff's testimony.

2. Testimony of a witness for plaintiff, who was also a candidate for office on the Democratic ticket, that defendant requested him not to support plaintiff, and said that, if witness did support plaintiff, defendant would not vote for witness, was competent to prove defendant's malice towards plaintiff.

3. In an action for slander, defendant may be asked, on cross-examination, if he did not compromise an action by him for slander, for \$175, without requiring defendant in that action to retract the charge, as such question is competent as tending to impeach him as a witness to show he had put a low estimate on his own character.

4. Comment of counsel, not objected to when made, cannot be complained of on appeal. *Hudson v. Jordan*, 12 S. E. Rep. 1029, 108 N. C. 10, followed.

5. Where the circular was a publication of qualified privilege, and charged plaintiff with crime, the language of the circular was properly considered in determining whether defendant was actuated by malice in making it, since in

such case plaintiff need not prove malice by extrinsic evidence, but may rely on the words of the libel itself for such proof.

Appeal from superior court, Wayne county; George A. Shuford, Judge.

Action by J. E. Bird against O. J. Hudson and others for libel. There was judgment for plaintiff, and defendants appeal. Affirmed.

An alleged libelous circular, published by defendants concerning plaintiff, the Democratic candidate for tax collector, charged that he had requested McCullen, a leading member of the Populist or Third party, to help him secure the nomination for tax collector on that ticket. Plaintiff was offered as a witness in his own behalf, and admitted that he was present at the Third party meeting, but stated that he did not then, or at any other time, try to secure a nomination for tax collector at their hands, and testified as follows: "On the day of said meeting, Mr. McCullen asked if I wanted the nomination for tax collector. I asked him what he meant,—was it with reference to the meeting to be held this P. M.? He said, 'No.' I told him I would not accept the nomination except from the Democratic party." The witness further stated that he did not know at the time whether McCullen was a Democrat or a Populist, but that he had afterwards learned that McCullen had voted the Democratic ticket. To the foregoing conversation with McCullen defendants excepted. J. A. Stevens was introduced as a witness for the plaintiff, and testified as follows: "I was a candidate last year on the Democratic ticket, and the plaintiff, Bird, was a candidate on the same ticket. The defendant O. J. Hudson came to me during the campaign, and asked me not to support Bird as the Democratic nominee. I told him that I would have to support Bird, and he then said that if I did he would not vote for me, or any one else who would vote for Bird." This was offered to show malice. Objected to by defendants, objection overruled, and defendants excepted.

Allen & Dortch, for appellants. W. C. Munroe, for appellee.

CLARK, J. 1. The testimony of the plaintiff touching his conversation with McCullen was competent as corroborative of his testimony on the trial. *State v. Whitfield*, 92 N. C. 831. There is no exception that the court failed to instruct the jury that they should consider it only in that view, and it will be presumed that proper instructions were given. *State v. Powell*, 106 N. C. 635, 11 S. E. Rep. 191.

2. The second exception was abandoned, and, as to the third exception, the testimony of Stevens was clearly competent as tending to prove malice. 13 Amer. & Eng. Enc. Law, p. 431, § 4.

3. The question put to defendant on cross-examination, whether he had not compro-

mised an action for slander for \$175, without requiring the defendant to retract the charge of perjury, was an impeaching question. It was competent as tending to impeach him as a witness to show he had put a low estimate on his own character. The witness was properly allowed to explain the matter. It is, however, not every question tending to disparage or disgrace a witness which is competent. The question must be, as in this instance, limited to particular acts; and even then, when it is apparent to the court that it is put merely for the purpose of annoying or harassing the witness, the trial judge may, in his discretion, refuse to compel him to answer. *State v. Gay*, 94 N. C. 814.

4. The comment of counsel was not objected to at the time, and the objection is lost. *State v. Suggs*, 89 N. C. 527; *State v. Lewis*, 93 N. C. 581; *State v. Powell*, 106 N. C. 635, 11 S. E. Rep. 191; *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. Rep. 1029.

5. In *Ramsey v. Cheek*, 109 N. C. 270, 13 S. E. Rep. 775, the law of slander and libel is thus summarized: (1) When the words are actionable per se, unless the matter is privileged, the law presumes malice, and the burden is on the defendant to show that the charge is true. (2) If it is a case of absolute privilege, no action can be maintained, even though it could be shown that the charge was both false and malicious. (3) In a case of qualified privilege the burden is on the plaintiff to prove both the falsity of the charge and that it was made with express malice. Or, to put it more succinctly, if the words are actionable per se in "unprivileged" slander and libel, falsity and malice are prima facie presumed; if "absolutely privileged," falsity and malice are irrebuttably negated; and if it is a case of "qualified privilege," falsity and malice must be proven. In *Ramsey v. Cheek*, supra, which, like the present, was a case of qualified privilege, (13 Amer. & Eng. Enc. Law, p. 420, par. 11,) it was further held that in such cases, while the plaintiff must prove both the falsity of the charge and malice, and though the falsity of the charge taken alone, was not sufficient to establish malice without showing further that the defendants knew it to be false, or would have known if they had used the opportunities open to them, yet "the plaintiff is not bound to prove malice by extrinsic evidence. He may rely on the words of the libel itself, and on the circumstances attending its publication, as affording evidence of malice. *Odger, Libel & Sland.* §§ 277-288; 13 Amer. & Eng. Enc. Law, 431." The instruction now excepted to, that "the language of the circular, which imputes to plaintiff a crime, and alleges that one of the defendants had been damaged by him, may be considered by the jury in finding whether the defendants were actuated by malice in making the publication, is therefore unobjectionable. *Bradsher*

v. Cheek, 109 N. C. 278, 13 S. E. Rep. 777. There was other evidence of malice, among other that of Stevens which is set out in the third exception. The language of the circular might therefore be properly considered in connection with the other evidence in passing upon the question of malice. Newell, Defam. 770. It should be noted that in cases of qualified privilege, though proof of falsity does not per se raise a presumption of malice, yet proof of malice takes away the protection of privilege, and shifts the burden of proving the truth of the charge upon the defendant. *Ransey v. Cheek*, 109 N. C. 270, 13 S. E. Rep. 773, and cases cited on page 275, 109 N. C., and page 776, 13 S. E. Rep.

No error.

WARD v. WILMINGTON & W. R. CO.
(Supreme Court of North Carolina. Nov. 7, 1893.)

RAILROAD COMPANIES—KILLING STOCK—OBSTRUCTIONS ON RIGHT OF WAY.

A railroad company must remove bushes or other growth, calculated to obstruct the view of its engineers, to the outer bank of the side ditches, or from all the ground of which it assumes actual dominion for corporate purposes; and if it fails to do so, and a horse is killed by a train because concealed by the bushes, it is liable.

Appeal from superior court, Pender county; Winston, Judge.

Action by E. W. Ward against the Wilmington & Weldon Railroad Company for killing a horse. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant requested the court to charge the jury: "(1) If the jury believe that the engineer, as soon as he could, by looking out and being on the watch, discovered the horse, and then used all the efforts at his command to stop the train, and could not do so in time to keep from striking the horse, then the defendant was not guilty of negligence, and plaintiff could not recover. (2) If the jury believe that the engineer was prevented from seeing the horse, had he been on the careful lookout, by the weeds and bushes growing upon the right of way not in the actual use of the company, and on the side of the road on which the horse was killed, and the horse suddenly emerged therefrom, and got upon the track in front of the approaching train, and the engineer did all he could to prevent the collision, and the horse was killed, then the prima facie case in favor of the plaintiff would be rebutted, and the jury should find the first issue in favor of the defendant." The court gave the second instruction as asked for, but modified the first by adding the following: "But if the jury should find from the testimony that the defendant carelessly and negligently suffered and permitted bushes and weeds to grow on its right of way between the railroad track and the railroad

ditch to drain the roadbed, which ditch, in this case, is testified to be in about three or four feet of said track; and if the jury shall further find that said weeds and bushes were tall enough to hide the horse from the engineer, and did hide the same until it was too late to stop the train and prevent the destruction; and if the jury shall, in addition, believe that the horse was killed because he was concealed by the bushes and weeds as aforesaid, and but for the same would not have been killed,—then the defendant was negligent. The defendant is not required to clear the right of way outside of the said drain or ditch, and, if the horse was killed because of being concealed in bushes or weeds growing beyond said limits, the defendant is not negligent."

Haywood & Haywood, for appellant.

AVERY, J. The defendant's engineer testified that the bushes which hid the horse from his view grew "on the inside" of the "railroad drain," and "next to the track." It was held on the former appeal in this case to be the duty of railroad companies to remove such growth, whether of shrubs, trees, or grain, as was calculated to obstruct the view of their engineers, to the outer bank of the side ditches, or from all of the ground of which they assumed actual dominion for corporate purposes. *Ward v. Railroad Co.*, 109 N. C. 358, 13 S. E. Rep. 926; *Hinkle v. Railroad Co.*, 109 N. C. 472, 13 S. E. Rep. 884. In making the addition and qualification of the instruction asked, to which defendant excepted, the judge below stated the law applicable to the testimony of the defendant's witness Knight, and substantially as announced by this court in the opinion referred to. There was therefore no error.

STATE v. THOMPSON.
(Supreme Court of North Carolina. Nov. 7, 1893.)

PERJURY—INDICTMENT.

An indictment which charges that defendant did unlawfully commit perjury on the trial of an action in a certain court wherein the state was plaintiff and J. was defendant, by falsely asserting an oath in substance as follows, to wit, (setting forth the alleged false testimony,) said defendant knowing the said statements to be false, against the form of the statute, etc., is in compliance with the form prescribed by the act of 1889, and is sufficient.

Appeal from criminal court, New Hanover county; Meares, Judge.

John Thompson was convicted of perjury, and appeals. Affirmed.

The jurors, etc., present that John Thompson, etc., did unlawfully commit perjury upon the trial of an action in the mayor's court in the city of Wilmington, in said county, wherein the state of North Carolina was plaintiff and John Thompson was defendant, by falsely asserting on oath "in substance as

follows, to wit: 'About 8 o'clock on the 25th of February I was between Schulkin and Dennis' store. A man passed in about 6 or 7 feet of me, and made an oath. He had a gun in his hand. He walked to the corner, and stood up by a post. In a few minutes a car came up to the end of the switch, and as the man changed the trolley he fired. I am positive the man that fired the gun was Buck Wright. I have known him for some time. I have seen the gun before. Wright left it in my shop to be repaired last Christmas. I put a new spring in it,'—the said John Thompson knowing the said statements to be false against the form of the statute in such cases made and provided, and against the peace and dignity of the state." The jury returned a verdict of guilty, and the defendant moved in arrest of judgment on the ground that the indictment was not sufficient in its averments to charge the crime of perjury, as it did not specifically charge that the matters alleged to be sworn to were willfully, absolutely, and falsely in a matter material to the point in issue. The motion was denied, and the defendant appealed from the judgment pronounced.

The Attorney General for the State.

BURWELL, J. The averments in the indictment are sufficient. It complies in all essential particulars with the form prescribed by the act of 1889, which has been approved by this court in *State v. Gates*, 107 N. C. 832, 12 S. E. Rep. 319, and in other cases. Affirmed.

BOYKIN et al. v. WRIGHT.

(Supreme Court of North Carolina. Nov. 7, 1893.)

APPEAL—TIME OF TAKING—DISMISSAL.

An indorsement on "the case" of acceptance of service, signed by the counsel who represented appellee in the court below, is not, standing alone, a waiver of appellee's right to a dismissal of the appeal because not docketed in the supreme court within the prescribed time.

Appeal from superior court, Sampson county.

Action by Boykin, Carmer & Co. against John C. Wright. From a judgment for plaintiffs, defendant appeals. Dismissed.

R. O. Burton, for appellant. W. R. Allen, for appellees.

BURWELL, J. The judgment was rendered at February term, 1892, of the superior court. The appeal was docketed in this court March 13, 1893. It appears in the record that the appellees agreed that the appellant might have "thirty days to perfect appeal." Upon "the case" is this indorsement, "Service accepted December 31, 1892," and this is signed by counsel who represented the plain-

tiffs in the court below. We do not think this indorsement, standing alone, constitutes in any degree a waiver of the appellees' right to insist that the appeal shall be dismissed because not docketed here within the prescribed time. Their motion to dismiss must be allowed. Appeal dismissed.

COX v. GRISHAM.

(Supreme Court of North Carolina. Nov. 7, 1893.)

JUSTICE OF THE PEACE—SUMMONS—AMENDMENT.

Where the original summons in an action before a justice to recover personalty fails to state the value, the justice may allow an amendment, under Code, § 840, rule 9, or section 908, giving him power to amend any warrant, process, pleading, or proceeding, either in form or substance, or under section 273, permitting an amendment inserting other allegations material to the case.

Appeal from superior court, Onslow county; Armfield, Judge.

Action commenced before a justice of the peace by O. B. Cox against O. F. Grisham. On appeal from a judgment for plaintiff the action was dismissed, and plaintiff appeals. Reversed.

Batchelor & Devereux, for appellant.

CLARK, J. This was an action for the recovery of a sow and five pigs. The original summons failed to show the value of the property, and the justice allowed a motion to amend the summons by filling in the blank, left for allegation of the value, with the words "ten dollars." The defendant offered no evidence, but, upon judgment being rendered against him, he appealed. In the superior court, the defendant moved to dismiss the action on the ground that the justice had no power to amend the warrant. This motion was erroneously allowed. The justice had ample authority to grant the amendment. Section 908 of the Code provides that a justice of the peace "shall have power to amend any warrant, process, pleading or proceeding" in any action pending before him, either civil or criminal, "either in form or substance." To the same purport is Code, § 840, rule 9; also, section 273, which permits an amendment "inserting other allegations material to the case." The evidence, uncontradicted, being that the value of the property was less than \$50, this amendment could have been allowed even after verdict and judgment. Had the averment of value been omitted from the summons, as it doubtless was, by mistake or inadvertence, the amendment could have been allowed even on the trial in the superior court, not to give jurisdiction, but to make it appear by the summons that it had not been improperly exercised. "Such amendment would relate back to the date of the summons. It could not work injustice to the parties, because in

fact the jurisdiction existed. It only helped—cured—defective process.” *Leathers v. Morris*, 101 N. C. 184, 7 S. E. Rep. 783. In *State v. Sykes*, 104 N. C. 694, 10 S. E. Rep. 191, *Merrimon, C. J.*, says: “Procedure and proceedings before justices of the peace are generally more or less informal and summary. They are favored by every reasonable intendment, and are to be helped by the free exercise of the large powers conferred by the statute (Code, § 906) upon the courts where the action in which they appear may be pending to amend them, as to form or substance, at any time before or after judgment. *State v. Smith*, 103 N. C. 410, 9 S. E. Rep. 200, and cases there cited.” To same purport are *State v. Baker*, 106 N. C. 758, 11 S. E. Rep. 360, and *State v. Norman*, 110 N. C. 484, 14 S. E. Rep. 968.

Error.

WILLIAMS v. COOPER.

(Supreme Court of North Carolina. Nov. 7, 1893.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED.

1. Under Code Civil Proc. § 590, which provides that “no party shall be examined in his own behalf against the administrator of a deceased person except where the administrator is examined in his own behalf concerning the same transaction,” the administrator of the payee of a bond is competent to prove its execution by defendant, and testifying to such execution renders defendant a competent witness “concerning the same transaction” only.

2. Testimony of an administrator, on cross-examination by defendant, to a transaction concerning which he did not testify in chief, does not render defendant a competent witness concerning such transaction.

Appeal from superior court, Duplin county; Bryan, Judge.

Action by A. F. Williams, as administrator, against Moses Cooper, on bond and note. Judgment for plaintiff. Defendant appeals. Affirmed.

H. R. Kornegay, for appellant. A. D. Ward, for appellee.

CLARK, J. The plaintiff, administrator and distributee of the payee, was competent to prove the execution of the bond by the defendant. The incompetency attaches only to the surviving party to the transaction. Code, § 590. The representative of the deceased can testify if he so elect, under penalty of making the surviving party a competent witness to the same transaction. *Thompson v. Humphrey*, 83 N. C. 416. On cross-examination by the defendant, witness stated that he did not know of any payment made by the defendant. The witness was not examined in his own behalf, except in regard to the execution of the note. This rendered the defendant a competent witness only “concerning the same transaction or communication,” by the very terms of the stat-

ute. *Kesler v. Manney*, 89 N. C. 369; *Burnett v. Savage*, 92 N. C. 11; *Sumner v. Candler*, Id. 634; *Hughes v. Boone*, 102 N. C. 137, 9 S. E. Rep. 286; *Bunn v. Todd*, 107 N. C. 266, 11 S. E. Rep. 1043. Nor could the door be opened wider by defendant cross-examining the witness as to another transaction, to wit, payments on the note as to which the witness was not offered, and did not testify, in chief. To permit this course would be to nullify that portion of the section (590) which restricts the competency of the opposite party when an administrator has been offered as a witness to the “same transaction.” This would become meaningless if the opposite party could, by cross-examining as to other matters, make himself competent as to them, also. No error.

EVANS v. CHAMBERLAIN.

(Supreme Court of South Carolina. Nov. 20, 1893.)

MASTER AND SERVANT—FELLOW SERVANTS—NEGLECT OF MASTER—DEFECTIVE APPLIANCES—EVIDENCE—INSTRUCTIONS.

1. In an action by a brakeman against a railroad company for personal injuries, proof that the cars which plaintiff was coupling were pushed together with undue force by the engineer, so that plaintiff's arm was crushed, was insufficient to make a *prima facie* case of negligence, as the engineer and brakeman were fellow servants, and there was no evidence that the engineer was employed without due care, or was incompetent.

2. Where the evidence showed that plaintiff, while uncoupling cars, the bumpers on which were apparently in good order, was injured by the cars coming so close together as to crush his arm, and expert testimony tended to show that the accident could not have occurred if the bumpers had been in good repair, a nonsuit for failure of proof was properly refused, as it was an essential duty of the railroad company to its employees to have the bumpers to cars in good repair.

3. An instruction “that if the jury believe the bumper which caused the injury to plaintiff was defective, and had been allowed to remain so by defendant, the plaintiff is entitled to a recovery, even though he may have been able to discover such defects by the use of ordinary care and diligence,” was not erroneous as charging in respect to facts, where the judge gave such charge when considering the question of plaintiff's diligence, and, in considering the cause of the injury, charged that plaintiff should satisfy the jury by a preponderance of evidence that his arm was crushed from defective machinery.

4. Such charge was not erroneous in allowing plaintiff to recover “even though he may have been able to discover such defects by the use of ordinary care and diligence,” as he had the right to assume, without inquiry or examination, that the appliances furnished him were safe.

Appeal from common pleas circuit court of Aiken county; J. H. Hudson, Judge.

Action by H. S. Evans against D. H. Chamberlain, as receiver of the South Carolina Railway Company, for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Henderson Bros., for appellant. John G. Evans, for respondent.

MCGOWAN, J. The plaintiff was a brakeman on the railway, operated by the defendant as a receiver, and claims that he was injured by the coming together of two bumpers of two freight cars at Branchville on February 4, 1892. The complaint alleges as follows: "That at night, at Branchville, a station on said line of railway, he was engaged in coupling cars on said freight train, which said act was his duty, and within the scope of his employment; that, while making a coupling on said train, it was necessary for plaintiff to use his right hand to hold and place in position the coupling pin; that, while so engaged, the cars were pushed together with undue force by the engineer, and, through the carelessness and wanton negligence of the defendant, a weak, defective, and insecure bumper had been appended to one of said freight cars, which said fact was unknown to the plaintiff; that as soon as the bumpers of the said freight cars came together, by reason of the negligence and carelessness of the defendant, or his agents, in using unnecessary force in pushing said cars, and by reason of said insecure, weak, and defective bumper, said bumper was driven in, and rendered useless, allowing plaintiff's right arm to be caught between the deadblock of one car and the body of the other, thereby breaking, mangling, and rendering the same useless for life; that had it not been for the carelessness and negligence of defendant in using such defective and insecure bumper, and the careless and reckless manner of defendant's agents in pushing said cars together, said injury to plaintiff could not have happened, it being otherwise impossible for said cars to have come together so as to injure plaintiff; that by reason of defendant's negligence, plaintiff has lost the entire use of his right arm, and has been damaged thereby to the reasonable amount of two thousand (\$2,000) dollars," etc. These allegations were denied by the receiver, and the issue thus made up came on for trial before his honor, Judge Hudson, and a jury. There was much testimony, which is all printed in the record. When the plaintiff rested, the defendant moved for a nonsuit upon the ground that there was no evidence of negligence to go to the jury, which was refused, and the case went to the jury. Both parties made requests to charge, but it will not be necessary to consider any of them, except those as to which the appellant alleges error. Under the charge of the judge, the jury found for the plaintiff \$1,000 damages, and the defendant appeals to this court upon the following exceptions:

"First. That his honor erred in refusing to grant nonsuit on the motion of the defendant, for the reason that the testimony produced by the plaintiff showed an entire fail-

ure to prove the alleged cause of action set up by the plaintiff in his complaint against the defendant, and showed an entire failure of proof as to any cause of action against the defendant," etc. As we understand it, the rule is well settled that if, in a law case, there is any pertinent evidence to be considered, the case must go to the jury. In such a case, neither the circuit judge nor this court has the right to weigh conflicting evidence. It is, however, within the province of the circuit judge to determine, in the first instance, whether there is any evidence to go to the jury,—that is to say, whether, regarding the plaintiff's evidence as true, the case, as it stands, is such as to authorize the jury, properly, to find for the plaintiff,—and, if so, the case should go to the jury. Now, taking this as the test, did his honor, the judge, commit error of law in refusing a motion for nonsuit in this case?

1. As to the allegation of the complaint that "the cars were pushed together with undue force by the engineer," etc., we do not think that there was sufficient proof to make a *prima facie* case of negligence. Besides, if such had been shown, we incline to agree with the judge that the engineer and brakeman were fellow servants, in the sense of the rule upon that subject, and, there being no evidence that the engineer had been employed without due care, or was not competent, that the plaintiff could not recover from the company damages for an injury caused by the negligence of the engineer in managing his engine in the operation of coupling or uncoupling cars in his train.

2. But the judge held that there was some evidence to go to the jury upon the other allegation of the complaint, viz. "that a weak, defective, and insecure bumper had been attached to one of the cars to be coupled or uncoupled, which fact was unknown to the plaintiff," etc. As we consider it, this is a very different matter from mere carelessness on the part of the engineer in managing his engine so as to assist in the operation of uncoupling cars in his train. "While it is true, on the one hand, that a workman or servant, in entering into an employment, by implication, agrees that he will undertake the ordinary risks incident to the service in which he is engaged, including injuries from fellow servants, it is also true, on the other hand, that the employer or master impliedly contracts that he * * * will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life, and security against injury," etc. See *Hooper v. Railroad Co.*, 21 S. C. 546. It thus appears that it is one of the essential contract duties of a railroad company, as such, to furnish all employees with safe and suitable appliances to

perform the work in which they are engaged; and this certainly includes bumpers to cars, in good repair, one object of which, as we suppose, is to prevent collision, by keeping the bodies of the cars at a certain distance from each other. In the line of his duty, the plaintiff was required to uncouple cars at Branchville, to be left there. No defect in the bumpers was apparent. The plaintiff made an effort to uncouple, and in doing so had to use his right hand, and at that instant the cars came so close together that his right arm was crushed before the rebound of the cars. There was testimony of experts tending to show that such could not have been the result if the bumpers on the cars had been sound, and in good repair. We cannot say that the trial judge committed error of law in refusing to grant the nonsuit.

"Second. That his honor erred in charging the jury as requested by the plaintiff's attorney in his third request to charge, as follows: 'That if the jury believe the bumper which caused the injury to the plaintiff was defective, and had been allowed to remain so by the defendant, the plaintiff is entitled to a recovery, even though he may have been able to discover such defects by the use of ordinary care and diligence,'—for it is submitted that the charge was erroneous, in charging upon a question of fact, viz. that the bumper caused the injury, and was further erroneous in this: that if the plaintiff could discover the alleged defect as well as the defendant, and did not do so, he could not recover, under the law," etc.

1. We do not think that the judge charged "in respect to facts," in saying "that if the jury believe that the bumper which caused the injury to plaintiff was defective," etc. When the expression fell from the judge, he was not considering the question as to what inflicted the injury, but whether the plaintiff should be precluded from recovering if he could, by ordinary care and diligence, have discovered the defects alleged to exist. There was no conflict of testimony, or even a contention, as to injury to the plaintiff, or as to where it was received. Besides, in determining whether the circuit judge has committed error of law in his instructions to the jury, the charge must be considered as a whole; and, considered in this light, the defendant certainly had no cause to complain of the charge. After a full and clear statement, the judge said: "Bear in mind you must determine from all the evidence whether that arm was broken from defective machinery. The plaintiff has so alleged, and the burden of proof is upon him, and he must satisfy you by the preponderance of the evidence that it is so; and if he does not, then the evidence is wanting, and the case should fail. If you come to the conclusion that the evidence does not show that the machinery was broken, but the arm was

broken by the want of proper skill on the part of the plaintiff, then the company is not responsible," etc. See *Hume v. Insurance Co.*, 23 S. C. 190.

2. But the defendant further insists that the judge should have charged that if the plaintiff could have discovered the alleged defect as well as the defendant, and did not do so, he could not recover, under the law. This view would emasculate the fundamental rule that it is incumbent upon the master to furnish safe and suitable appliances for the employe. As was said by the chief justice in delivering the judgment of the court in the case of *Carter v. Oil Co.*, 34 S. C. 215, 13 S. E. Rep. 419: "The rule is that it is the duty of the master, and not of the servant, to exercise due care and diligence to ascertain whether the appliances furnished are safe and suitable; and a servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable. *Lasure v. Manufacturing Co.*, 18 S. C. 281. Of course, if he uses a machine or other appliance, knowing at the time that it is out of repair to such an extent as to render it unsafe, then another rule applies, with certain qualifications, which it is needless to state here," etc. We have carefully considered the case of *Grant v. Railroad Co.*, 133 N. Y. 657, 31 N. E. Rep. 220, cited and relied on by defendant's counsel. While, at first view, there does seem to be some analogy between that case and this, we think that, upon a close examination, it will be found to be more seeming than real. In the New York case the plaintiff, an employe of the defendant, was at work upon one of three coal cars standing on a trestle. Two other loaded cars were being pushed upon the same trestle by a locomotive to which they were attached by a drawbar, which was slightly bent. When they approached the three cars, steam was reversed, the engine stopped, and the drawhead of the first car, to which the drawbar was attached, broke, and the two cars ran into the cars standing on the trestle with such force as to push them over the end of it, and the plaintiff was injured. There was a verdict for the plaintiff. It was not denied that the breaking of the drawhead was the cause of the injury, and the question was whether the fracture was made by the slight bend in the drawbar, or by some possible latent defect in the drawhead of the car. The court, saying, among other things, "that it appears almost beyond doubt that the deviation of the drawbar from a straight line had no effect whatever in producing the result," held as follows: "Where, in an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, it appears that there were two or more possible causes of the injury, for one or more of which the defendant was not responsible, the plaintiff, in order to re-

cover, must show by evidence that the injury was wholly or partly the result of a cause for which the defendant is responsible. If the evidence leaves it just as probable that the injury was the result of one cause as of the other, the plaintiff cannot recover," etc. Now in this case, it seems that there was no breaking, as to which a question might arise as to "a latent defect;" but the circuit judge placed the whole case upon the question of fact, whether the bumper was defective, and caused the injury. In charging, he said: "Bear in mind you must determine whether, from all the evidence, that arm was broken from defective machinery. The plaintiff has so alleged, and the burden of proof is upon him, and he must satisfy you by the preponderance of the evidence that it is so." etc. We cannot doubt that under this charge the jury found solely upon the allegation that the injury was caused by the defective bumper, being a cause for which the company was responsible. In a law case, this court cannot review the testimony, with the purpose of granting a new trial for the want of sufficient evidence. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

Ex parte LEONARD.

In re BOWEN'S ESTATE.

(Supreme Court of South Carolina. Nov. 3, 1893.)

WILLS—SIGNING BY ANOTHER—WITNESSES.

1. Under Gen. St. § 1854, providing that a will shall be signed by testatrix, or by another person in her presence, and by her express directions, and shall be attested and signed by three or more witnesses, the person signing for testatrix may sign as a witness.

2. If the whole conversation between testatrix and the one signing for her amounted to an express declaration that he should sign the will, this would satisfy the requirement that it should be done by her express direction.

3. Where the person directed to sign the will for testatrix subscribed her name to it before coming into her presence and that of the witnesses, but, when in her presence and that of the witnesses, wrote beneath her name his name, preceded by the word "by" and followed by the words "by request," he sufficiently signed for testatrix in her presence and that of the witnesses.

Appeal from common pleas circuit court of Laurens county; J. J. Norton, Judge.

On petition of B. E. Leonard, as executor of Emeline Bowen, deceased, her will was admitted to probate, and Albert Dial and others appeal. Affirmed.

Haskell & Dial and W. H. Martin, for appellants. H. J. Haynsworth, for respondent.

McGOWAN, J. On August 16, 1890, Emeline Bowen, widow, departed this life. On

September 6th thereafter a paper writing, purporting to be her last will and testament, was filed in the office of the probate judge of Laurens county, who admitted the same to probate in common form, and on October 20, 1891, Albert Dial and others, the heirs and distributees of deceased, if she died intestate, filed their petition that Benjamin E. Leonard, the party producing said paper, be required to prove the same in due form of law on or before November 15th thereafter. On November 11, 1891, said Leonard filed his petition accordingly, and on June 23, 1892, the matter came on for a hearing in the probate court, and, after hearing the testimony of the subscribing witnesses and others, both for and against the said will, the probate judge filed his decree admitting the same to probate in due form of law, whereupon Albert Dial, Elizabeth Teague, and others appealed to the court of common pleas of the said county. At the February term of the court thereafter the proceedings on appeal came on for a hearing before his honor Judge Norton, who submitted two questions to the jury: (1) Was the paper duly executed as a will? (2) Was Mrs. Emeline Bowen, at the time of executing the will, competent to make a will? On these issues of will or no will there was much testimony, covering nearly 100 pages of printed matter, reported by the stenographer, as it fell from the witnesses, and of course it cannot be restated here; but, in order to make the points intelligible, it will be necessary to make a short and condensed statement of facts as developed. It appeared that Mrs. Bowen, the testatrix, was very sick with what was called "typhoid fever," and that about noon of August 16, 1890, she asked her attending physician, Dr. S. S. Knight, to prepare her will for her, and gave him minute instructions as to how she wished it drawn, of which the doctor took rough notes. Among other things, she asked him if it would not do for him to sign her will for her, as she was so nervous, to which he replied that he thought so. Later the doctor drafted the will, and, as he testifies, he first prepared it to be signed by "a mark," by leaving a blank space, and writing "her mark" above and below respectively. It is not very clear whether he then wrote the name of "Emeline Bowen" in preparing for the mark, but we think it probable that he did. After having done this, the doctor says he concluded that it would be best not to sign with "a mark," and so erased the words "her mark." About twilight he procured two other witnesses, and went to Mrs. Bowen's room, which was lighted by a lamp. He then produced the paper, and told Mrs. Bowen that it was her will, and was ready to be executed. He recalled to her attention what she had said about signing the will, by asking her, "Shall I sign the will for you?" to which she answered "yes," and he signed the will for her. It is not quite clear whether he

did this by writing then all the words "Emeline Bowen. By S. S. Knight, by request," or whether, the name "Emeline Bowen" having been previously written in preparing the will for "a mark," and not having been erased, the signing was merely by writing under the name "Emeline Bowen" the other words, "By S. S. Knight, by request." Then each of the witnesses in turn signed the paper, including Dr. Knight, who signed the paper for the deceased. All this was done in the presence of the testatrix, who was lying in bed, with her face towards the little table in the room, on which the paper rested, in full view of all who chose to use their senses. Mrs. Bowen died on the next day night, within 30 hours after the signing of the paper. After a full and careful charge, the jury found both issues of fact referred to them in the affirmative,—that Mrs. Bowen was competent to make a will, and that the will was executed according to law. The contestants did not except to the finding on the second issue, that Mrs. Bowen was competent to make a will, and therefore that issue goes out of the contest; but they did except to the finding on the first issue, as to the manner of the alleged execution of the paper propounded as a will, and moved for a new trial, which was refused; and then the whole issues involved came on to be heard by the presiding judge, who, after argument, held and decreed as follows: "The parties seeking to set aside the probate of the will raise and urge the following propositions before me now: 'First. That the witness S. S. Knight is not a competent witness, as he signed the name of the testatrix to the paper propounded as a will. Second. That the will was not signed by S. S. Knight in the presence of testatrix. Third. That the will was not signed by her express direction. Fourth. The signature of testatrix not having been made in her presence, was the signing of S. S. Knight's signature under hers a sufficient ratification of any previous instructions to sign for her?' I am of opinion that the three first propositions are not well taken, and are overruled. As to the fourth and last proposition I am in doubt, rather inclining to sustain the position; but, as the effect would be to grant a new trial, I prefer that the supreme court pass upon this question, as in that event the case would be ended one way or the other, and therefore the motion to set aside the probate of the will is refused, and the appeal dismissed."

From this judgment the contestants appeal to this court upon numerous exceptions, 14 in number, which are all printed in the brief; but, following the good example of the appellants' attorney, we think that they all may be considered under four general propositions, urged in the argument below to set aside the verdict of the jury and refuse probate of the will, which have already been stated in the judgment of the court. The power to direct

during life how one's property shall go after death is certainly a great privilege. As was said by the court in *Means v. Means*, 5 Strob. 190: "The right to make a will is especially valuable to the old and infirm. Their thoughts dwell most upon posthumous arrangements, and in this right they have the means, not only of gratifying their feelings, but of securing substantial advantages while they live," etc. In order to protect this valued right against fraud and imposition, the law has prescribed for the execution of wills peculiar formalities, which must be observed. Section 1854 of the General Statutes declares that "all wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the said devisor, and of each other, by three or more credible witnesses, or else they shall be utterly void and of no effect." The words of this law which are in point here are identical with those in the old English statute of frauds, and have often received construction which may throw light on the inquiry here. Mrs. Bowen, the testatrix, did not sign the paper propounded as her will, but the law allowed her to execute a will, "signed by another person in her presence, and by her express directions, attested and signed by three or more subscribing witnesses in the presence of the devisor and of each other," etc.

1. The first objection to the execution is that, "as Knight signed the name of the testatrix to the paper propounded as her will, he was not a competent witness to attest her will as one of the subscribing witnesses required by law." At first some of us thought it rather an anomalous proceeding for a witness to attest a signing by himself, but Mr. Jarman explains that such a witness does not attest the signing merely, but also the directions given to sign; but, at all events, the authorities concur that, under the circumstances stated, the signer of the will is competent as one of the three subscribing witnesses required by law. See 1 Jarm. Wills, 204; Schouler, Wills, 338; Redf. Wills, 209. Mr. Redfield says: "Both the earlier and present English statute, and most of those in force in this country, allow the testator's signature to be made by some other person, if made in the presence of the testator, and by his express direction. Under this clause of the statute, it has been held that this act may be done by one of the witnesses. Indeed, it is the law in some of the states that one who has signed for the testator, at his request, must write his name as witness to the will." We think there was no error here.

2. The second proposition is that Mrs. Bowen did not give Doctor Knight "express directions" to sign her will for her. The judge charged that it was a question of fact, to be decided by the jury; saying that the "plain-

tiffs' attorney contended that Mrs. Bowen need not have said in articulate words, "Doctor Knight, you must sign that paper for me;" and that is the right contention. It is sufficient if the whole conversations that occurred between the testatrix and Dr. Knight amounted to an express declaration, it should be construed into "an express direction" to sign the paper." As we understand it, a simple question and answer may amount to a declaration. We cannot suppose that the word "express" was intended to be limited necessarily to an expression in words. We take it that one perfectly dumb, and unable to speak a word, may in some way indicate his desire, so as to come within the provision of the law, as to giving direction; as some one has tersely put it, "a direction in fact, but not in words." But, taking both conversations of the parties together,—that of the afternoon, when Dr. Knight was requested to write the will, and that at night, when they were about to execute it,—we think that the judge committed no error on this point. There is no evidence that Dr. Knight was a volunteer in the matter.

3. The next proposition is that "the will was not signed in the presence of Mrs. Bowen, the testatrix, and the signing of S. S. Knight's name under hers was not a sufficient ratification of any previous instructions to sign for her." The judge charged: "If you find that S. S. Knight did not write or sign Mrs. Bowen's name to the paper propounded as her will in her presence, then it was not duly executed, under the law, unless he then and there adopted it by signing his name as agent in the presence of the other witnesses." Under the charge the jury must have found that Knight wrote the words "By S. S. Knight, by request," under the name of "Emeline Bowen," already in the will, thereby adopting the name previously written by himself, and that this was done at the time the will was executed, in the presence of the testatrix and the witnesses. Assuming, then, that the name of the testatrix was written on the will in the afternoon, and not rewritten at the time of execution, it is very clear that her written name, no matter when or where made, was not an accomplished act, but only preparatory to something else, to give it vitality. At first the appending of "her mark" by Mrs. Bowen was intended, which would certainly have adopted it, no matter when written, but afterwards changed to "another person signing for her by request." Standing alone, it was a perfect nullity, and might have been stricken out, as a word incorrectly used. As it seems to us, it is not a question of ratification by Mrs. Bowen, for she did not know that in preparing her will her name had been written in it, but rather a question of adoption by Knight, as a part of his signing by request. Neither the law nor the testatrix directed Knight how he was to sign, and we

cannot see why he might not adopt her name, previously written by himself, as he could then have run his pen through the name, and have rewritten it then and there. But if in this we are in error, if, from the nature of the subject, Knight could not adopt the name of Mrs. Bowen, standing on the draft of the will, so as to be a compliance with the law, which requires that the signing by "another person" must be in the presence of the testator, etc., was it indispensable to the execution that the "other person" deputed to sign for Mrs. Bowen should, in doing so, set out her name? It will be observed that the law does not so require, and, as it seems, the signing by "another person" is not confined only to the name of the testatrix. All the authorities agree that a will may be executed without the name of the deviser appearing on its face. It has often been decided that a mark, without the name itself, is sufficient, and, of course, the initials of testator's name would also suffice, (see *Ray v. Hill*, 3 Strob. 303, and *Adams v. Chaplin*, 1 Hill, Eq. 265;) and the will may be signed by another person for the testator. "That 'other person,' as it seems, may be one of the witnesses, and it is immaterial that he signed his own name, instead of the name of the testator; and, when the testator directed a person to sign the will for him, which that person did by writing at the foot 'This will was read and approved by C. F. B., by C. C., in the presence of,' etc., and then followed the signature of the witnesses, the will was held good," etc. The following form of subscription is sufficient: "E. N., for R. D., at her request." "So, also, where the testator's name was subscribed, at his request, by one of the subscribing witnesses." See 1 Jarm. Wills, p. 79, and Redf. Wills, 205, and numerous cases in the notes; and also 1 Williams, Ex'rs, p. 83. But, be this as it may, we cannot say it was error to hold that, under the authority given him by the testatrix to sign for her, S. S. Knight sufficiently signed for her on Sunday night, at the time the will was executed, in the presence of the testatrix and of the subscribing witnesses.

The judgment of this court is that the judgment of the circuit court be affirmed, and the case be remanded to the probate court of Laurens county, for such further proceedings as may be deemed proper and necessary to carry out the conclusions herein announced.

McIVER, C. J., and POPE, J., concur.

KAUFFMAN MILLING CO. v. STUCKEY.
(Supreme Court of South Carolina. Nov. 20, 1893.)

SALE—SPECIAL GUARANTY—BREACH—RESCISSON.

A breach of a special guaranty by a seller of flour "that the flour sold would give satis-

faction to the customers of the purchaser" does not give the purchaser any greater rights against the seller than would a simple breach of a warranty implied by law, and does not authorize a rescission of the contract of sale.

Appeal from common pleas circuit court of Spartanburg county; J. J. Norton, Judge.

Action by the Kauffman Milling Company against J. K. Stuckey for the price of goods sold and delivered to defendant. There was judgment for plaintiff, and defendant appeals. Affirmed.

Duncan & Sanders, for appellant. Bomar & Simpson, for respondent.

McGOWAN, J. This case has been in this court before, (see 37 S. C. 8, 18 S. E. Rep. 192,) where all the facts will be found stated. The complaint alleged that it was a corporation doing business in the city of St. Louis, Mo., and that on or about October 24, 1888, the plaintiff sold and delivered to the defendant on account 25 barrels of flour of the brand Victoria, at \$5.05 per barrel, and 25 barrels of flour of the brand Gem, at \$4.75 per barrel, which the defendant agreed to pay therefor; that the defendant has paid the freight on said flour, viz. \$40.50; and that there is due and owing from the defendant to the plaintiff on said account the sum of \$204.50, etc. The defendant admitted the principal allegations, but made defense that the flour was purchased by sample, and did not come up to the sample, and, after he had sold a number of the barrels, (14,) he offered to return it, or keep it at a reduced price, which offers were duly refused by the plaintiff. The plaintiff had a verdict for \$185.50, but upon appeal this court granted a new trial for error in regard to the admission of certain testimony, etc. After the case went back, the defendant, by permission of the court, amended his answer, setting up the following defenses, to wit: "(1) That the flour was sold to him by sample; (2) that it was sold to him as good, sound, merchantable flour, for the purpose of being sold to his customers for bread-stuff for family use, and under the special agreement that it would give satisfaction to his customers; (3) that relying upon this guaranty, and believing it to be sound and good flour, he hauled it to his store, and offered it for sale; (4) that the flour did not come up to the sample, was unfit for the purposes for which it was bought, was not 'a sound, merchantable flour,' was unfit for family use, and failed to come up to the guaranty given by plaintiff; (5) that as soon as he ascertained that it was not giving satisfaction, was unfit for family use, and not a sound, merchantable flour, he tendered it back to plaintiff." Under the pleadings as amended, the case was tried before Judge Norton and a jury. Several counterclaims were pleaded, as in the first trial, but, from the view taken, it will not be necessary to consider them here. There was much testi-

mony upon all the issues. There were also requests to charge on both sides. The judge, among other things, charged as follows: "So, gentlemen, the sum and substance of the charge I have given you is this: If you think there was no defect in the flour, then you ought to find for the plaintiff the full amount of his bill under the contract, which is admitted. The price is admitted, less the amount paid for freight that is set out in the complaint. That is the plaintiff's case as he made it. You ought to find the plaintiff's case as he states it in his complaint, if there was no defect in the flour, and if it did not fail to come up to the implied warranty, or the special warranty made on its sale. If you do think that it did not come up to either of these warranties, or failed to come up to both of them, then you will make your calculation as to what you think the value of the flour was, taking into consideration what the contract price was, and give, after deducting the amount that was paid for freight, a verdict for the plaintiff for the value, taking the contract price as the basis of value, to see what proportion you ought to deduct from the contract price. If you think, however, from the evidence, that the flour was of no value at all, then you could only give the plaintiff judgment for so much of the flour as was actually sold by Mr. Stuckey, as he would have no right to take even a worthless article of the plaintiff, and sell it, and then defend himself by saying that it was worthless, but he must account for the proceeds of the sale. You would still have to deduct from that the amount of the freight, and find for the plaintiff or the defendant, whichever had the balance in his favor, after making that calculation," etc. Under this charge, the jury again found for the plaintiff, \$106. From this judgment the defendant again appeals to this court, upon numerous exceptions, (14 in number,) which are all printed in the record, and need not be set out here.

As far as we are able to see, there is really but one new point made, all the others having been decided in the first trial of the case, and, as we understand it, the point claimed to be still open may be expressed in the following proposition: "That the additional allegation in the amended answer of the defendant claiming that at the time of the sale a special guaranty was verbally made to the following effect, 'That the flour sold would give satisfaction to the customers of the purchaser,' and that guaranty having been broken, the rights of the defendant are now greater than they were at the first trial, under a simple breach of a warranty implied by law, which alone was considered at that time," etc. Passing by the vagueness of the alleged special guaranty,—"satisfactory to the customers,"—and assuming that it was made and breached, as claimed, we do not see how that could alter the character of the contract, so as to make it a con-

ditional sale. On the contrary, it still remained a warranty, possibly a little different from the ordinary warranty of soundness implied by law, but still a warranty, as to which the remedy was damages for its breach, unless the facts authorized the party to rescind, and, as a consequence, to return the property. This is the right which the defendant so strenuously claims, and which was denied him at the first trial. It was then and there held, both upon reason and authority, "that the defendant had no right to rescind, unless (1) there was an agreement at the time he purchased that, if the flour did not come up to sample, (or, as we suppose, warranty,) he could return it; or (2) where there has been fraud; or (3) where there has been an entire failure of consideration," etc. It is not now claimed, under the amended answer and the allegation of the special guaranty, that there was any such agreement as to returning the property. Upon this subject there is a total absence of proof as at the first trial. Nor was there any proof of fraud at either trial. It may have been incidentally argued that there was an entire failure of consideration by regarding the sale of the 14 barrels as necessary, merely to test the quality of the flour in the other barrels, which were in the store, "unopened and unsampled." We cannot accept this view, and concur with the judge when he charged: "If you think, however, from the evidence, that the flour was of no value at all, then you could only give the plaintiff judgment for so much of the flour as was actually sold by Mr. Stuckey, as he would have no right to take even a worthless article of the plaintiff and sell it, and then defend himself by saying it was worthless, but he must account for the proceeds of sale," etc. In the language of Judge Evans, speaking for the court in the case of *Carter v. Walker*, 2 Rich. Law, 48: "As the jury have found that the property was of value, and there was no allegation of fraud in the sale, the defendant was not entitled to rescind the contract. He was entitled to an abatement in the price, and that the jury have allowed, and therefore the motion for a new trial must be dismissed." The judgment of this court is that the judgment of the circuit court be affirmed, and the appeal dismissed.

McIVER, C. J., and POPE, J., concur.

RUFF et al. v. ELKIN et al.

(Supreme Court of South Carolina. Nov. 13, 1893.)

JUDGMENT — COLLATERAL ATTACK — RETURN ON SUMMONS — IMPEACHMENT — ORDER OF SALE — AMENDMENT.

1. On a proceeding to partition land among heirs, P., who claimed the land adversely on the ground that a foreclosure by which his title

was divested was invalid, was made a party; it being agreed that his claim should be determined therein, and that he should "have the right to introduce any evidence and make any point in his defense which he could introduce or make in any action which he might bring to set aside" the judgment in the foreclosure proceedings. The sheriff's return in such previous proceedings was to the effect that there was personal service on P., then an infant under 14 years of age. *Held*, that the sheriff and P. were properly allowed, in the partition proceeding, to give evidence contradicting such return.

2. An order rendered in a foreclosure proceeding for the sale of a tract of land cannot be amended at a subsequent term, without a rehearing, so as to include another and additional tract.

Appeal from common pleas circuit court of Fairfield county; James Aldrich, Judge.

Proceeding by Silas W. Ruff and others against Carrie G. Elkin, Henry L. Parr, and others, to partition certain land, and to determine title thereto. From a judgment in favor of defendant Parr, the other parties appeal. Affirmed.

J. G. McCants, for appellants. McDonald, Douglass & Obeare, for defendants, appellants. Ragsdale & Ragsdale, for respondent.

McGOWAN, J. The parties in this case are very numerous, and the facts somewhat complicated, so that it will promote clearness to make a short preliminary statement:

Many years ago, one James Elkin, of Fairfield county, died, leaving a will, by which, among other things, he devised a certain tract of land, containing 181 acres, to his son, William B. Elkin, on the express condition, that, in case he should die without heirs of his body, the said land should be divided between his daughters, Mary Ann Elkin and Judith M. Ruff, and to their issue or children, forever, etc. The life tenant went into possession, and some time before 1858 some proceeding was instituted in the old court of equity to sell the land, and change the investment; and Chancellor Dargan granted a decretal order that the land should be sold upon a credit, except as to costs, for 1, 2, 3, 4, and 5 years; the purchaser "to give bond and good personal security, and a mortgage of the premises, to secure the purchase money." One Henry W. Parr became the purchaser, and complied with the terms of sale by giving to W. R. Robertson, then the commissioner in equity for Fairfield, a bond for the purchase money, with personal sureties,—R. W. Coleman and John Yarborough,—and secured the same by a mortgage of the premises sold, viz. the Elkin land, consisting of 181 acres. It seems that the said purchaser, Parr, also executed another mortgage to Coleman, one of his sureties on the aforesaid bond to the commissioner, in order to save harmless and indemnify the said Coleman from any loss by reason of his suretyship upon the bond aforesaid. This latter mortgage was on another tract of land

of the said Parr, and generally known as the "Montgomery Land," 581 acres, being the tract now in dispute. Matters seem to have remained in this condition during the war, and down to 1876, when the mortgagor, Parr, died intestate, possessed of some personalty and several tracts of land, and leaving, as his only heir and distributee, an infant son, Henry L. Parr, then under seven years of age, who is the party named in this case as a defendant. Soon after the death of Parr, the father, William B. Elkin, the life tenant, obtained letters of administration upon the estate of Henry W. Parr; and on May 26, 1877, a suit on the equity side of the court was commenced in the name of Samuel B. Clawney, as clerk of the court, (who had succeeded to the rights of Robertson, as commissioner in equity,) against Henry L. Parr, the infant son of the mortgagor, Henry W. Parr, deceased, to foreclose the two mortgages above described,—both that of the Elkin land, to Robertson, as commissioner, and that of the Montgomery land, to Coleman, as surety. The legal proceedings in this case, seeming to be regular on their face, and neither W. B. Elkin, as administrator, nor the guardian ad litem of the infant, Parr, making any objection, proceeded to judgment; but as to the legality, force, and effect of which, we will have occasion to consider hereafter. (1) The order of sale under this judgment of Judge Mackey, May 9, 1877, included only the original Elkin land, under the mortgage to the commissioner, which the sheriff reported that he sold to one Murphy for \$726, and the same was confirmed by the court. (2) On October 29, 1877, Judge Kershaw passed an order purporting to amend the original order of sale by adding to it the Montgomery tract of land, which seems to have been conveyed by the sheriff on December 3, 1877, for the consideration of \$1,995 expressed in the sheriff's deed; reciting that the land had been sold on that day, viz. December 3, 1877, under Judge Mackey's order of May 9, 1877, (then amended,) to W. B. Elkin, "to hold the same in accordance with the provisions and limitations contained in the will of James Elkin, deceased,"—that is to say, to hold the land himself for life, etc.

On April, 1890, W. B. Elkin died without issue; and thus the event upon which the remainders over in the original devise were to take effect had occurred. At that time the two persons, viz. Mary A. Elkin and Judith W. Ruff, who were named as the first takers in remainder, were dead, but leaving numerous children and grandchildren, who, together, were about to institute proceedings to partition among themselves the Montgomery tract of land, in the view that, by sale under the foreclosure decree in the case of Samuel B. Clawney, as clerk of the court, v. Henry L. Parr and W. B. Elkin, as administrator of Henry W. Parr, deceased,

said tract had been substituted for that devised in the Elkin will. At the same time, Henry L. Parr, having attained his majority, and claiming that the sale in foreclosure, under which that tract purported to have been sold, was irregular, illegal, and absolutely void, as to him, was about to institute proceedings for the establishment of his rights thereto. Under these circumstances, and in order to facilitate the effort to ascertain the rights of the different parties, they mutually entered into the following agreement: "Whereas, the children of Judith W. Ruff and of Mary A. Elkin claim the said [Montgomery] tract of land, and are now instituting proceedings to partition the same among themselves; and whereas, the said Henry L. Parr is in the possession of the said tract of land, claiming to be the owner thereof in fee, and is about to institute proceedings for the establishment of his rights thereto; and whereas, it will facilitate matters to have all issues settled in one action,—it is agreed: (1) That the said Henry L. Parr shall be joined as a party defendant in the action for partition among the children of Judith W. Ruff and Mary A. Elkin, deceased. (2) That the issues between the said parties respecting the ownership of, and the right to, the said tract of land, shall be submitted to the court and a jury, and the said parties, the children of Mrs. Ruff and Mary A. Elkin, shall have the opening and the reply. (3) [Substituted.] That the defendant Henry L. Parr shall have the right to introduce any evidence and make any point in his defense which he could introduce or make in any action which he might bring to set aside the said judgment of Samuel B. Clawney, as clerk, v. Henry L. Parr and William B. Elkin, as administrator, or in any direct proceeding which he might institute to vacate or set aside said judgment," etc.

In pursuance of this agreement, the circuit judge submitted to the jury the following issue: "Is Henry L. Parr the owner in fee of the land described in the complaint?" Upon this issue the plaintiffs offered in evidence the judgment roll in the case of Clawney, clerk, v. Henry L. Parr and W. B. Elkin, administrator, filed on May —, 1877, and certified copy of deed of Sheriff Ruff to William B. Elkin, made under said proceedings. From the record it appeared that the summons was in the usual form, and had indorsed the following acceptance: "I accept service of the summons and complaint as guardian of Henry L. Parr, at Alston, S. C. [Signed] W. B. Elkin." And there was the following affidavit of service:

"R. F. Martin, being duly sworn, says, that he served the summons and complaint in this action on the defendants by delivering to them, personally, and leaving with them, copies of the same, at Alston, S. C., on the 29th day of March, 1877, and that he knew

the persons so served to be the ones mentioned and described in the summons as Henry L. Parr and William B. Elkin, the defendants therein; and the deponent is not a party to the action. R. F. Martin.

"Sworn to before me March 13, 1877. S. B. Clawney, Clerk."

Notice of the application for the appointment of a guardian ad litem for the infant defendant, Henry L. Parr, was also served on the said William B. Elkin at the same time and place. The plaintiffs then rested.

Then Henry L. Parr, over objections, offered testimony impeaching the record, and tending to show that personal service of the summons was never made, as alleged, upon him, who was then an infant under the age of seven years. He testified positively that no paper in the case was ever personally served upon him, and that he really did not know that there was any such case until years afterwards. And the deputy sheriff, Martin, also testified that the service was not actually made upon the infant Parr, but upon William B. Elkin, who claimed to be his guardian; the infant, however, being present at the time, etc.

The attorney of Parr made 11 requests to charge, which are long, and, all being printed in the brief, need not be restated here. Among other things, the judge charged: "Now, you have in this case the return of the deputy sheriff, in which he states that he served the summons and complaint in this action on the defendants by delivering to them, personally, and leaving with them, copies of the same, at Alston, on March 29, 1877, and that he knows the persons so served to be the ones mentioned and described in the summons and complaint as Henry L. Parr and William B. Elkin. That is a paper,—a written instrument. It is my duty to construe that paper. There is nothing hidden about that paper. It is a plain, outspoken affidavit that he served Henry L. Parr personally, and upon its face it is regular. That being the law, and it being my duty to instruct you, I charge you that that service was according to law, and that Henry L. Parr was personally served. But it would be manifestly unjust if a sheriff or deputy sheriff could, by making a false return, bind a party,—in this case, Henry L. Parr,—when, as a matter of fact, he never served him personally. Therefore, the law is that while that affidavit on the record, coming, as it does, from an officer of the court,—nothing else appearing,—is presumed to be correct, yet, when it is attacked, it may be shown to be incorrect or false. In this case they have undertaken to attack that affidavit of Martin. Now, I can't charge you as to what the facts were. You have heard the testimony of Mr. Parr, in which he states as to the failure to serve the summons and complaint on him. You have heard the testimony of Mr. Martin in

regard to what he did,—what he now says about the matter. Well, I cannot comment on that. I do not mean to say, though, that the jury are restricted to determine the issues whether Mr. Martin, when he made that affidavit, perjured himself,—told a willful falsehood,—or made an unintentional mistake. You heard his testimony; and the question for you to pass upon now is not whether Mr. Martin was guilty of perjury, or whether he made a mistake. The question is, did he serve these papers on Henry L. Parr? If he made a personal service, then that is all, so far as that issue is concerned. If he failed to serve them personally, then this judgment, and the sale under it, never divested the rights of Henry L. Parr," etc. Under this charge, the jury found, affirmatively, that Henry L. Parr was the owner, in fee simple, of the Montgomery tract of land. Thereupon, the other parties moved for a new trial on the minutes of the court, which was refused, and they then moved that his honor would "proceed to adjust the equities of the parties;" and this, also, being refused, the judge delivered his decree, affirming the verdict of the jury, and dismissing the complaint as against Henry L. Parr, with leave to plaintiffs to apply to the court for such action as they may deem proper, and the law will permit, to revive the action against W. B. Elkin, as administrator.

From this final judgment, the appeal comes to this court upon the following exceptions: "(1) That his honor erred in allowing R. F. Martin, deputy sheriff, to testify in contradiction to his affidavit of service of summons and complaint in Clawney, clerk, v. Henry L. Parr and W. B. Elkin. (2) That his honor erred in allowing Martin, deputy sheriff, to testify as to his recollections and impressions as to the service of the summons and complaint in Clawney, clerk, v. Parr and Elkin, in contradiction of his affidavit indorsed on said summons. (3) That his honor erred in charging that there must have been a manual delivery of the summons in the case of Clawney, clerk, v. Parr and Elkin. (4) That his honor erred in charging the requests of defendant Henry L. Parr, numbered 2, 3, 5, 6, 7, 8, 9, 10, and 11. (5) That his honor erred in charging the jury upon the question of chilling the biddings at the sale under the judgment aforesaid, when there was no evidence in the case to warrant the charge. (6) That his honor erred in charging the jury as to fraud on the part of the Ruffs and Elkins, being parties to this action, in procuring the "judgment in the aforesaid case of Clawney, clerk, v. Parr and Elkin, administrator, when there was no testimony showing that they were parties to said action. (7) That his honor erred in charging the jury upon the general question of fraud in, and payment of, the judgment of Clawney, clerk, v. Parr

and Elkin, as there was no evidence to warrant such a charge. (8) That his honor erred in holding that it was necessary to have a legal representative of the estate of Henry W. Parr before the court, before he could adjudicate the equities between the parties, when it appeared from the undisputed testimony that a legal and valid judgment had already been obtained and entered against the estate of Henry W. Parr, deceased, in the case of Clawney, clerk, v. Henry L. Parr and William B. Elkin, as administrator. (9) That his honor erred in holding that the order of Judge Kershaw, amending the aforesaid judgment of Clawney, clerk, etc., was without force and effect. (10) That his honor erred in holding, on the equity side of the court, that the complaint should be dismissed," etc.

The Montgomery tract of land was the property of Henry W. Parr, the father, and never passed under the will of James Elkin; and therefore the devisees under that will have no interest therein, unless it was transferred to them by the force and effect of the sale made under the proceedings in the case of Clawney, clerk, v. Henry L. Parr and William B. Elkin, administrator. It is therefore manifest that the main question in the case is whether that judgment, and the sale under it, were binding upon Henry L. Parr, or illegal and void as to him. It is insisted that the said proceedings were and are absolutely void as to him, for at least two reasons: That he was never made a party to that case; and, if he was, that the original order for sale made by Judge Mackey did not give authority to sell the Montgomery tract of land, the same not being included in the mortgage to the commissioner, (clerk,) or in the order of sale; and the subsequent order of Judge Kershaw, to amend the order of sale by adding the Montgomery tract to it, did not cure the defects.

1. Was Parr made a party in the case of Clawney, clerk, etc., so often referred to? Being a minor under 14 years of age, he could be made a party defendant only by a strict compliance with the law upon the subject, which requires that "all civil actions in courts of record shall be commenced by service of a summons." Code, § 148. "If the action be against a minor, under the age of 14 years, a copy of the summons shall be served by delivering to such minor personally, and also to his father mother or guardian, or, if there be none within the state, then to any person having care or control of such minor, or with whom he shall reside, or in whose service he shall be employed." Code, § 155, subd. 2. The record states service of the summons upon Henry L. Parr in the usual form, and also shows that William B. Elkin accepted service "as guardian of Henry L. Parr." The judge referred the fact as to personal service of summons to the jury, and, against objection, allowed Parr himself to be examined,—

and he testified that he had never been served with any paper in the case,—and the deputy sheriff, Martin, who had served the papers, to explain and contradict his sworn return of the personal service of summons. Did the judge commit error in allowing the record to be thus assailed? There is much conflict in the authorities upon the subject, but we may assume that these propositions have been settled in this state: (1) That a void judgment, order, or decree, in whatever tribunal it may be rendered, is, in legal effect, nothing. "All acts performed under it, and claims flowing out of it, are void. Hence, a sale based on such a judgment has no foundation in law." (2) That judicial proceedings are void when the court in which they are taken is acting without jurisdiction, either as to the subject-matter or the parties. If it have jurisdiction of the subject-matter, but not of the parties, the judgment, quoad such parties, is void. (3) That, however, a judgment is considered as something more than an ordinary fact, liable to be overthrown by parol proof; that there is in its favor something more than a presumption of correctness, which may be rebutted; that this is a legal presumption, so conclusive in its character as to give the judgment immunity from impeachment in any collateral proceeding,—that is to say, "in an action other than that in which it was rendered, except upon proof of fraud, or want of jurisdiction." See 1 Rap. & L. Law Dict., "Collateral Impeachment," p. 226; *Riker v. Vaughan*, 23 S. C. 187; *Turner v. Malone*, 24 S. C. 398; *Tederall v. Bouknight*, 25 S. C. 276. From these settled principles, we think it naturally and necessarily follows that where there is a judgment regular on its face, but showing a jurisdictional infirmity, which is hidden, and can only be made to appear by proof, it is what is called a "voidable judgment," and an injured party may assail it, in a direct proceeding instituted for the purpose of setting it aside in whole or in part, for the want of jurisdiction. It is not denied, but, on the contrary, was expressly admitted, by the parties "that the defendant Henry L. Parr shall have the right to introduce any evidence and make any point in his defense which he could introduce or make in any action which he might bring, to set aside the said judgment of Samuel B. Clawney, as clerk, v. Henry L. Parr and William B. Elkin, as administrator, or in any direct proceeding which he might institute to vacate or set aside said judgment," etc. We cannot say that the circuit judge committed error in admitting the parol testimony objected to, as in conflict with the record, or in construing the provisions of the Code as to the necessity of personal service of summons on a minor under 14 years of age. See the authorities appended in a note to *Taylor v. Lewis*, 19 Amer. Dec. 135.

2. Under this view, the other grounds of

appeal lose much of their importance, but we will advert to them briefly. Clawney, as clerk, brought the contested action to foreclose the mortgage on the Elkin land, (181 acres,) given to his predecessor, as commissioner; making exhibit, also, of the mortgage on the Montgomery place, which had been given to Coleman to indemnify him as surety. There was only one order of sale, (May 9, 1877,) which referred to premises "as hereinafter set forth;" and no other premises were "set forth," except the Elkin land, (181 acres.) At the next term of the court, however, Judge Kershaw, on October 25, 1877, passed an order purporting to amend the order of sale by adding thereto, at the end thereof, a paragraph describing the Montgomery tract, under which it was sold. The judge held, as matter of law, "that Henry L. Parr, not being a party to the action, and being an infant, was incapable of employing an attorney, and that the consent of Mr. Obear as attorney gave no force and effect to the judgment, and that said order of Judge Kershaw was without force or effect." We cannot say that this was error. See *Chaffee v. Rainey*, 21 S. C. 16; *Barrett v. James*, 30 S. C. 331, 9 S. E. Rep. 263; 2 Daniell, Ch. Pr. 1028. The rule seems to be "that no alteration can be made in a decree or motion without a rehearing, except in a matter of clerical error or of form, or where the matter to be inserted is clearly consequential, on the directions already given," etc. The fourth exception, that there was error in charging the requests of Parr numbered 2, 3, 5, 6, 7, 8, 9, 10, and 11, is, as it seems to us, a clear misapprehension. The judge charged that the requests were good law, except as modified in his charge, which we are now considering. Besides, the exception is too vague and general. In order to make the points clear, it was necessary, not only to show that the requests, as modified, were still error, but in what particulars they were so.

Exceptions 5, 6, and 7 seem to complain that as the plaintiffs were not parties to the foreclosure suit in the name of Clawney, as clerk, it was error to refer to the jury the question of fact, as to the alleged fraud in chilling the biddings, etc. It is true that the plaintiffs—remainder-men under the will of James Elkin—were not nominatin parties to the foreclosure suit of Clawney, clerk, who had no interest except as a public officer. But they were, nevertheless, beneficiaries under the proceeding; the sheriff who made the sale being one, and the purchaser of the land, another, of those parties. We cannot hold that it was error to leave the question of actual fraud to the jury,—always a proper tribunal for the decision of such questions.

We are not sure that we understand what is meant by "adjudicating the equities between the parties." The plaintiffs, surely,

have no right to partition the Montgomery tract of land until their right to it is established. From the view which was taken by the circuit judge, it seems to us that there was nothing for him to do but to dismiss the complaint, as to Henry L. Parr, simply upon the ground that the sale of the Montgomery tract of land, under the aforesaid foreclosure proceedings, was, as to him, an utter nullity,—simply as void as if it had never existed. The question of payment in fact was withdrawn from the jury, and this ruling is without prejudice to any rights, which the parties may be advised that they are entitled to. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

BEASLEY et al. v. NEWELL.
(Supreme Court of South Carolina. Nov. 13, 1893.)

INDEMNITY MORTGAGE—WHAT CONSTITUTES—
FORECLOSURE—ESTOPPEL.

1. A mortgage executed by a trustee to the sureties on his bond stated that it was given to secure them "free and harmless from any loss which they may sustain on account of their being my security," and recited that, if they should be injured by being security, "if the within-mentioned premises can be sold for more than the amount which they * * * may have paid for me, that then and in that event" they should sell the premises, returning any overplus to the mortgagor. *Held*, that the latter clause did not destroy the character of the mortgage, as one of indemnity, which may be enforced by the sureties when endangered, and before actual payment of the debt for which they are sureties.

2. The probate court granted a petition by a life tenant, joined in by the trustee, which set forth that such life tenant was entitled to the interest on the trust fund, with remainder to her children, and prayed that the trustee might pay over to such children as were then of age, and to others as each became of age, their respective shares, and the trustee paid the children that were then of age their shares. Fourteen years afterwards, such life tenant and the other children filed a petition stating that such children were of age, and that the trustee was in arrears, and praying that he account to her and such children. The court ordered the trustee to forthwith pay the amounts found due, and no appeal was taken from the order. *Held* that, in an action by the trustee's sureties to foreclose an indemnity mortgage because the trustee had failed to pay as ordered, such trustee and the grantees of the mortgaged premises were estopped from claiming that the probate court had no jurisdiction to order the trust fund paid to the children during the life of the life tenant.

Appeal from common pleas circuit court of Darlington county; J. J. Norton, Judge.

Action by Reuben Beasley and W. A. Parrott Clark, as administrators of the estate of Giles Carter, deceased, against William D. Newell, to foreclose a mortgage. From a judgment sustaining exceptions to the report of a referee, and dismissing the complaint without prejudice, plaintiffs appeal. Reversed and remanded.

The report of the referee, and the exceptions thereto, are as follows:

"The above-stated case was referred by his honor, J. B. Kershaw, on the 19th day of November, 1887, to J. J. Ward, as special referee, to ascertain and report what amount is due the plaintiff on the mortgage claim set forth in the complaint, and that he hear and decide all other issues raised by the pleadings, and report his findings of law and fact to this court. It being so that the said J. J. Ward could not act as said referee, the undersigned was, per agreement, substituted, and hereby submits the following report:

"James Newberry, of the county and state aforesaid, by his will, left certain property in trust to Alexander M. Newberry and Samuel C. Graham, for the use of Elizabeth Jane Scaff for life, and after her death to be divided among her children. That the said Alexander M. Newberry and Samuel C. Graham declined to accept the said trust, and that, by due proceeding held in the court of equity, one Isaac J. Newberry was appointed trustee on the 16th day of February, 1859. That the said Reuben Beasley and Giles Carter, the intestate of the said J. N. Garner, became the sureties on the trust bond of the said Isaac J. Newberry. That the said Isaac J. Newberry, on the 9th day of November, A. D. 1859, executed the mortgage in question (a copy of which is hereunto attached) to the said Reuben Beasley and the said Giles Carter to indemnify them against all loss by reason of the said suretyship. The said mortgage was duly recorded in the office of R. M. C. for the county and state aforesaid, on the 25th day of April, 1860, in book T, pages 414 and 415. On September 7, 1872, the said Elizabeth Jane Scaff filed a petition in the office of the probate judge for the county and state aforesaid, setting forth that she was only entitled to the interest of the trust fund for her natural life, with remainder to her children, and praying that the court would empower the trustee to pay over to the children then of age, and to the ones then under age, as each became of age, their respective shares in the trust funds; stating that she, the said Elizabeth Jane Scaff, was willing to make such a surrender of her life interest, and that the said trustee concurred and joined in said petition. That the judge of probate, James M. Brown, passed an order on the 7th day of September, 1872, granting the prayer of said petition. That in accordance with that order the said trustee paid over to the children then of age, to wit, James J. Scaff and Mary A. Baker, their respective shares. That Frances Rebecca Cobb, Milton Scaff, Annie Dubose, Nettie Lovett, and Elizabeth Jane Scaff, on the 15th day of March, 1886, filed a petition in the probate court against Isaac J. Newberry, as trustee, alleging that he, the said Isaac J. Newberry, as trustee, had failed to pay over to the children as they

arrived of age, and also to pay the interest annually to the life tenant, the said Elizabeth Jane Scaff. That, after due proceeding had in the probate court, the Hon. E. C. Baker, judge of said court, on the 15th day of May, 1886, filed a decree against the said Isaac J. Newberry, to wit, that the said I. J. Newberry do pay over, forthwith, to said Elizabeth Jane Scaff the said sum of \$650.04, being the amount of interest due her as aforesaid. It is further ordered that he do also, forthwith, turn over and distribute equally to and among the said Frances Rebecca Cobb, Milton Scaff, Minnie Dubose, and Nettie Lovett the said trust fund of \$403.36, with interest on each of said sums, to the respective parties, till the same is paid. That abstract of said judgment was duly filed. That the parties in interest pressed for payment, but the judgment has never been paid by the said trustee or by the said sureties, and that the amount due by the said trustee is the amount of the said judgment and cost, plus the interest, which amounts to the sum of one thousand four hundred and seventy-six 86-100 dollars, up to date. That the said Reuben Beasley lives in Arkansas, and that the estate of the said Giles Carter is insolvent. That the said defendant, W. D. Newell, came into possession of the land through intermediate purchasers of the said Isaac J. Newberry, by deed bearing date 4th day of December, 1878, for the sum of \$1,150. That Newell (the defendant) was a purchaser with notice. The above is a concise statement of the facts, as I find them.

"Questions of law: Can the sureties on a trust bond foreclose a mortgage like the one in question, given to secure them free and harmless on account of their being my security on said bond against a purchaser with notice, when the sureties have not paid anything by reason of the default of the trustee? A surety is not liable to suit on a trust bond until it has been judicially ascertained that the trustee has defaulted. *Orane v. Moses*, 13 S. C. 561. It has been judicially determined by the judgment of the probate court that the trustee, Isaac J. Newberry, is in default. Therefore, the sureties are liable to suit, and have become endangered thereby, and can foreclose a mortgage against the principal, given to indemnify them against loss. *Tankersley v. Anderson*, 4 Desaus, Eq. 45; *Hellams v. Abercrombie*, 15 S. C. 110. Can the sureties foreclose against Newell, a purchaser with notice? I hold that they can. Granting that the judgment does not bind Newell as to amount, and that he had a right to surcharge and falsify the same,—on which points no evidence was introduced,—it is evidence of the default of the trustee. The defendant claimed that the order of the probate court passed on the 7th of September, 1872, changed the contract of suretyship, and thereby discharged the sureties. It is a principle of law that, when the cred-

itor and principal change the terms of the contract, the surety is released, but that principle does not apply in this case. Whatever change of contract there was, it was done by the court, and the principal was a party; and, furthermore, that rule is for the protection of the sureties, and those claiming under them, and not for the principal, who was a party to it, or those parties who claim under or through the principal. I recommend that the mortgage be foreclosed; that the land be sold by the clerk of court, and the proceeds applied to the said debt, of one thousand four hundred and seventy-six and 86-100 dollars, (\$1,476.86); and I further recommend that the plaintiffs' attorneys be paid out of the proceeds a fee of one hundred dollars, and after paying the said debt and fee, and the cost of this action, the surplus, if any, to be paid to the defendant."

Exceptions to referee's report: "The defendant excepts to the report of T. H. Spain, Esq., referee herein, dated the 2d day of November instant: (1) Because the said referee erred, in law, in finding that the said mortgage from Newberry to the sureties on his bond as trustee was the ordinary obligation of indemnity, whereas the said referee should have found the said mortgage to be a special contract, binding on Newberry only in case of actual loss to his sureties. (2) Because the said referee erred, in law, in finding that there was a breach in the condition of the said mortgage from Newberry to his sureties before actual loss to them. (3) Because the said referee erred, in law, in finding that the probate court had jurisdiction of the action instituted by Elizabeth Jane Scaff against Isaac J. Newberry to recover the amount due to her by him as trustee. (4) Because the said referee erred, in law, in finding that the indebtedness of Newberry as trustee was legally established against the defendant. (5) Because the said referee erred, in law, in finding that the agreement of Newberry to pay the remainder-men the corpus of the estate could be enforced against the sureties or against the defendant before the death of the tenant for life. (6) Because the said referee erred, in law, in finding that the probate court had jurisdiction in the premises, and that the order of the said court of date September 7, A. D. 1872, is binding and conclusive as to the defendant, whereas the said referee should have found that the said probate court had no such jurisdiction, and that the said order is null and void as to the defendant. (7) Because the said referee erred, in law, in finding that the said probate court had power to so change and alter the contract of suretyship of the said sureties as to charge them and the defendant with the payment of the corpus of the trust estate to the remainder-men during the lifetime of the life tenant. (8) Because the said referee erred, in law, in awarding judgment to the plaintiffs

against the defendant during the lifetime of the tenant for life, for a sum of money due to the remainder-men only on and after her death."

Boyd & Brown, for appellants. E. Keith Dargan, for respondent.

McIVER, C. J. By the will of James Newberry, certain property was given to trustees to hold for his daughter Jane Elizabeth Scaff for life, and after her death to be equally divided among her children. The trustees named in the will having declined to accept the trust, one Isaac J. Newberry was, by proper proceedings in the court of equity, duly appointed trustee in the place of those named in the will, and as such entered into bond, with the plaintiff Reuben Beasley, and Giles Carter, the other plaintiff's intestate, as his sureties, conditioned for the faithful performance of the duties of his trust. Shortly afterwards, the said Isaac J. Newberry executed a mortgage of a tract of land to the said Beasley and Carter, a copy of which is set out in the case; and, as this appeal turns largely upon the proper construction of the terms of that mortgage, it is proper that the same should be set out here, substantially, omitting only the formal parts thereof. Its recital is as follows: "Whereas, Giles Carter and Reuben Beasley * * * did this day sign and execute, as my security as (on) a trusteeship bond to T. B. Haynesworth, commissioner in equity for Darlington district, for the penal sum of two thousand four hundred dollars, conditioned that the said I. J. Newberry shall and do well and truly discharge all the duties which may devolve upon him as trustee for Mrs. E. Jane Scaff, wife of Riley Scaff, and the children of said E. Jane Scaff: Now, know ye, that I, the said I. J. Newberry, for the purpose of securing the said Giles Carter and Reuben Beasley free and harmless from any loss which they may sustain on account of their being my security on said bond as aforesaid, and for and in consideration of the sum of five dollars. * * * The condition of the above bargain and sale is this: That if I, the said I. J. Newberry, shall keep and save the within-named Giles Carter and Reuben Beasley harmless from any loss which they may sustain by their being my security as aforesaid, then the above sale shall be null and void; otherwise, it shall remain in full force and virtue. And it is agreed by and between the parties aforesaid that the said I. J. Newberry is to have and retain peaceable possession of, all and singular, the premises within mentioned, until the said Giles Carter and Reuben Beasley shall sustain loss by being my security as aforesaid. And in the event that they should be injured by being my security as aforesaid, if the within-mentioned premises can be sold for more than the amount which they, the said Carter and Beasley, may have paid for me, that then, and

in that event, the said Carter and Beasley shall sell and dispose of said premises, returning the overplus, if any, after paying all liabilities and costs, to said I. J. Newberry, or his heirs and assigns." This mortgage was duly recorded on the 25th of April, 1860. Subsequently, the land covered by this mortgage came into the possession of the defendant, William D. Newell, through intermediate purchasers from said Isaac J. Newberry, under a deed dated 4th of December, 1878. Two proceedings were instituted in the court of probate, the first being a petition filed by the said E. Jane Scaff on the 7th of September, 1872, setting forth that she was only entitled to the interest of the trust fund for life, with remainder to her children, and praying that the trustee, I. J. Newberry, be empowered to pay over to such of the children as were then of age, and to the minors as each became of age, their respective shares of the trust fund, she, the said E. Jane Scaff, being willing to make such surrender of her life interest. The trustee concurred in this petition, and joined in the prayer thereof. Accordingly, the judge of probate, on the same day, made an order granting the prayer of the petition, and in accordance therewith the trustee paid over to the two children who were then of age their shares in the trust fund. The other proceeding was a petition filed by the other children and Mrs. Scaff on the 15th of March, 1886, setting forth the proceedings under the previous petition, that these children had now become of age, and that the trustee had failed to pay to Mrs. Scaff any interest due her since the 1st of January, 1873, and praying that the trustee should account for his actions and doings as such, and pay over to the petitioners the amounts found due them, respectively. Whereupon, a hearing was had before the judge of probate, who rendered his decree adjudging that the trustee was indebted to Mrs. Scaff in the sum of \$650.04, arrears of interest, and was likewise indebted to the other petitioners in the sum of \$403.36, to be equally divided between them, and he was ordered to pay the said amounts forthwith. Mrs. Scaff and her children, through their attorney, made demand upon the trustee for the payment of the money thus found to be due, which proving to be fruitless, demand was made upon the plaintiff Beasley, and the representative of Carter, deceased, as sureties on the bond of the trustee, whereupon the mortgage above mentioned was put into the hands of the attorney for foreclosure, who commenced action for that purpose on the 4th of October, 1886. The issues in the action were referred to a referee, who made his report, (a copy of which should be incorporated in the report of this case,) wherein, after finding the facts substantially as above stated,—that one of the sureties, Beasley, was absent from, and resided beyond the limits of, this state; that the other surety,

Carter, had died insolvent; and that the defendant was a purchaser with notice,—he found, as matter of law, that the plaintiffs were entitled to have foreclosure of the mortgage, even though they had paid nothing for their principal, and recommended judgment accordingly. To this report the defendant filed the several exceptions set out in the case, and the same came before his honor, Judge Norton, who rendered the following judgment: "There are no exceptions to the referee's findings of fact in this case, and they are adopted; and I agree with him in his conclusions of law, except two: (1) I construe the mortgage given by I. J. Newberry to be a special agreement to repay his sureties any moneys which they should have been required to pay for him. The use of the word 'loss,' without more, would have entitled the sureties to the relief sought, if the proper parties were before the court; but the expression, 'the amount which they may have paid for me,' as synonymous with 'injury,' which had just been used as synonymous with 'loss,' leads me to the interpretation above announced, which seems more conclusive because it is not until that event that they are authorized to sell the mortgaged premises. And (2) the probate court had no jurisdiction, either to call the trustee to account, or to pass the order authorizing and requiring him to anticipate the payment of the corpus of the trust estate. The exceptions of the defendant to the referee's report are overruled or sustained in accordance with the above opinion. It is adjudged that the complaint be dismissed without prejudice to the right of plaintiffs, or any other person interested, to proceed, in such manner as they may be advised, to attain the object of this action." From this judgment, plaintiffs appeal, upon the several grounds set out in the record, which need not be repeated here, as the appeal really makes but two questions: (1) As to the construction of the mortgage; (2) as to the question of the jurisdiction of the court of probate.

Ever since the case of Tankersley v. Anderson, 4 Desaus. Eq. 44, it has been regarded as the settled law of this state that a surety who holds a mortgage or other collateral security given him to indemnify him against loss by reason of his suretyship may proceed to enforce such mortgage or other security as soon as he becomes endangered, and before actual payment of the debt for which he has become security. This doctrine has been fully recognized as late as the case of Hellams v. Abercrombie, 15 S. C. 110. Indeed, we do not understand that the circuit judge disputes it, for he rests his conclusion solely upon the terms of the mortgage, which he construes to be nothing more than a special agreement to pay whatever amount his sureties may have paid for him, and not a mortgage of indemnity. So that our first inquiry is whether the

judge erred in his construction of the terms of the mortgage. It cannot be denied that this instrument, down to its last sentence, is an ordinary indemnity mortgage. After reciting the fact that Carter and Beasley had become his sureties on the trusteeship bond, the mortgagor declares, in the most explicit terms, that he gives the mortgage "for the purpose of securing the said Giles Carter and Reuben Beasley free and harmless from any loss which they may sustain on account of their being my security on said bond as aforesaid." It would seem that language could not express more clearly the real intention of the parties to this instrument,—to make an ordinary mortgage of indemnity. It is urged, however, that the last clause in the mortgage converts it into a mere special agreement to repay the sureties any money which they may have been required to pay for the mortgagor, and, hence, that the sureties could not maintain their action without showing that they had actually paid something. It is very obvious that the language used in the last clause of the mortgage does not very clearly express the manifest intention of the parties, for, if that language be literally construed, the sureties, even if they had paid the full amount of the bond, could not proceed to sell the mortgaged premises unless the same could be sold for more than the amount thus paid. The language is: "And in the event that they [the sureties] should be injured by being my security as aforesaid, if the within-mentioned premises can be sold for more than the amount which they, the said Carter and Beasley, may have paid for me, that then, and in that event, the said Carter and Beasley shall sell and dispose of said premises, returning the overplus, if any, after paying all liabilities and costs, to said I. J. Newberry, or his heirs and assigns." Under a literal construction of this language, the sureties could not sell the mortgaged premises, even to reimburse themselves for any money they may have paid, unless the mortgaged premises could be sold for more than the amount thus paid, for the power of sale is only conferred "if the within-mentioned premises can be sold for more than the amount thus paid," and it is only "then, and in that event," that the power of sale is given. But it is very obvious that no such construction could be adopted, as that would be so totally at variance with the whole tenor and manifest object of the instrument as to show that such cannot be the proper construction. Indeed, it would border on absurdity to hold that the mortgaged premises could not be sold for an amount which would be a single dollar less than the amount paid by the sureties, and thus defeat the manifest and declared purpose of the mortgage, and yet if sold for a single dollar, or even five cents, more than such amount, the sale would be valid. It

is absolutely necessary, therefore, that some other than a literal construction of this last clause should be adopted. What, then, is the proper construction of this paper? As is well said by Mr. Justice McGowan in the case of *Anderson v. Holmes*, 14 S. C., at page 165, where a similar attempt was made to control the construction of a mortgage by certain words found in the closing sentence of the mortgage: "The intention of the parties to make a mortgage is clear. The object of construction is to ascertain what the parties meant by the terms and expressions used, and, where the intent can be clearly and distinctly ascertained, it will prevail, not only in cases in which it is not fully and clearly expressed, but even when it contradicts particular terms of the agreement. The general intention, to be collected from the whole context and every part of a written instrument, is always to be preferred to the particular expression." Guided by this rule, let us look at the instrument which we are called upon to construe. The instrument is in the form of a mortgage of indemnity, and its declared purpose is to save the sureties harmless from any loss which they may sustain by reason of their suretyship. All the terms of the instrument, down to the very last sentence, are in conformity to this declared purpose. Can the particular expression used in the last clause be allowed to control, and in fact destroy, the general intention? The authority just cited says no. Besides, as we have seen, the language used in the last clause cannot, with any sort of propriety, be given a literal construction, and therefore some other must be adopted; and what other more appropriate than that which will make it conform to the manifest and declared intention in the previous portion of the mortgage? Indeed, we think that the sole object of the last clause was to provide for the payment to the mortgagor or his assigns of any balance of the proceeds of the sale of the mortgaged premises which might remain after paying the amount of the mortgage debt, so to speak, and the costs and expenses of enforcing the mortgage; and this accounts for what would otherwise be the very extraordinary provision (to use no stronger term) authorizing a sale only in the event that the mortgaged premises could be sold for more than the amount paid by the sureties.

Again, it is a well-settled doctrine of equity that a creditor is entitled to avail himself of any security which may be held by the sureties to insure the payment of his debt; but, if the security held by the sureties in this case could not be enforced until the sureties have paid their liability on the bond of their principal, the result might and probably would be, in this case, that the beneficiaries of the trust would lose the benefit of this equity, and the declared object of the mortgage be defeated, for it appears that

one of the sureties has died insolvent, and the other is beyond the jurisdiction of the court; and hence it is not at all likely that anything ever would be paid by the sureties, or either of them. It seems to us, therefore, that the circuit judge erred in the construction which he put upon the mortgage.

Next, as to the question of the jurisdiction of the court of probate. Under the facts, as found in this case, we do not deem it necessary to inquire into that question, for the trustee, Isaac J. Newberry, having submitted himself to the jurisdiction of that court, and having acted under the judgment first rendered, by paying over to such of the children as were then of age their shares of the trust fund, as directed by the decree of the judge of probate, and having acquiesced in the second decree by not raising the question of jurisdiction, or appealing from the decree, is estopped from now disputing the jurisdiction of the court of probate, (*Finley v. Robertson*, 17 S. C. 435;) and the defendant, who claims under him, and is only entitled to his rights in the premises, would likewise be estopped. It may be that the defendant might still be at liberty to surcharge and falsify the account, as taken in the court of probate; but this does not appear to have been attempted, and, as no question of this kind seems to have been raised in the circuit court, we are not at liberty to consider it.

There seems to have been some question raised before the referee as to whether the sureties were not discharged by an alleged change in the contract, but as that question was determined by the referee adversely to the defendant, and his finding in that respect was confirmed by the circuit judge, to which no exception has been taken, the question is not before us, and we are not to be regarded as determining anything upon that subject. It seems to us, however, that, inasmuch as one of the sureties has died insolvent, and the other is beyond the jurisdiction, the ends of justice require that the complaint should be amended so as to make the beneficiaries of the trust fund parties, in order that the proceeds of the sale of the mortgaged premises, or so much thereof as may be necessary to satisfy their claims, may be paid to them directly, instead of to the surviving surety and the representative of the deceased insolvent surety, after making proper provision for the payment of their counsel fees. The trustee, Isaac J. Newberry, may also be made a party, if it is desired to raise the question whether the defendant can now be permitted to surcharge and falsify the accounts heretofore taken in the court of probate. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for the purpose of carrying out the views herein announced.

MCGOWAN and POPE, JJ., concur.

PORTER et al. v. JEFFERIES et al.

(Supreme Court of South Carolina. Nov. 18, 1893.)

COVENANT OF WARRANTY—ACTION FOR BREACH—MISTAKE OF LAW—ESTOPPEL—USURY.

1. In an action for breach of covenants of warranty in a mortgage, the attorney who drew the mortgage cannot testify to previous conversations of the parties as to their intentions, in the absence of an allegation or proof that any fraud was intended by any of the parties to the mortgage, since its true construction must be gathered from the terms in which the intentions of the parties were expressed in writing.

2. In an action against executors on covenants in a mortgage executed by them, an answer alleging, generally, that, in executing the mortgage, defendants did not intend to bind themselves personally on the covenant of warranty, and that plaintiff's attorney told them they would not be so bound, does not state facts constituting a defense, and testimony as to the alleged mistake is properly excluded.

3. A mistake of law as to the construction of a written instrument is not a ground for equitable relief.

4. A mortgagee is not estopped to sue for breach of the covenant of warranty in the mortgage because defendant executors executed it under a representation of plaintiff's attorney that they would not be bound personally by the covenant, since defendants cannot take the benefit of the mistake as to the legal effect of the terms of the mortgage, without allowing plaintiff the benefit of the misrepresentation, though innocently made, as to the title to the land offered by defendants as security for the money obtained.

5. Where the maker of a note tainted with usury borrowed from the holder, and incorporated the two debts into a new note secured by a mortgage, it was not error to charge that the new loan was not tainted with usury by the fact that the original note was tainted.

6. Since Acts 1882, (18 St. 36,) providing for a forfeiture of double the sum received as usurious interest, requires it to "be collected by a separate action or allowed as a counterclaim to any action for the principal sum," a counterclaim for such forfeiture is properly excluded in an action for breach of a covenant of warranty in a mortgage given to secure a usurious note.

Appeal from common pleas circuit court of Spartanburg county; J. J. Norton, Judge.

Action by John A. Porter and another, as executors of R. C. Oliver, deceased, against John R. Jefferies and Eber C. Allen, for breach of covenants of warranty contained in a mortgage. From a judgment for plaintiffs, defendants appeal. Affirmed.

Stangarne Wilson, for appellants. C. P. Sanders and D. E. Hydrick, for respondents.

MELVER, C. J. This action was originally commenced by R. C. Oliver, and upon his death continued in the name of his executors, the plaintiffs above named. The object of the action was to recover damages for the breach of covenants of warranty contained in a certain mortgage, a copy of which is set out in the case; but, as we propose to extract therefrom so much of the terms thereof as bear upon one of the points made by this appeal, it is unnecessary to set out the

mortgage in extenso. It seems that Woodward Allen, of whose will the defendants are the duly-qualified executors, being indebted to Jesse F. and John B. Cleveland in a large sum of money, during his lifetime executed a mortgage on 835 acres of land to secure the payment of said debt, and that after his death the defendants, being executors as aforesaid, desired to pay the Cleveland debt, because it was bearing a high rate of interest, and for this purpose borrowed from R. C. Oliver the sum of \$3,500, and extinguished the Cleveland mortgage, giving to said R. C. Oliver a mortgage on the same land covered by the Cleveland mortgage. Subsequently, the defendants procured another loan from said R. C. Oliver, the amount of which, together with the amount then due on the former loan, was embraced in a new note, and secured by a new mortgage on the same land; and it is this new mortgage which contains the covenants, the breach of which constitutes the cause of action in the present case. So much of this last-mentioned mortgage as is pertinent to the questions raised by this appeal reads as follows: "We, John R. Jefferies and E. C. Allen, executors of the last will and testament of Woodward Allen, deceased, by virtue of the power given to us in said will and testament, of the county and state aforesaid, send greeting: Whereas, we, the said John R. Jefferies and E. C. Allen, executors as aforesaid, in and by a certain note bearing date the twenty-second day of February, A. D. 1884, promise to pay R. C. Oliver or order the sum of three thousand and seven hundred and twenty-five dollars, (\$3,725.00,) payable on the 1st day of January, 1885, with interest from the 1st of February, 1884, at 10 per cent. per annum till paid. * * * Now, know all men that we, the said John R. Jefferies and E. C. Allen, in consideration of the said debt and sum of money aforesaid, and for the better securing the payment thereof to the said R. C. Oliver, according to the terms of the said note, and also in consideration of the further sum of three dollars to us, the said Jefferies and Allen, in hand well and truly paid by the said R. C. Oliver, * * * we, the said Jefferies and Allen, executors as aforesaid, have granted * * * being the tract on which Mrs. Allen, the widow of the late Woodward Allen, now resides, containing eight hundred and thirty-five acres, (835,) more or less, and being the tract of land of which the late Woodward Allen, at the time of his death, was seised in fee. * * * And we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said R. C. Oliver, his heirs and assigns, from and against us and our heirs, executors, administrators, and assigns, and all persons lawfully claiming or to claim the same, or any part thereof." The attesting clause of the mortgage is in these

words, "Witness our hands and seals this 22nd day of February, A. D. 1884," and it is signed as follows: "John R. Jefferies, [L. S.,] Eber C. Allen, [L. S.,] Executors of W. Allen, deceased."

The breaches of this covenant of warranty, as assigned in the complaint, are as follows: (1) That by proceedings in this court, to which the defendants as well as the said R. C. Oliver were parties, it has been adjudged that three hundred and thirty-five acres of the land embraced in the mortgage did not belong to the said Woodward Allen, but was the individual property of his widow, Mrs. Harriet Allen, and therefore not liable to the lien of the mortgage. (2) That in the same or similar proceedings it has been adjudged that the said widow is entitled to both dower and homestead in so much of the mortgaged premises as remained after taking off the said 335 acres adjudged to be the individual property of Mrs. Allen. The defendants, in their answer, set up several defenses: (1) That of mistake in executing the mortgage; (2) estoppel arising from the representations made to them at the time of the execution of the mortgage by the attorney of Oliver; (3) estoppel arising from a former proceeding to which both Oliver and these defendants were parties; (4) that the lands of Woodward Allen, when sold under the mortgage, were bid off by R. C. Oliver at much less than their real value, and he should be required to credit his mortgage with the full value of the land bought by him; (5) usury in the note secured by the mortgage; (6) a counterclaim for double the amount of usurious interest paid on the note secured by the mortgage. The case came on for trial before his honor, Judge Norton, and a jury, and after his charge the jury found a verdict in favor of the plaintiffs for \$603.98; and, judgment having been entered, the defendants appeal upon the several grounds set out in the record.

We will first take up those which impute error to the circuit judge in his rulings as to the admissibility of testimony. The first ground alleges error in refusing to allow Mr. Carlisle to answer the following question: "Was it not a fact that they [meaning the defendants] considered the land as belonging to Woodward Allen?" On turning to that part of the case where this question was objected to, we find that counsel for defendants explained by saying: "I am asking him, as the representative of both parties, if he believed at that time the mortgage was upon the land of Woodward Allen?" Taking the question in either form, it seems to us that there was no error in ruling the question irrelevant. It seems that the parties repaired to the office of Mr. Carlisle, who had been for some time the attorney of Oliver, and there the mortgage was drawn and executed, from the description of the land in the Cleveland mortgage. How Mr. Car-

lisle could know what the defendants considered as to the ownership of the land, except from what was said at the time, or how what was considered, or what he himself believed, could affect any question raised by this appeal, we are at a loss to conceive. There is no allegation, and certainly no proof, that any fraud was intended by any of the parties, and any previous conversation as to the intention or legal effect of the mortgage was merged in the instrument as it was written; and, without any such allegation or proof, the true construction of such instrument must be gathered from the terms in which their intentions were expressed in writing.

The testimony alleged to be erroneously excluded in the second, third, and fourth grounds of appeal was so manifestly irrelevant to any issue raised by the pleadings, or so clearly immaterial, that we do not deem it necessary to dwell upon it. The fifth ground will be more appropriately considered in connection with the eighth, for, as matter of fact, the testimony there referred to was received, though the judge afterwards instructed the jury to disregard it; so that the objection was really more to the charge than to the ruling as to the admissibility of the testimony.

The sixth ground complains of error in permitting plaintiffs to ask Mr. Carlisle the question whether he would have told the defendants that they were not personally liable on the mortgage, if he had known, or if it had been intimated to him, that Mrs. Allen claimed a part of the land embraced in the mortgage. Even if this question had been incompetent, the answer to it, certainly, was not incompetent, for his answer was in accordance with what he had said before, without objection, viz. "I would not have taken the mortgage at all." So far as we can perceive, the witness did not then answer the hypothetical question as to whether he would have told the defendants they were not personally liable upon the covenants in the mortgage if he had known, or if it had been intimated to him, that Mrs. Allen claimed a considerable part of the land covered by the mortgage. If he can be regarded as saying anything upon that subject, it was in reply to a subsequent question, to which no objection was interposed, to wit: "If you did state to them [referring to the defendants] that they were not liable individually, upon what was that based?" to which the reply was "that they were acting under the will, mortgaging the land belonging to their testator." Indeed, it is manifest from all the testimony upon this point that both Mr. Carlisle and the defendants, at the time the mortgage was executed, regarded the whole of the land as subject to the lien of the mortgage, which Mr. Carlisle regarded as ample security for the debt; and hence anything that may have

been said as to the personal liability of defendants was said in that view, for, of course, if the value of the mortgaged premises was sufficient to secure the payment of the debt, no personal liability could have been incurred. We think, therefore, that in any view of the matter the sixth ground of appeal cannot be sustained.

The seventh ground of appeal, which imputes error to the circuit judge in holding that the covenant of warranty in the mortgage was the personal covenant of the defendants, and binding upon them as individuals, need scarcely be considered, for it is admitted by counsel for defendants that the authorities sustain the view taken by the circuit judge; and we need not go further back than the cases of *McDowall v. Reed*, 28 S. C. 486, 6 S. E. 300, and *Moss v. Johnson*, 36 S. C. 551, 15 S. E. 709, to show that such admission was amply justified.

We come then to the fifth and eighth grounds of appeal, which raise what seem to be regarded by counsel for appellants the most material questions in the case. The circuit judge held that, inasmuch as the allegations in the answer were not sufficient to raise the question of mistake on the part of the defendants in giving such a covenant of warranty as would bind them personally, all the testimony bearing upon that alone should be disregarded by the jury, and that defense must be determined adversely to the defendants. In the argument here, counsel for appellants rely upon paragraphs 2, 3, and 6 of the answer to show that the defense of mistake was sufficiently pleaded; and, in justice to the appellants, these paragraphs should be incorporated in the report of this case. It seems to us that the allegations there found are too general in their character to warrant the introduction of evidence to sustain the defense relied on. These allegations, practically, amount to this,—that the defendants, in executing the mortgage, did not intend to bind themselves personally by the covenant of warranty, and that they were told by Oliver's attorney that they would not be so bound. There is no allegation that any words were omitted which ought to have been inserted, nor any words inserted which ought to have been omitted. Indeed, there is no allegation of any fact upon which an issue could be raised, unless it be the fact that they were "told by plaintiff's attorney, in his presence, that they assumed no individual liability thereby," and that fact alone, as we shall see presently, was not sufficient to sustain the defense. It seems to us, therefore, that these paragraphs were demurrable, upon the ground that they did not state facts sufficient to constitute any defense; and if so, then, clearly, there was no error in excluding testimony as to such allegations. *Pom. Rem.* § 603. There was no error, therefore,

on the part of the circuit judge, in excluding from the consideration of the jury the testimony as to the alleged mistake. But, as it is possible (though we are not to be regarded as so holding) that the defect in the answer might have been cured by amendment, we are not content to rest our judgment upon the ground of defect in the pleading.

It is not pretended that there was any fraud or concealment on the part of either Oliver or his attorney, nor can it be pretended that the mistake relied on was as to any matter of fact. If any, it was a mistake of law, and, what is more, a mere mistake as to the proper construction of a written instrument. Against such a mistake, a court of equity will not relieve. In 15 Amer. & Eng. Enc. Law, 637, we find the following proposition laid down, and supported by quite an array of authorities: "A mistake on the part of a person executing an instrument as to its legal effect, or that it has an effect different from that intended, cannot avail to avoid that construction of the instrument which the language used, and the rules of law as applied thereto require." So in 2 Pom. Eq. Jur. § 843, we find the following: "The rule is well settled that a simple mistake by a party as to the legal effect of an agreement which he executes, or as to the legal result of an act which he performs, is no ground for either defensive or affirmative relief." This doctrine is fully supported by our own cases. *Keitt v. Andrews*, 4 Rich. Eq. 349, and *Munro v. Long*, 35 S. C. 360, 14 S. E. 824. We do not think, therefore, that, even if the mistake here relied upon had been fully made out, it could have availed the defendants as a defense in this action.

The ninth and tenth grounds both relate to the defense of estoppel, and may therefore be considered together. We do not think that there is any just foundation for these grounds. The appellants claim that inasmuch as they executed the mortgage containing a covenant of warranty, which, as we have seen, bound them personally, the plaintiffs are estopped from enforcing such covenant because they signed the mortgage under a representation made to them by the attorney of Oliver that they would not be bound personally by such covenant; but they take no account of the fact that they obtained Oliver's money by a representation that all of the land embraced in the mortgage was subject to the lien thereof, for the land is described in the mortgage as "being the tract of land of which the late Woodward Allen, at the time of his death, was seised in fee." It does not seem to us to be at all in accordance with the principles upon which the doctrine of estoppel rests to allow the defendants to avail themselves of the benefit of an alleged mistake in the construction and legal effect of the terms of the mort-

gage, without at the same time allowing the plaintiffs the benefit of a misrepresentation, though innocently made, as to the title to the land offered as security for the money which they obtained. The plaintiffs cannot be estopped from bringing their action to recover damages for a breach of warranty plainly written in the mortgage, when such breach has been occasioned by the misrepresentation (innocent though it be) made by the defendants, in the mortgage, as to the title to the land warranted to be in Woodward Allen. Indeed, it is a mistake to say that defendants were misled by the statement of plaintiffs' attorney, for it is clear, from the undisputed testimony, that Mr. Carlisle was acting for both parties, and the language used by the defendant Jefferies in reply to the question when he asked Mr. Carlisle whether they would be responsible as individuals, as to both of the mortgages, his reply was, "Yes, that was the general counsel he gave me all the time," showing very clearly that he regarded Mr. Carlisle as his attorney, as well as the attorney of Oliver, for otherwise he would have had no right to call on Mr. Carlisle for "counsel."

The eleventh ground imputes error to the circuit judge in charging that \$500, part of the debt, would not be tainted with usury, even though the original debt was so tainted. As we understand, the undisputed testimony in the case was that the original sum borrowed was \$3,500, which it is claimed was tainted with usury; and after that debt had been running for some two or three years the defendants borrowed another sum, of about \$500, to pay the balance on a note due to the bank, and then the two debts were incorporated in a new note, which was secured by the last mortgage; and, as we understand the charge, the jury were instructed that the mere fact that the original note was tainted with usury would not have the effect of tainting the new loan with usury, and in this we see no error. But as it seems to us that the figures show clearly that the verdict of the jury could not have been reached if any interest had been allowed upon any part of either of the debts, the instruction complained of, even if erroneous, could not possibly have affected the result, and therefore the error, if there was one, becomes wholly immaterial.

The twelfth ground alleges error in ruling out the counterclaim for double the usurious interest paid. The second section of the act of 1882 (18 St. 36,) provides, as an additional penalty for receiving usurious interest, a forfeiture of double the sum so received, "to be collected by a separate action, or allowed as a counter-claim to any action brought to recover the principal sum." This, being a penalty imposed only by a special statutory provision, can be enforced only in the mode prescribed by the statute; and as it is there declared "allowed as a

counter-claim to any action brought to recover the principal sum," and as this is not an action to recover the principal sum, but, on the contrary, an action to recover damages for the breach of a covenant of warranty, it is quite clear that there was no error in excluding the counterclaim.

The only remaining ground, the thirteenth, claims that there was error in charging the jury that the allowance of a homestead would constitute a breach of the covenant of warranty. While it is quite true that in one portion of his charge the circuit judge did say to the jury that he thought the taking the homestead out of the land would be a breach of the covenant of warranty, yet after a colloquy between himself and counsel as to the homestead, in the concluding part of the charge, the matter of homestead was dropped out; and the jury were practically instructed that, if they found that there was usury in the whole transaction, then, in order to ascertain what damages the plaintiffs had sustained by reason of the breach of warranty, they should add together the principal sums of the two notes, \$3,500 and \$510.95, and the amount paid for dower, \$963.64, and from the sum thus ascertained deduct the sum of all the payments made upon the mortgage debt, and the balance would be the damages which the plaintiffs were entitled to recover. This, as we understand the figures, was just what the jury did, and hence the question as to the homestead became wholly immaterial. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

TOMPKINS et al. v. TOMPKINS et al.
(Supreme Court of South Carolina. Nov. 4, 1893.)

JUDICIAL SALES—VALIDITY — ORDER FOR RESALE.

1. Where the decretal order for a sale of land fixes the date thereof, a sale made at any other time is unauthorized and void.

2. After a purchaser at judicial sale had paid into court a part of the price bid by him, and the money so paid had, by order of court, been used for the purposes of the action, the sale was declared void, as having been made at an unauthorized time. *Held*, that it was proper to order another sale, subject to the condition that if no bid was made, greater than the price paid at the former sale, the former sale should be confirmed, and that if there were such bid the former sale should be declared void, and the money paid thereon be returned to the purchaser.

Appeal from common pleas circuit court of Edgefield county; James F. Izlar, Judge.

Action by J. G. Tompkins and others against S. S. and J. W. Tompkins, executors, and others. From an order setting aside a sale of land by the master, and directing a resale thereof, S. S. Tompkins and one W. R. Parks, the purchaser at such sale, appeal. Modified.

The decretal order of the circuit judge was as follows:

"This is a motion, upon due notice, by the defendants, to set aside a sale of certain real estate made by the master under an order passed in the said cause on the 11th day of March, 1891, upon the following grounds: (1) That the order obtained at the March term, 1891, was passed without notice to the plaintiffs or defendants, or any of them. (2) That all the parties interested in said land were not parties to this suit in March, 1891, and are not now parties herein. (3) That the order passed at March term, 1891, was in all respects regular, and properly passed. It authorized the master to sell only 'on sales day in November, 1891,' and on no other day or at any other time; and the sale reported as having been made on the 3d day of January, 1892, was a surprise to and a fraud upon the parties in interest, without authority, and void. The motion was heard by me at the March, 1892, term of the court of common pleas for said county.

"The facts necessary to a full understanding of this question raised and to be determined are, briefly, as follows: The action was commenced several years ago for an accounting and settlement of the estate of James Tompkins, deceased. Creditors were called in, and, among others, J. H. Jennings, executor of Rhoda Ramsey, presented and proved against the said estate a claim for about fifteen hundred dollars. To pay the debts presented and proven against said estate, certain of the real estate of the said testator, James Tompkins, deceased, was sold under a decree made in said cause. The home tract, containing 1,056 acres, more or less, was not sold, a portion thereof being in litigation. On the 11th day of March, 1891, the debt of J. H. Jennings, executor, as aforesaid, being still unpaid, an order in the cause was passed by his honor, J. H. Hudson, directing a sale of the 'homestead tract by the master of said county,' and the manner in which he should apply and pay out the proceeds. This order directed that the 'homestead tract be sold by W. F. Roath, as master for Edgefield county, or his successors in office, on sales day in November, 1891, for one-half cash; the balance on a credit of twelve months from date of sale; the credit portion to be secured by bond of the purchaser or purchasers, and a mortgage of the premises sold.' Under this order, said master advertised the said homestead tract for sale on the sales day fixed in said decretal order, but afterwards, and before the day of sale, the advertisement was, by direction of Mr. Ernest Gary,—one of the counsel engaged in the cause,—withdrawn. Afterwards, and without any further order of the court, the homestead tract was by said master advertised for sale on sales day in January, 1892. On the sales day in January, 1892, the homestead tract was sold by said master to W

R. Parks for the sum of three thousand two hundred dollars, as appears by the master's report of sales, bearing date 4th March, 1892. It also appears from the affidavit of S. S. Tompkins, Esq., that he was not informed of the sale of said homestead tract until the 21st day of January, 1892, and that he immediately, upon receiving said information, wrote to the said master, notifying him that said sale was without authority, and that he would resist the confirmation thereof, and also, on the 25th day of February, notified said master not to take any steps to consummate the sale, or to make title to the purchaser of said land, and suggested to him that he report the facts and circumstances to the court; to which suggestion the master replied that he would report the case to the court, and would not make title until he had the judgment of the court thereon. These facts are not denied by the said master. Afterwards, the said master executed titles to the said purchaser, who paid the cash portion of the purchase money, and gave his bond and mortgage to the master to secure the credit portion thereof; and thereafter the master reported said sale to the court, not referring therein to the circumstances in regard thereto, or the objections interposed by the said S. S. Tompkins and others. The master, in his affidavit read at the hearing, says the sale was, in all respects, fairly and regularly conducted, and that the bidding was spirited; and W. R. Parks, in his affidavit, states that he had no suspicion of any irregularity in any of the proceedings which led to the sale, and assumed that all the parties in interest were satisfied with the advertisement, especially as nearly all the heirs at law are residents of the county, and that one of them, at least, was present, and participated in the bidding. Several affidavits were read in reply to the affidavits submitted in support of the motion, tending to show that the homestead tract was bid off at a fair and full price for the same.

"In the view I take of the case presented, I do not think it necessary to discuss fully the first and second grounds set forth in the motion papers. It may be proper to say, however, that I do not think these grounds can avail the moving parties. The order of the 11th day of March, 1891, was made in open court, and ordinarily all parties interested would be charged with notice thereof, and, if certain necessary parties were not before the court at that time, their rights are not affected thereby. The third ground, however, presents a serious question. It is clearly competent for the court, in the absence of any statutory regulation, to prescribe the mode and terms of sale; fix the time of sale; and these requirements must be complied with by the master or other persons conducting the sale. The conduct of the person conducting the sale is subject

to the scrutiny of the court. Confirmation is the judicial sanction of the court, and in cases of this nature, the court being the vendor, it may, in its discretion, give or withhold its consent. Any mistake or misunderstanding between persons conducting the sale and intended bidders or parties in interest; any accident, fraud, or other circumstances by which interests are prejudiced without fault of the injured party or parties, or by reason whereof property is sold at a price considerably disproportioned to the real value,—will be deemed sufficient cause for refusing confirmation, and for ordering a resale; and so, generally, whatsoever, and even less, that is sufficient to set a sale aside after its consummation, will, of course, upon the same principle, cause confirmation to be denied. *Rorer, Jud. Sales, § 129.* The powers of the master are precisely what the decretal order of the court confers. *Young v. Teague, Bailey, Eq. 22.* The term of the decretal order became the law of the case,—the condition on which the authority is to be exercised. *Bally v. Bally, 9 Rich. Eq. 395.* If the official fails to comply with the terms of the order in making the sale, such sale is without authority, and therefore void. *Bally v. Bally, supra; Alexander v. Messervey, (S. C.; 1892,) 14 S. E. Rep. 854.* Now, in *Bally v. Bally, supra*, it is held that where a commissioner sells land without having advertised the sale for the time prescribed in the order of sale, the sale is invalid, and will be set aside. At that time there was no statute regulating the time for the advertisement of sales made under the order of the court. While, therefore, the rule may be different, now, as to the length of time lands shall be advertised before sales, by reason the statute set, we have no statutes regulating the time when, or the month in which, sales of land ordered by the court shall be made. Such being the case, I take it that the court may fix the time in the decretal order of sale, and, when this is done, it becomes one of the conditions on which the authority of the master, or the person making the sale, is to be exercised; and if such officer fails to comply in this respect with the terms of the order, in making the sale, such sale is without authority, and therefore void. It often becomes a serious question at what time a sale of land should be made; and frequently the court is called upon to exercise a sound judicial discretion in fixing the time of sale, so as to prevent a sacrifice of the property, and an impairment of the rights and interest of the parties. If the time fixed by the decretal order for sale can be disregarded by the master, then the object which the court had in view may be wholly defeated. To allow the master to modify the terms of the decretal order of sale in this particular, at his discretion, would be dangerous to the rights and interests of the parties interested in such

sales. If the master can, in his discretion, when the time of sale is fixed to take place on sales day in a certain month, disregard this specific condition, and sell upon some subsequent sales day thereafter, what is there to prevent him selling on some sales day previous to that named in the order? In my opinion, the master has no such discretion. If the decretal order specifies that the sale is to be made on a certain sales day, this becomes one of the conditions on which the authority of the master is to be exercised; and, if he fails to sell on that day, his authority is at an end, and his power to make the sale is gone. He must await the further order and direction of the court. If, in the exercise of his discretion, he proceeds to sell upon some sales day previous or subsequent to that named in the order, such sale will be invalid for want of authority to make it. Here, the decretal order fixed the time for the sale on the sales day in November, 1891. No authority is given the master to sell at any other time. Without any further order or direction from the court, he sells on the sales day in January, 1892. This was certainly a surprise to the parties here complaining, even if bound by, and charged with notice of, the order of March 11, 1891. Immediately upon receiving information that the sale had been made, the master is notified not to consummate the sale, or its confirmation would be resisted. Notwithstanding this notice, the master, after having led the parties to believe that he would not complete the sale, but would report the facts and circumstances to the court, and ask its direction, proceeds to complete the sale by receiving the cash portion of the purchase money, taking the bond and mortgage of the purchaser for the credit portion, and executing and delivering titles to the purchaser. This conduct on the part of the master, under the circumstances, is, to say the least, not commendable. He should have submitted the matter for the judgment of the court. I am not prepared to say that the premises would not have brought a larger price than that bid by W. R. Parks. I am rather inclined, however, to think that they would, as, doubtless, there would have been more and greater competition. This was, in a measure, at least, prevented by the master's selling at an unauthorized time. It is therefore ordered that the motion to confirm the master's report of sales, bearing date the 4th day of March, 1892, be, and the same is hereby, refused; that the sale of the homestead tract made by the master on the sales day in January, 1892, be set aside, and that the master of Edgefield county do resell the said homestead tract, at Edgefield C. H., at public auction, on the sales day in November next, or some convenient sales day thereafter, after due and legal advertisement, upon the same terms, as to cash, credit, and security, as directed in the previous order for sale there-

of. Further ordered, that said master do pay out the proceeds arising from such sale as directed in the previous order for sale of the homestead tract, and retain the surplus until further order of the court."

S. S. Tompkins, for appellants. Sheppard Bros., for respondents.

POPE, J. It seems that in 1877 the plaintiffs, J. G. Tompkins and others, exhibited their complaint on the equity side of the court of common pleas for Edgefield county against S. S. Tompkins and J. W. Tompkins, as executors of the last will of James Tompkins, deceased, and J. L. Tompkins and F. A. Tompkins, as defendants, wherein, in general terms, it may be stated that the object was to withdraw from said executors the further control of the estate of their testator; that their accounts as such executors might be stated, etc. Creditors of the testator were called in. Decree was made, and carried on appeal to the supreme court. A portion of the real estate of testator was sold under the order of the court, but a tract of over 1,000 acres, known as the "Homestead Tract," was reserved from sale. The cause remained on the calendar of the court of common pleas for Edgefield county down to the present time. At the March term, 1891, of said court, Judge Hudson passed an order directing the sale by the master of this homestead tract of land on the first Monday in November, 1891. No appeal was taken from this order. The master advertised the sale to take place on first Monday in November, 1891; but at the suggestion of one of the counsel interested in the cause, such master, without any direction from the court, withdrew the land from sale, but readvertised the land for sale on the first Monday of January, 1892,—again acting without any authority from the court. He sold the land to W. R. Parks, at the price of \$3,250,—said purchaser complying with his bid by paying one-half of the purchase money in cash; but before deed was executed by the master, or a bond and mortgage by the purchaser, notice from S. S. Tompkins was given to such master and the purchaser, Parks, that he objected to such sale. Nevertheless, after such notice, the master executed a deed to the purchaser, and the purchaser gave his bond secured by mortgage. Thereafter, a motion was made at the March term, 1892, before his honor, Judge Izlar, to refuse to confirm the sale. This motion was made on numerous affidavits. Judge Izlar made an order setting aside the sale, and directing the master to resell the said premises on the first Monday of November, 1893, in accordance with the terms of Judge Hudson's decretal order of March 7, 1891, and pay out the proceeds of such sale as directed in Judge Hudson's order. From this order of Judge Izlar, two separate appeals are taken,—one on behalf of S. S. Tompkins, and one

by W. R. Parks, for himself. The grounds of Mr. Tompkins' appeal are: (1) That said order was made without any motion therefor, and without notice to this defendant, or opportunity of arguing the same. (2) That said order was made without having the necessary parties before the court, the legal representatives of appellant's deceased codefendants, J. W. Tompkins, James L. Tompkins, and F. A. Tompkins, who represent, in the aggregate, one-half interest in said land; they never having been made parties to this suit. (3) That his honor erred in ordering any further sale of testator's land until the proceeds of former sales had been accounted for and applied, and the exact amount of each subsisting claim ascertained, and the parties in interest given the opportunity of settling the same without selling the ashes of their ancestors. (4) That his honor erred in ordering any part of the proceeds of sale to be paid to Messrs. Gary and Evans; their said claim, being an individual liability of appellant's codefendant, J. W. Tompkins, if it was ever a claim against the estate, being barred by the terms of the order of this court, calling in the creditors of said estate, as directed by the supreme court. W. R. Parks presented the following grounds of appeal: (1) Because, as matter of law, his honor erred in refusing to confirm the master's report of sale herein. (2) Because his honor erred in setting aside the sale of the homestead tract made by the master on sales day in January, 1892. (3) Because, if his honor did not err in ordering the homestead tract to be resold, he erred in refusing to provide for the return by the master to W. R. Parks of the amount paid by him to the master for the purchase money of said tract.

We will first consider and dispose of the appeal of Mr. Tompkins:

We cannot see any virtue in his first ground. Judge Izlar was asked at the regular term of court, in March, 1892, at Edgefield, by this appellant, to protect him against what he conceived was an invasion of his rights by the master, by a disregard of the terms of the decretal order of Judge Hudson, wherein a tract of land known as the "Homestead Tract" was required to be sold. When Judge Izlar viewed the terms of such order, and compared the terms of sale adopted by the master, he saw there was, what he conceived, a fatal variance. To provide a relief to the plaintiff, he tried, by his order, to place all the parties as they were under the order of Judge Hudson. It would be difficult to conceive what other course the circuit judge could have adopted during term time.

The reformation or change in the administrative part of Judge Hudson's decretal order was all that was done by Judge Izlar, independent of setting the sale aside. This act of Judge Izlar forms no part of an order

on the merits. We fail to perceive any injury to this appellant. Besides, there is nothing in the case which informs this court that a decree was not made in this cause when all the parties were alive, and allowed to speak for themselves. The previous sale of 2,000 acres of land furnishes strong evidence of this.

The third ground of appeal seems fanciful. There is nothing to show us that all due regard had not been paid to the rights of all the parties to this controversy in the action of the court below. It certainly had remained on the calendar of the court in Edgefield sufficiently long to enable any amount of scrutiny into the claims of creditors. Besides, this court cannot be called upon to assume the existence of errors in the court below. They must be made to appear by the case, and here there is a woeful silence in every important particular.

The fourth ground of appeal is disposed of by the views we have expressed in disposing of the first ground of appeal. These four grounds of appeal must be dismissed.

It remains now to consider the complaint of W. R. Parks:

(1) Was it error in the circuit judge to refuse to confirm the sale made by the master to Parks? Let us consider this matter seriously, for it involves the decision of a question of practice that is of moment to purchasers at judicial sales. We should be slow in adopting any views that would create doubt in the minds of would-be purchasers at such sales. It is of the utmost importance that such sales should be regulated by such wholesome rules, the effect of which will cause the property thus exposed to sale to command its full value, by obtaining bidders to agree to purchase at such figures as represent that full value, and technical difficulties growing out of such a sale ought not only to be discouraged, but, when made, speedily disapproved of. The court of last resort in this state has repeated the rule to be that purchasers are only to be concerned with the facts that the court that orders the sale has jurisdiction, and that all the parties essential to the cause have been made parties. This rule seems to us to include the idea of an order for sale, and imports that purchasers should be bound to observe the terms of the order for the sale. The courts of this state are interdicted from "opening the bids," as it is called. But it has been held that where a sale has been made under a decree of the court of equity in this state, and there has been a failure by the master to observe the terms of such decree, the court will refuse to confirm such sale. *Baily v. Baily*, 9 Rich. Eq. 392. Chancellor Dargan, as the organ of the court in that case, said: "But where the court has made an order of sale, of which a notice is to be given by advertisement for a given time, such direction, *as well as the other terms*, [italics ours.] be-

come the law of the case. It becomes the condition on which the authority is to be exercised, the nonperformance of which will destroy the power." Again, he says: "The decree investing the commissioner with power to sell is held sufficient, *if he conforms to the conditions of his authority.*" The circuit judge elaborates this view in his decretal order, that will accompany the report of this case. We concur in the views expressed by him. We suppose it is scarcely necessary that we should say, in announcing this conclusion, that no reflection is intended to be made upon the worthy gentleman who was master, and made this sale. His motives were praiseworthy, but he was guilty of an error. It may be stated, in passing, that great caution should be observed by officers charged with the duty of making sales under decrees of courts. We will not say that they are never justified in failing to sell on the day named in a decree without the authority of an order of court for that purpose. It is decidedly the safest and best course, however, to obtain such order. But for an officer who has failed to get such an order, of his own motion, to fix a new day for such sale, cannot be sanctioned. It is true, if all parties in interest had consented to this course, and the court had thereafter sanctioned it by the passage of an order, the error would have been cured. This ground of appeal is overruled, and for the same reasons the second ground of appeal is dismissed.

The third ground of appeal seems to us to be meritorious. In this case, everybody concerned acquiesces in the sale, except S. S. Tompkins. The purchaser has paid into court \$1,625 of his money, a large part of which has been appropriated to the purposes of the action, under the decree of court. Now, if there is one thing, over others, in our system of jurisprudence, that merits the commendation of all, it must be the flexibility of the principles adopted by courts of equity, by which they are made to subserve the needs of each particular case. Ought not these principles to be applied here? It seems so to us. Under our law, William R. Parks, by being a successful bidder at the sale provided for by a decree in this cause, has, to a certain extent, become a party to this action. His money has been paid into court, and used for the purpose of the action,—under an honest mistake, it is true. Only one party to the action seeks any relief against him. The circuit judge orders a new sale, without any provision being made for his (Parks') protection. This is error, and must be rectified. After much reflection, we have concluded that a decretal order should be made on circuit, whereby the master should be directed to sell the homestead tract of land here in dispute, after 21 days' public advertisement, for one-half of the purchase money to be paid in

cash, and the balance on a credit of 12 months,—the credit portion to be secured by bond of the purchaser, and a mortgage of the lands by the purchaser,—but that such sale shall, in the advertisement and in its conduct, provide that no bid will be received of less than \$3,250, and that, if no more than \$3,250 is bid at such sale, then the purchase by Parks shall be confirmed, but, if more than \$3,250 is bid, that then the sale to Parks shall be annulled, his deed from the master for the premises shall be canceled and delivered up by him, and that he shall be paid the sum of \$1,625 in cash, and have his bond and mortgage canceled by the master, and delivered to him, (Parks.) It is the judgment of this court that the judgment of the circuit court be modified as herein required, and that the cause be remanded to the circuit court, without any delay of the remittitur going down, for the purpose of having the circuit court prepare the decree in accordance with the directions of this court.

McIVER, C. J., and McGOWAN, J., concur.

PEAKE, Master, v. YOUNG.

(Supreme Court of South Carolina. Nov. 13, 1893.)

EQUITY — SALE BY ORDER OF COURT — POWER OF MASTER—SPECIFIC PERFORMANCE—LIMITATIONS.

1. A decree in equity for the sale of land need not explicitly direct the execution of a conveyance by the master, as a direction to sell the land, and to take a bond and mortgage from the purchaser for part of the selling price, implies the duty of conveying.

2. A master sold land under a decree for part cash, with the balance secured by bond and mortgage, and entered the purchaser's name in the book of sales. The purchaser made the required cash payment, entered into possession, and subsequently refused to execute the bond and mortgage; and the term of office of the master expired before he took the bond and mortgage from the purchaser, and executed a conveyance. *Held*, that the book of sales, and the money paid by the purchaser, were transferred, under Gen. St. § 457, to the master's successor in office, who, though without power to convey, could maintain an action for specific performance of the contract, on the refusal of the purchaser to give the bond and mortgage.

3. In such action a decree may be rendered for the sale of the property to pay the purchase money, in case the purchaser further refuses to execute a bond and mortgage.

4. Such action is not barred by the statute of limitations applicable to an action at law for the recovery of the balance due on the purchase price.

Appeal from common pleas circuit court of Union county; James F. Izlar, Judge.

Suit by Christopher H. Peake, as master of Union county, against John L. Young, for the specific performance of a contract for the sale of land. Decree for plaintiff. Defendant appeals. Affirmed.

The following is the decree of James F. Izlar, P. J.:

"The history of this case, as developed by the pleadings and testimony, is as follows: James Munro, late master of Union county, on the sales day in January, 1883, sold, under a judgment duly obtained in this court in a cause entitled Thomas B. Jeter, as administrator of Andrew Wallace Thomson, deceased, plaintiff, against Aurelius Wallace Thomson, defendant, the lot of land described in the complaint herein. At said sale the said lot was bid off by and set down to John L. Young by the said master, and said defendant became the purchaser at the price of two hundred and twenty-five dollars. That the terms of the said sale were one-fourth cash, and the balance on a credit of one and two years; the credit portion to be secured by a bond of the purchaser bearing interest from the day of the sale, and a mortgage of the premises. The defendant paid to James Munro, master, the sum of fifty-six dollars and twenty-five cents, being the cash portion of the purchase money, and entered into the possession of the premises under his purchase, and has been ever since, and is now, in the possession and use of the same; but he has failed and neglected to comply with the terms of the sale, by executing his bond and mortgage for the credit portion of the purchase money, as required by the terms of sale, and the decree of the court under which said lot was sold. James Munro, late master, prepared the deed, bond, and mortgage, and was ready and willing to deliver the conveyance upon the execution of the bond and mortgage by defendant; but, in consequence of the failure of the defendant to execute the bond and mortgage, the conveyance was not delivered. The defendant sent a check to James Munro, master, for the two installments, not including the interest due thereon. This sum said master declined to accept in full satisfaction of the debt. James Munro went out of office in January, 1891. After the plaintiff, his successor, had qualified as master, he signed the deed of conveyance which had been previously prepared by him; and this deed, together with a deed signed by his successor in office, were duly tendered to the defendant, who refused to accept the same, and to execute his bond and mortgage, as required by the terms of sale. That the said James Munro was ready and willing at all times during his term of office to execute the deed of conveyance, as required by the decretal order which the land was sold, and to deliver the same upon the defendant's executing his bond and mortgage for the credit portion of the purchase money, as fixed by said decree, or upon his paying the credit portion of the purchase money and interest; and the plaintiff has also been ready and willing to do the same. The defendant raised no objection to the title of said property, but claimed that the estate of Andrew W. Thomson, deceased, was indebted to him. James Munro,

knowing that the defendant was perfectly good for his contracts, and believing that he would comply with the terms of sale, took no steps to enforce it. The defendant made no absolute refusal to comply until just before action was commenced. On the 24th day of February, 1892, James Munro, as late master of Union county, executed the following paper to C. H. Peake, as master of said county: 'I, James Munro, late master of Union county, do hereby assign and transfer unto C. H. Peake, as master of said county, a certain agreement entered into on the 1st day of January, 1893, by John L. Young, with me, as master, for the purchase by said John L. Young of a lot of land containing four acres, more or less, in the town of Union, state of South Carolina, bounded,' etc. Action was commenced by the plaintiff on the 25th day of February, 1892. The case was heard by me at the October term, of 1892, of the court of common pleas for said county, the testimony being taken in open court. The defendant offered no testimony. The material allegations of the complaint are fully sustained by the evidence. The defendant, however, pleads the statute of limitations to the cause of action alleged in the plaintiff's complaint, and demurs orally on the ground that the complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff. These pleas raise serious questions, and demand more than casual consideration.

"The action is for specific performance. The specific performance of contracts is a branch of the equitable jurisdiction of the court of equity. This jurisdiction arises out of the inability of the courts of common law to enforce the actual performance of the contract. 'There are many cases,' says Mr. Fry in his work on Specific Performance, (page 1,) 'in which, though a contract is, in conscience, obligatory upon both parties to it, yet the common law, from the strictness of its forms, affords no remedy to the party injured by the nonperformance of the other. The defect of justice which would hence arise is avoided by the jurisdiction of equity, which, in such cases, compels the specific execution of the contract, if in other respects fit for the intervention of the court.' Again, (page 2:) 'The fact that the legal remedy has been lost by the default of the very party seeking the specific performance will not exclude the jurisdiction, if it be, notwithstanding, conscientious that the agreement should be performed, as in cases when the plaintiff has performed his part substantially, but not with such exactitude as to be able to plead performance at law.' That the court of equity would enforce specific performance of a contract like the present, I have no doubt.

"The rule in equity is different from that in law, in regard to the time in which a contract is to be performed. 'A court of

equity discriminates between those terms of the contract which are formal, and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which are of the substance and essence of the agreement; and, applying to contracts those principles which have governed its interferences in relation to mortgages, it has held time to be, *prima facie*, nonessential, and has accordingly granted specific performance of agreements after the time for their performance has been suffered to pass, by the party asking for the intervention of the court, if the party has not shown a determination not to proceed.' Fry, Spec. Perf. p. 312. It is clear to my mind, that the defendant in the present action, notwithstanding the lapse of time since his purchase and entry into the possession, could have maintained his action against James Munro, master, for specific performance of the contract to convey, at any time before he went out of office, in case he had offered to perform his part of the agreement, and said master had refused to execute the conveyance. In the case of *Waters v. Travis*, 9 Johns. 450, where, by a contract for the sale of land, the vendor was to convey at a time specified, and the vendee was, 'at the same time,' to secure the purchase money, and the vendee took possession under the contract, but no conveyance was executed, and the purchase money was not paid for fifteen years, it was held that the lapse of time was no objection to a decree for specific performance at the suit of the vendee. Fry, Spec. Perf. p. 322, note 13. If such lapse of time would not bar the vendee, one party to the contract, why should it bar the vendor, the other party? And that the vendor here is the court, acting through its agent, the master, can certainly make no difference. In *Longworth v. Taylor*, 1 McLean, 395, it was held that the parties might be considered as mortgagor and mortgagee, as the defendant's default has prevented them from occupying that position in law; that the plaintiff's equity was not extinguished by lapse of time; and that he had not been guilty of such negligence as to cut off his right to a decree for performance. So I hold in the present case. The plea of the statute of limitations, therefore, cannot prevail, under the circumstances of this case.

"But the difficulties in the case do not end here. The plaintiff is the successor in office to James Munro, late master, who made the sale, and who, as the agent of the court, was directed to execute the conveyance to the purchaser, the defendant. Has the plaintiff, then, such right and interest in the agreement entered into between his predecessor in office and the defendant, respecting the sale of said lot or parcel of land, as entitles him to maintain an action upon it for specific performance? Now, if the con-

tract for the sale of said lot had been completed, and the bond and mortgage had been executed by the defendant to James Munro, master, and, not having been paid, had been turned over to his successor, the plaintiff, it is clear that he could have maintained an action of foreclosure to enforce the payment of the same. But here the contract was not completed by James Munro, plaintiff's predecessor. When the late master went out of office, he had, it is true, prepared the deed and other papers, but he had not signed the deed. He signed the deed after his authority to exercise the duties of the office of master had ceased. When his office ceased, his duties in connection with the office ceased. After this, he could perform no official act. His authority for making the sale, and executing a deed of conveyance to the purchaser, was contained in the decree under and by virtue of which he acted. Outside of said decree, he had no authority in connection with the sale and conveyance of said lot, and could exert none. When he went out of office, the sale was not completed; the deed had not been delivered. The making of the deed was a part of the act of selling. He was appointed by the court to make the sale. Therefore, he was the only person who could make the deed, without the further order of the court. Ror. Jud. Sales, § 427. Where a sale is made, by order of the court of equity, by the master, the court takes the matter into its own hands, and makes the sale for the parties. It directs, controls, and manages the whole proceeding, until the sale is, in all things, carried into effect. *McKee v. Lineberger*, 69 N. C. 240, cited by Ror. Jud. Sales, § 7, note 2. Had he signed the deed in the manner required by law, while in the exercise of the duties of his office, and in that shape the papers had been turned over to the plaintiff, as his successor in office, to be delivered by him to the defendant upon his completing the contract of purchase on his part, I think the plaintiff would have been warranted in completing the contract with the defendant by delivering to him the conveyance upon his executing and delivering to him, as master, the bond and mortgage required by the terms of sale, for under these circumstances the plaintiff would have been in position to have fulfilled the agreement on the part of the vendor, the court, by delivering the deed authorized by the decree. The transaction would, when executed, have related back, and have taken effect as of the time when it should have been completed; and such act of the master, upon being reported to the court, would, without doubt, have been confirmed by the court, as the court has complete control over the officers making a judicial sale, and the approval or disapproval of such sale rests in its sound discretion. But such was not the case. The deed was not signed by James Munro, late master,

until after his successor, the plaintiff, had qualified, and taken possession of the office. But, even under these circumstances, I think the plaintiff had such a right and interest in the contract as would enable him to maintain an action for specific performance. While it is true that the master's office is created by statute, and he can only exercise the powers conferred by statute, and that there is no statute which authorizes and empowers the successor to the master who made the sale to execute a conveyance to the purchaser on his complying with the terms of the sale, and that the authority of the master who made the sale is derived from the decree under which the sale is made, yet it appears to me that the successor to the master who made the sale is at least invested with sufficient right and interest in the completed contract of sale as to enable him to compel the purchaser to comply with his contract. The act establishing the office of master, approved March 22, 1878, (16 St. p. 608,) provides that masters shall possess the powers, perform the duties, and be subject to the liabilities prescribed in and by the act of the general assembly passed in 1840, entitled 'An act to ascertain and define the powers, duties, and liabilities of masters, commissioners, registers in equity,' etc. Section 26 of the act of 1840 (11 St. p. 130) prescribes, among the duties required of masters, that, upon the expiration of the term of any master, he shall (within twenty days after his successor has received his commission) pay over, transfer, and deliver to his successor, all moneys, bonds, notes, certificates of stock, and other choses in action, or property, held by virtue of his office. The right to take proceedings in equity is an equitable chose in action. James Munro, late master, at the expiration of his term, had a right to bring an action in equity against the defendant to compel him to complete his contract of sale regarding the lot of land described in the complaint. This right of action, under the statute, passed to, and was transferred to, his successor. I have no doubt whatever that, had the present plaintiff reported to the court the status of the case under which the sale was made, the court would have had, under the circumstances of this case, authority to have ordered the present master, upon the defendant's complying with the terms of sale, to execute to him a deed of conveyance to the premises, and that upon this being done, and reported to the court, and the sale confirmed, it would have vested in the defendant the title to the lot, and determined all questions as to its regularity, and left nothing further to be considered and done in regard to it. Now, does the mere fact that this course was not pursued prevent the court from granting any relief in the present action? I hardly think so. It may have

been better to have proceeded in the case in which the sale was made, and to have invoked a different process of the court to compel the defendant to comply with his contract. But, be this as it may, I hardly think that, under the broad and liberal rules of the court of equity, the plaintiff will be turned out of court, with the injunction: 'You have mistaken your remedy. You have no interest in this matter, which entitles you, under these proceedings, to the relief which you demand.'

"I know it is a well-settled principle that the court of equity will not compel specific performance unless it can at the time execute the whole contract on both sides, or at least such part of it as the court can ever be called on to perform. But, in the view I take of this case, no such difficulty is presented. The purchaser at a judicial sale becomes a party to the proceedings in which the sale is made. 'Now, whoever makes himself a party to the proceedings of a court of general jurisdiction, and undertakes to do a particular thing under its decretal orders, may be compelled to perform what he has undertaken. The proper tribunal to compel it is the same court, and by motion in the same cause, in which the undertaking occurred.' Ror. Jud. Sales, § 148. The purchaser at a judicial sale may be compelled to complete his purchase by rule to show cause why the property should not be resold at his risk, made in the case in which the property was sold; and in such case, when a resale is ordered, the former sale is not set aside, but the property is sold as the property of the former purchaser. If it brings more than the debt, he is entitled to the surplus. If it brings less, he is responsible for the deficiency. But, as I take it, rule to show cause in the action under which the land was sold is only one of the modes by which the purchaser may be compelled to complete his purchase. It appears to me, therefore, that, while the party seeking to compel the purchaser to complete his contract of purchase may proceed in a summary way, by rule to show cause in the case in which the sale was made, (and this, it would seem, is the usual and proper proceeding,) there is at the same time nothing to prevent the party from adopting the formal action of specific performance to compel the purchaser to specifically perform his contract. Although the defendant is in the possession of the lot of land, and has an equitable estate therein, nevertheless, the vendor still retains the legal title, 'and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure, namely by paying the price according to his contract.' 3 Pom. Eq. Jur. § 1260. And the action here may be regarded simply as an action to compel

the defendant to make payment of the purchase price of the lot within a specified time, according to the terms of his contract, or else foreclose the contract.

"I conclude, therefore, that, under the circumstances of this case, the delay in completing the contract of sale is attributable to the defendant, and it would be inequitable to allow him to avail himself of lapse of time as a defense; that there has been no laches on the part of the plaintiff subsequent to the absolute refusal of the plaintiff to complete his contract; that the plaintiff has such an equitable right and interest in the contract of sale as will entitle him to maintain this action; that the complaint states facts sufficient to constitute a cause of action; and that the plaintiff is entitled to the relief which he demands. It is therefore ordered, adjudged, and decreed that the defendant specifically perform his agreement respecting the purchase of the lot of land described in the complaint, by executing his bond to the plaintiff, as master of this court, conditioned for the payment of one hundred and sixty-eight dollars and seventy-five cents, payable in two equal annual installments, with interest from the 1st day of January, 1883, payable annually,—that is to say, eighty-four dollars and thirty-seven cents on the 1st day of January, 1884, and all interest then due; and the remaining sum of eighty-four dollars and thirty-seven cents, and all interest then due, on the 1st day of January, 1885, together with a mortgage of said lot or parcel of land; and that the plaintiff, as master of this court, do at the same time execute to the defendant a deed of conveyance to said premises; and that, simultaneously with the delivery of said conveyance by the plaintiff to the defendant, the defendant deliver to the plaintiff the bond and mortgage hereinbefore ordered to be executed by him. That the cost of this action be paid by the defendant. It is further ordered and adjudged that, in case the defendant shall fail to execute and deliver the said bond and mortgage, or to pay the credit portion of the purchase money of said lot, with the interest due thereon, according to the terms of sale, on or before the 1st day of February, 1893, the said lot or parcel of land be sold on the sales day in March next, or on some convenient sales day thereafter, at Union courthouse, after due advertisement by the clerk of this court, for cash, the purchaser or purchasers to pay for papers, and, in case the purchaser or purchasers shall fail to comply with the terms of sale, the said premises to be resold on the same sales day, or on some subsequent sales day, on the same terms, and at the former purchaser or purchasers' risk; that in case of sale the said clerk shall, out of the proceeds, pay first the costs and expenses of sale, and the cost of this action, then the amount due to the plaintiff for principal and interest on his

debt, and, if there be a surplus, that he pay said surplus to the defendant, but in case the proceeds of sale be insufficient to pay the debt and interest of the plaintiff, in full, that the defendant pay such deficiency to the plaintiff."

D. A. Townsend, for appellant. William Munro, for respondent.

POPE, J. This action was brought to a hearing before his honor, Judge Izlar, in the court of common pleas for Union county, at the October term, 1892; and the decree of the court having been rendered on the 3d of January, 1893, in favor of the plaintiff, the defendant has appealed therefrom on 28 grounds, to wit, that the circuit judge erred in finding: (1) That James Munro, Esq., was ready and willing at all times during his term of office to execute the deed of conveyance, as required by the decretal order under which the land was sold, and to deliver the same, upon the defendant's executing his bond and mortgage for the credit portion of the purchase money of said land. (2) That said deed was not delivered because of defendant's failure to execute such bond and mortgage. (3) That the defendant made no absolute refusal to comply till just before action was commenced, and in not finding and decreeing the contrary. (4) That the material allegations of the complaint are fully sustained by the evidence. (5) That the action is one for specific performance. (6) That the court of equity would enforce the specific performance of a contract like the present one. (7) That the rule in equity is different from that in law in regard to the time in which a contract is to be performed. (8) That the plea of the statute of limitations could not prevail, under the circumstances of this case. (9) That the plaintiff is the successor in office of James Munro, as late master for said county. (10) That James Munro, as late master, was directed by the court to make a deed of conveyance of said land to the purchaser thereof. (11) That there was a sale of said land to the defendant. (12) That if James Munro, Esq., as master, as aforesaid, had signed the deed, as required by law, while in the exercise of the duties of his office, to be delivered by him to the defendant, Young, upon his complying with the contract of purchase on his part, the plaintiff would have been warranted in completing the contract by delivering to defendant the said conveyance, upon defendant's executing the bond and mortgage required by terms of sale, and that the plaintiff would have been, under these circumstances, in a position to have fulfilled the agreement on the part of the vendor, and that the transaction would have related back, and have taken effect as of the time when it should have been completed, and that such act would have been confirmed by the court. (13) That, under

the circumstances of this case, the plaintiff has such right and interest in the contract as would entitle him to maintain an action for specific performance. (14) That the successor in office of the master who made the sale is invested with sufficient right and interest in the uncompleted sale to enable him to compel the purchaser to comply with his contract. (15) That the act of the legislature approved March 22, 1878, (16 St. at Large, p. 608,) and cited by his honor as if in 18 St. at Large, p. 608, applies to the present case. (16) That the duties of James Munro, as late master as aforesaid, were governed by the said act of the legislature of 1841. (18) That the right to take proceedings in equity is such chose in action as is mentioned in the act of 1841. (19) That Munro, late master, at the expiration of his term of office, had a right to bring an action in equity against the defendant to compel him to complete his contract, and that this right passed to, and was transferred to, the plaintiff. (20) That, notwithstanding the irregularity in this case, the court can grant relief therein. (21) That this action may be regarded as an action to foreclose a contract, and that the plaintiff had a right to enforce it. (22) That there were no laches on the part of the plaintiff or of James Munro, as late master. (23) That the delay in completing the contract was attributable to the defendant, even after the absolute refusal of the defendant to comply. (24) That the complaint states facts sufficient to constitute a cause of action. (25) That the plaintiff is entitled to the relief demanded in the complaint. (26) That his honor further erred in adjudging and decreeing that the defendant specifically perform said alleged agreement respecting the said purchase, by executing and delivering his bond to the plaintiff, as master of this court, conditioned for the payment of \$168.75, payable in two equal annual installments, with interest from the 1st day of January, 1883, payable annually: that is to say, \$84.37 on the 1st day of January, 1884, and all interest then due, and the remaining sum of \$84.37, and all interest then due, on the 1st day of January, 1885, together with a mortgage of said lot. (27) That the defendant pay the costs of this action. (28) That in case the defendant failed to execute and deliver said bond and mortgage, or failed to pay the credit portion of the said purchase money, said lot be sold by the master.

Before undertaking to consider in their order the numerous grounds of appeal here presented for our consideration, it may not be amiss to recall some of the facts upon which this action is predicated, although they are very fully and accurately set forth in the decree of the circuit judge, which decree, in full, will accompany this case. James Munro, as master for Union county, under a decree of the court of common pleas,

on its equity side, exposed for sale at public auction a lot of land containing four acres, situated in the town of Union, and constituting a part of the real estate owned by Dr. A. Wallace Thomson at the time of his death, on the first Monday of January, 1883, for one-fourth of the purchase money to be paid in cash, and the balance on a credit of one and two years, in equal installments, with interest on the credit portion from the 1st January, 1883, and at such sale the defendant, John L. Young, became the purchaser, at the price of \$225. Col. Young paid the one-fourth of his bid in cash to the master, but, although requested by said master to complete his purchase, neglected so to do. He, however, offered to pay this credit portion to the master, but refused to pay any interest. His offer was declined by the master. Thus the matter stood (Young being in possession of the land) until 1891, (January,) when the present plaintiff, Christopher H. Peake, was duly appointed master for Union. Although the law contemplated a surrender by Munro to Peake, within less than 30 days after Peake duly qualified as such master, of all the assets of the office of the master, yet, no doubt by an arrangement between these gentlemen,—the outgoing and incoming master,—Mr. Munro did not formally assign the contract of Young for his said purchase until early in the year 1892. Efforts were then made by both these gentlemen to induce Col. Young to close up this matter by giving his bond and mortgage. They tendered to him deeds for the lot of land in question. At last, Col. Young flatly refused to comply with his bid, still holding possession of the lot of land in question. Peake, as master, then brought this action against Young, as defendant, reciting all the foregoing facts, and demanding a judgment of the court against the defendant, by which the defendant should be required to perform said agreement, and pay to the plaintiff the balance of the purchase money, with interest thereon, and costs, and, upon his failure to do so, that the premises be sold, and the proceeds of sale applied to the payment of the same, and the costs, and that the defendant be required to pay any deficiency. In his answer the defendant admits that he bid off said land at the sale thereof made by Munro as master, and that he paid the one-fourth of the purchase money, but denies all the other allegations. The defendant further pleads that the cause of action did not arise within the six years immediately preceding the commencement of plaintiff's action. He also presented an oral demurrer that the complaint did not state facts sufficient to constitute a cause of action.

Judge Izlar heard the testimony in open court. The plaintiff alone introduced testimony. The defendant offered none. The testimony offered corroborated all these facts

pleaded in the complaint. By his decree, Judge Izlar adjudged that the defendant should perform his contract of purchase, in accordance with the terms of the original decree for sale; that the plaintiff, as master, should execute and deliver to the defendant a deed of conveyance of the premises, but that said deed should be delivered simultaneously with the execution of bond and mortgage by defendant; and for costs to be paid by defendant. However, in case the defendant failed to complete his observance of his duty in the premises by either executing the bond and mortgage, or by paying in cash, on or before 1st February, 1893, that the lot of land should be sold by the master on sales day in March, 1893, or on some convenient sales day thereafter, and apply the proceeds of sale to the payment of the costs of the action, and to the satisfaction of the amount due by Col. Young on his contract of purchase, and in case of deficiency the defendant shall pay the same.

The 1st, 2d, 3d, and 4th grounds of appeal relate to the findings of fact by the circuit judge. The rule announced by this court so often sanctions such findings by the circuit judge, unless without any testimony to support them, or when such findings are manifestly against the weight of the testimony. A careful study of the testimony, as set out in the case, convinces us that the circuit judge has made no mistake here, and therefore these four grounds of appeal are dismissed.

By reading the allegations of the complaint, it is manifest that the action is one for the specific performance of a contract, and therefore the fifth ground of appeal is dismissed; but, even if this action should be held not to come within the strict rules in equity governing instances when that court would decree a specific performance of the contract, still the plaintiff would not be without a remedy in a court of equity, as we shall hereafter undertake to maintain, and hence the sixth ground of appeal is not meritorious.

Now, as to the ninth ground of appeal, it must be dismissed, for when the legislature of this state created the office of master for Union county and devolved upon the officer (master) duties similar to those exercised in most respects by commissioners in equity under our former statutes, and James Munro was duly appointed such master for Union county, whose term of office having expired on 1st January, 1891, at which time the plaintiff was commissioned and qualified as master, of course such plaintiff became the successor in office of the said James Munro. Where the court of equity for Union county ordered the master, who was at that time James Munro, to sell the land in dispute, although no words of explicit direction were then used for James Munro, as said master, to execute a conveyance of the land to the

purchaser thereof, the law implies the grant of such power by the court. The direction to sell, and take the bond and mortgage from the purchaser, imports the duty of conveying to such purchaser. *Young v. Teague*, Bailey, Eq. 22. Also, section 790 of the General Statutes of this state. The tenth ground of appeal must therefore be dismissed.

The proof in this case was overwhelming, and without any contradiction,—indeed, the answer of defendant admitted,—that at the sale of this land the defendant was not only entered upon the book of sales kept by the master as the purchaser, but the defendant actually paid a part of the purchase money. The eleventh ground of appeal must therefore be dismissed.

The twelfth ground of appeal relates to the enunciation by the circuit court of a sound piece of law, not applying, however, to the state of facts proved in this case, for James Munro did not execute any deed of conveyance to the defendant during his term of office. If he had done so, there would exist no necessity for the execution of a new deed by the present master. This ground of appeal is dismissed. Besides all this, when the decree appealed from is read as a whole, objections here raised are shown to be groundless. We scarcely deem it necessary to name and consider separately, and in their order, the 13th, 14th, 15th, 16th, 18th, 19th, 21st, 22d, 23d, 24th, 25th, 26th, and 28th grounds of appeal, though we shall not overlook any of them.

Let us examine carefully some of the elements that go to make up as much of the present controversy as we now purpose considering, and which are connected with these grounds of appeal. The condition of the estate of the late Dr. Wallace Thomson rendered it necessary that the personal assets of his estate in the hands of his administrators for the payment of such intestate's debts should be reinforced or aided by the sale of the lands owned by such intestate at his death. The law having transferred the title to such lands to the only heir at law of the intestate, Aurelius Wallace Thompson, a complaint was filed on the equity side of the court of common pleas for Union county by such administrator, against such heir at law, setting forth this necessity for the sale of such lands; and, in accordance with the prayer of the complaint, sale by the master, of such lands, was ordered. We need not repeat that the terms of such decretal order required the master to sell for one-fourth in cash, and the balance on a credit. Now, when John L. Young purchased the four acres in dispute, and his name was duly entered upon the book of sales by the master, he became amenable to the control of that court in that cause. He became, so to speak, a party to that cause. *Ror. Jud. Sales*, § 148; *Tompkins v. Tompkins*, (S. C.) 18 S. E. Rep. 233. Such purchaser could

have been proceeded against by rule to show cause why he had not complied with his bid. *Halg v. Commissioners*, 1 Desaus. Eq. 112. If James Munro, while master, had prayed for such process,—rule to show cause,—it would have been the easiest and speediest course, but this was not done. Munro ceased to be master on 1st January, 1891, and the present plaintiff became entitled, as his successor, to the moneys on hand, books, papers, etc., of the office. Section 457 of the General Statutes of this state. Now, the book of sales was transferred, and also the money paid by the defendant on his contract of purchase; so that the present plaintiff was, in the eye of the law, clothed with all the rights of his predecessor in office, as against Young. The plaintiff, under a misconception of his powers, offered to convey to Young; but, without an order therefor, he was powerless in this respect, for he had not made the sale. Thus we have before us a valid power in the master, Munro, to sell to Young; an actual contract by Young to purchase; the payment by Young of a part of the purchase money on his contract to purchase; the fact that Young had been let into possession of the land; no power in Munro to convey after he ceased to be master; no power in Peake, his successor, to convey; and no refusal on the part of Young to complete his purchase until after Peake had qualified, and entered upon the duties of his office, as master, as the successor in office of Munro. What power over this land did Young have? He was in possession, and had paid part of the purchase money. What power in his office, as master, did Peake have, to force Young to comply?

Where one, under a contract to purchase, is let into possession of land, and from any cause the owner of the fee declines to go further in the proposed sale, such possession of the would-be purchaser, is, in the eye of the law, after such declination of the owner, merely permissive of the true owner, and the relation of tenant at will is created by the law, as to such would-be purchaser's possession; but where one is let into possession under a contract to sell, evidence of which contract to purchase is reduced to writing, and such purchaser has paid part of the purchase money, a different rule prevails. In the latter case, the one who sells, and who holds the title, is declared to hold the title in trust for the purchaser, and the purchaser has an equitable claim for title, and, in addition, the vendor holds the legal title to protect his money due. As the doctrine is stated by Mr. Pomeroy in his work on Equity Jurisprudence, in section 1260, when, speaking of a vendor before delivery of title, though possession has been surrendered to the vendee, he says: "In the latter, although possession may have been delivered to the vendee, and although, under the doctrine of conversion, the ven-

dee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of the legal title was intended to secure,—namely, by paying the price according to the terms of the contract." So, in the case at bar, while Young, under his contract to purchase, evidenced by the entry on the sales book of the master, Munro, payment of part of the purchase money under such contract, and being let into possession of the land sold, has the right to treat the legal title as being held as his equitable estate, yet he has no legal title to the land, and cannot have, until the payment of the purchase money under his contract for such purchase. But the vendor has the right to enforce the payment of such purchase money, and cannot be called upon to convey the legal title until such payment is made. Now, here, who has created a breach of duty? Is it not, clearly, Young, the purchaser? Did the master, acting for the court, ever refuse to make title if Young would comply with his contract for this purchase? The court of common pleas, sitting as a court of equity, has complete control of this sale; and inasmuch as justice to all parties concerned required an allegation of the facts should be made to the court, in order that the rights and interests of all concerned should be subserved, and as the pleadings in an action, and testimony thereunder, are the methods recognized in law, whereby these results may follow, we can see no good reason for withholding our approval of the plaintiff's course to the defendant, by instituting this action. Defendant seems to question plaintiff's course without an order therefor. Parties in interest, such as creditors, might raise such a question, as the master, to a certain extent, is trustee for them. He is to receive, under the law, payment from the purchaser; and we cannot view with disapproval his honest efforts, in a legal manner, to enforce a payment so long delayed by this defendant.

We do not feel called upon—nor do we deem it pertinent to a proper decision of the legitimate issues growing out of this action, for us—to decide whether the act of 1840 governs the master, or his predecessor in office. We fail to find such irregularity on the plaintiff's part, in this action, as to shut him off from the relief he seeks, for it seems to us he has waited but a reasonably short time on the defendant, Young, before he tried conclusions with him in court. The patient forbearance of Munro seems to have been wasted upon the defendant here. Indeed, the previous master, Munro, was entirely too patient. His duty would have been better answered by a prompt report to the court of this negligence of Young. This waiting policy has nothing to commend it,

where the rights of others may be jeopardized. Let all these exceptions we have enumerated under this branch of the discussion be overruled.

We also agree with the circuit judge in the matter embraced in the twenty-first exception. We see no reason why this action may not be regarded in the nature of a foreclosure. This exception is overruled.

As to the twenty-seventh exception, it may be remarked that in chancery cases it is usually in the discretion of the circuit judge to affix the liability for costs when he makes up his decree. If we chose to express an opinion, we would venture the remark that the defendant richly deserves this penalty for his long-continued and persistent neglect of duty.

Before leaving the case, we should state that when the circuit judge, in his decree, provided that if the defendant failed to deliver his bond and mortgage, or failed to pay the credit portion of said purchase money, said lot should be sold by the master, he evinced a nice regard to the rights of others, as affected by the defendant. When the defendant admitted in his answer that he did bid off that parcel of land sold under an order of court, and had paid part of the purchase money, and these facts were supplemented by the facts proved at the trial, the circuit judge was justified in this order.

The statute of limitations, interposed by the defendant, might have been of some benefit to him, if plaintiff had been unwise enough to sue him for the money due, on the law side of the court; but here, in analogy to the action of the court when a mortgage is being foreclosed, (*Gibbes v. Railroad Co.*, 13 S. C. 253; *McCaughrin v. Williams*, 15 S. C. 505; *Nichols v. Briggs*, 18 S. C. 484,) the lapse of six years is of no avail. And it is well recognized as a principle of equity that the same rule that obtains in a court of law does not find admission in a court of equity, when such issues are raised as are here presented. The authorities cited in the circuit decree seem to be conclusive on this point. See, also, the case of *Blackwell v. Ryan*, 21 S. C. 123. All the exceptions of defendant are overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

MOORE v. TRIMMIER et al.

(Supreme Court of South Carolina. Nov. 13, 1893.)

APPEAL—REMAND AND PROCEEDINGS BELOW.

A case involving the order in which several tracts of land, owned by different parties, should be subjected to the satisfaction of a judgment, was decided by the supreme court on the theory that the judgment was a lien on the land of S., as appeared by the record on

appeal. Plaintiff, an owner of one of the pieces of land subject to the judgment, applied for a rehearing, alleging that the court had overlooked the fact that the lien on the land of S. had been released, which was denied. The petition of S. for an amendment of the record to show this fact, and for a rehearing, was also denied, but he was permitted to make such application as he might be advised in the lower court. The case was then remanded for ascertainment of certain equities. Thereafter, an order of the supreme court permitted plaintiff to raise in the lower court the issue of damages resulting from the release of the lien of the judgment on the land of S. *Held*, that this order could not avail plaintiff, for the reason, if there were no other, that the lower court thereafter, by consent of all parties, entered an order, on application of S., which, after reciting that prior to the commencement of the action the lien of the judgment on the land of S. had been released, and that this fact was not brought to the attention of the court at the former hearing, discharged it, but further provided that it was not to affect the rights of any of the other parties to the action, "as heretofore determined * * * by the judgment of the supreme court."

Appeal from common pleas circuit court of Spartanburg county; James F. Izlar, Judge.

Action by Baxter H. Moore against Margaret L. Trimmier, administratrix, and others, to enjoin the sale of certain land to satisfy a judgment before certain other land was exhausted. A judgment of the supreme court on a former appeal (11 S. E. 548, 552, 32 S. C. 511) determined the order in which the different pieces of property involved could be proceeded against, and remanded the case for the ascertainment of certain equities. From a judgment determining these values, and finding that the judgment could be enforced against plaintiff's property for a certain amount, plaintiff appeals.

R. K. Carson and Duncan & Sanders, for appellant. Bomar & Simpson, for respondents.

McIVER, C. J. This is the second appeal in this case, and for a detailed statement of the facts of the case, as originally presented, reference must be had to 32 S. C. 511, 11 S. E. 548, 552, where the same are fully set forth. It is sufficient to say that one of the main questions presented by the former appeal was as to the order in which the lands of John Winsmith, the judgment debtor,—which were covered by various mortgages, and some of which had been sold by such debtor to different persons at different times,—should be subjected to the payment of the Trimmier judgment, which was confessedly the oldest lien on all of the lands. The court, having determined the order in which the several tracts of land should be subjected to the payment of the Trimmier judgment,—making the equity of redemption which still remained in the judgment debtor, in the Tom Wofford tract, at the time of the sales to Mills & Hunter, first liable, before resorting to the two tracts last mentioned, but not thinking it just that the amount thereof should be tested by the sale of the

Tom Wofford tract, subsequently made, under the judgment of foreclosure of the Floyd mortgage, which covered both the Tom Wofford tract and the Nimrod Moore tract, for the reasons stated in the former opinion,—directed that the amount or value of such equity of redemption should be ascertained by testimony; and the same inquiry was directed as to the value of the equity of redemption in the 7-acre tract and in the 20-acre tract. When the case was remanded to the circuit court for the purpose of making the inquiries as directed, by consent of all parties defendant, an order was passed by that court on the 2d of August, 1892, directing that it be referred to the master "to take testimony, and decide all issues now existing, or that can be properly and legally raised, between the parties to this action, or any of them, and that he make his report thereon to this court, with leave to any party to this action to file exceptions to said report." In pursuance of this order the master took the testimony which is set out in the case, and made his report, likewise set out, to which exceptions were filed by the plaintiff, as well as by the defendant Trimmier. The case was heard by his honor, Judge Izlar, upon this report and the exceptions, who rendered judgment overruling all the exceptions but one, and confirming the report as modified by this exception, which will be hereinafter explained. From this judgment, plaintiff appeals upon the several grounds set out in the record, but which we do not deem it necessary to set out in detail.

Before going into any discussion of the questions raised by the appeal, it may be well to state certain other facts appearing in the case, and in the report of the former appeal. The opinion in the former appeal was filed on the 17th of April, 1890, and in due time two petitions for a rehearing were filed,—one by the plaintiff, a copy of which is set out in the case prepared for the argument of this appeal, and the other by C. Eber Smith, one of the defendants. On the 2d May, 1890, the petition of the plaintiff was dismissed, and on the same day this court made a special order, the terms of which may be seen by reference to 32 S. C., at pages 527, 528, 11 S. E. 552, 553,—and which should be carefully examined, for a proper understanding of the present appeal,—whereby the petition was dismissed without prejudice to the right of the petitioner to make such application as he may be advised to the circuit court for relief. It will be observed that in granting this order this court was unusually careful to avoid committing itself upon the question whether the petitioner, Smith, could then obtain the relief sought, but left that question entirely open, to be first decided by the circuit court, with the right of either party to appeal from such decision. In pursuance of this order, application was made to the

circuit court, and an order was granted on the 13th of February, 1892, by consent of all parties to this action, which, after reciting that prior to the commencement of this action the judgment creditor, Trimmier, had released the Nimrod Moore tract, owned by C. Eber Smith, from the lien of his judgment, and that the fact of such release having been executed was not brought to the attention of the court at the former hearing, discharged the Nimrod Moore tract from the lien of the Trimmier judgment. This order, however, contains these words, "it is further ordered and adjudged that this order and judgment is not to affect and disturb the rights of any of the other parties to this action, as heretofore fixed or determined or fixed by the judgment of the supreme court," which are italicised by us, as having, in our judgment, an important bearing upon the questions presented by the present appeal. It furthermore appears that, a short time before the granting of the order of the circuit court just mentioned, an order was obtained from this court, on the 25th of January, 1892, allowing the respondent,—the present appellant,—on the reference heretofore ordered by this court, "to raise the issue of damage to him resulting from the release of C. E. Smith's land from the lien of said judgment, and to set up the equity of credit of the value of Smith's land on said judgment before enforcing it against that of respondent." 35 S. C. 606, 15 S. E. 800. But this court was again careful to avoid committing itself upon the question thus permitted to be raised.

From this recital of the leading circumstances of this somewhat complicated case, supplemented by the facts stated in the former decision above referred to, it seems to us clear that the master took the proper view of his functions in the case, and that all he had authority to do, under the former decision, was to ascertain the true value of the equity of redemption in the Tom Wofford tract and in the 7-acre and 20-acre tracts in the manner prescribed by the former decision, and that his only error, which was rectified by the circuit judge, was in not finding that Trimmier could enforce his judgment, to the extent of \$723.50, against the Tom Wofford tract; that being the value of the equity of redemption in that tract, as found by the master, and confirmed by the circuit judge. That result followed necessarily from the former decision, by which it was adjudged that the equity of redemption in the Tom Wofford tract, whatever it might be, should be subjected to the judgment before resorting either to the Mills or Hunter land. It does not seem to us that the order of this court, permitting the present appellant to raise the issue of damage resulting to him from the release of the lien of the Trimmier judgment on Smith's Nimrod Moore tract, can

now avail the appellant, for the reason, if there were no other, that, after such order was granted, the order of the circuit court, consented to by all the parties, as is therein recited, and not contradicted by anything that we can find in the case, was granted upon the express condition that such order was not to affect or disturb the rights of any of the other parties to this action, as heretofore determined, as appears by the words hereinbefore italicized, extracted from said order. There was therefore no release of the lien on the Nimrod Moore tract, except upon that condition; and, as appellant's claim rests solely upon such release, it cannot be sustained, except upon the observance of the condition upon which such release was granted, to wit, that the rights of none of the parties should be affected thereby. Indeed, as it seems to us, all of appellant's exceptions, unless it be those designed to raise questions of fact, which are concluded by the concurring judgment of the master and the referee, really raise questions which have already been adjudicated by the former decision in this very case. Now, while this court is quite ready to concede its liability to err, yet, being the tribunal appointed by law for the final adjudication of the legal rights of litigants, when, after due and careful deliberation, it reaches a final judgment unanimously, such judgment should and must be respected as final. In this particular case, this court, after careful and anxious consideration, reached its conclusion and announced its judgment, and then, upon a petition for a rehearing, after a careful review of the case, found no reason to change its conclusion. "Interest republicæ ut sit finis litium."

But we cannot forbear to add that we are not yet convinced that there was any error in the former decision under the facts thus presented, which alone we had any authority to consider. Indeed, if there was any error in the former decision, it was due to the failure of the parties to bring before the court certain facts having an important bearing on the questions presented for decision; notably, the failure to bring before the court the fact that the lien of the Trimmer judgment upon the Nimrod Moore tract had been released before the commencement of this action. So, too, the court did not know, and had no means of ascertaining from the record upon which this case was originally heard, (to which alone resort could properly be had,) that the judgment for the foreclosure of the Floyd mortgage contained a provision that the Tom Wofford tract should first be exhausted before resorting to the Nimrod Moore tract; and, even if that fact had appeared, it is more than questionable whether such a provision could affect the rights of Trimmer, who was not a party to that action for foreclosure. We are not by any means prepared to admit that the fact that C. E. Smith bought, for full value, as

as it now appears, the Nimrod Moore tract, before the judgment of foreclosure of the Floyd mortgage was rendered, would have the effect now claimed for it by appellant, in view of the further fact that, at the time of such purchase, Smith took from the mortgagor a mortgage of another tract, the value of which has never yet been ascertained by any evidence brought before us, for the purpose of indemnifying himself from any loss which he might sustain by reason of the mortgage covering the Nimrod Moore tract. In the absence of any evidence showing the insufficiency of the indemnity thus demanded and obtained when he bought the Nimrod Moore tract, the natural inference would be that it was sufficient; and, if so, then it might be very difficult to establish Smith's equity to throw the whole mortgage debt upon the Tom Wofford tract, especially when that would result in detriment to others. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

CHERAW & C. R. CO. v. MARSHALL.
(Supreme Court of South Carolina. Nov. 13, 1893.)

JUDGMENT—REVIVOR—CONSTRUCTION OF STATUTES.

1. Act of 1873 gave a judgment lien for 10 years from the date of entry, and contained a provision (Code, § 310) "that plaintiff may at any time, in three years after its active energy has expired, revive the judgment by service of summons on the debtor as provided by law;" but such provision was omitted from the act of 1885, relating to the revival of judgments. *Held*, that a judgment entered in 1879 could be revived in 1891 under the provision of the act of 1873, as the act of 1885 was prospective in its operation.

2. Though the act of 1873 contains no express provision for the revival of a judgment against the executor of a deceased judgment debtor, the word "debtor," in the phrase "by service of summons on the debtor," includes the personal representative of a deceased judgment debtor.

3. The provision of the act of 1873 (Code, § 310) relating to the revival of judgments, and the provision of such act (Code, § 311) relating to the renewal of executions, are identical, except that section 311 substitutes "his heirs, executors, and administrators" for the phrase "as provided by law," in section 310. *Held*, that the phrase "as provided by law" should be construed to provide for the revival of a judgment against the executor of a deceased judgment debtor, as the right to revive an execution necessarily involves the right to revive the judgment.

Appeal from common pleas circuit court of Lancaster county; W. H. Wallace, Judge.

Rule by the Cheraw & Chester Railroad Company, for James T. Marshall, as executor of John W. Marshall, deceased, to show cause why a judgment against deceased should not be revived. Rule dismissed. The judgment creditor appeals. Reversed.

R. E. & R. B. Allison, for appellant. Jones & Williams, for respondent.

McGOWAN, J. It seems that the plaintiff company, on or about September 29, 1879, entered a judgment for \$200 and costs against one John W. Marshall, who was then living, but departed this life April 16, 1887, leaving in full force a will, of which James T. Marshall qualified as executor; and afterwards, on December 10, 1891, the plaintiff company caused to be issued against James T. Marshall, as executor as aforesaid, a summons to show cause, if any he could, why the said "judgment should not be revived and renewed against him as the executor of the last will and testament of the said John W. Marshall, deceased, according to the form, force, and effect of the former recovery."

James T. Marshall, the executor, showed for cause, by written answer, as follows: "(1) That no such judgment as that described above was ever entered against the defendant as such executor. (2) That this is not the proper proceeding to procure the entry 'revival or renewal' of a judgment against the defendant as such executor, or against John W. Marshall, defendant's testator. (3) That, if it is sought herein to revive a judgment entered against John W. Marshall, defendant's testator, in favor of the Cheraw & Chester Railroad Company, on or about September 26, 1879, as described in the summons herein, then this defendant shows that such judgment was originally entered more than ten years previous to the service of the summons herein, and that the same cannot now be revived in this proceeding, or otherwise. (4) That the said judgment has been paid," etc.

Upon the hearing, his honor, Judge Wallace, dismissed the rule, in the following order: "After hearing the return by the said executor, and it appearing that the said judgment debtor was dead at the time of the issuance of the summons herein, and after hearing argument of counsel, it is considered and adjudged by the court that there is no provision in the act of 1873 for service of summons to revive judgment on the executor of the judgment debtor; and it appearing that the said judgment was obtained on the 26th of September, 1879, and must be revived, if at all, under the act of 1873, therefore, on motion, it is ordered and adjudged that 'good cause' has been shown why said judgment should not be revived, and that said summons or rule be dismissed," etc.

The plaintiff company appeals from this order, upon the following grounds: "First. Because the circuit judge, it is respectfully submitted, erred therein, in holding that there is no provision in the act of 1873 for service of summons to revive judgment on the executor of the judgment debtor. Second. Because he erred therein in ruling that said judgment, being obtained on September 26, 1879, must be revived, if at all, under

the act of 1873, and that it cannot be revived thereunder. Third. Because he erred in not holding that said judgment, obtained at the time named, could be revived, under the act of 1873, by service of summons on James T. Marshall, as executor of the last will and testament of John W. Marshall, deceased, the said John W. being then dead. Fourth. Because he erred in holding that there was no law for the revival of a judgment recovered at the time mentioned, except the act of 1873, and that this act was defective, in that it contained no provision for the service of a summons to revive on the executor of a deceased judgment debtor. Fifth. Because he erred in ruling that the act of 1885, and other acts subsequent to 1873, were no authority to authorize 'the service of the summons' on the executor of the judgment debtor. Sixth. Because he erred in holding that there was no law or authority for the revival of said judgment in the courts of this state. Seventh. Because the judge erred in concluding that 'good cause' was shown why said judgment should not be revived, when no evidence was offered against the judgment, and no showing made to counteract the record of same. Eighth. Because, the judgment being good, and no payments on the same, it is unjust in the executor, James T. Marshall, to resist its enforcement, and he should be made to pay the costs of this litigation," etc.

As we understand it, there are but two questions in the case:

First. Was the rule to revive the judgment and renew the execution made in time? The judgment was rendered after 1873, and while the act of that date was the law as to judgments and executions. It gave to a judgment a lien for 10 years from the date of its entry, with this supplemental provision: "Provided, however, that the plaintiff may, at any time, in three years, after its active energy has expired, revive the judgment, with like lien as in the original, for a like period, by service of a summons on the debtor, as provided by law," requiring him to show cause, etc. This provision was omitted in the act of 1885, which was before the 10 years of plaintiff's lien had expired; but this court has held that the latter act (1885) was not intended to apply to judgments previously obtained, and therefore, as we think, the plaintiff had 3 years in addition to the original 10, within which to make application to revive its judgment, and that carried the right down to September, 1892, and before that time, viz. on December 10, 1891, the rule to show cause, etc., was filed, so that the rule was in time. *King v. Belcher*, 30 S. C. 381, 9 S. E. 359; *Ex parte Witte Bros.*, 32 S. C. 226, 10 S. E. 950.

Second. But the judge further held that as the judgment could only be revived under the act of 1873, and that made no provision

for the service of summons on the executor of the judgment debtor, there was no authority whatever for reviving the judgment against the executor. It is true that the act of 1873, in the section we are considering, does not in express terms give the right to serve summons to revive a judgment on the executor of a deceased defendant in execution; nor, as to that matter, does it expressly give the right to the executor of a creditor, in the case of his death, to issue such a summons. But we cannot suppose that the law makers, in the very act of giving the right to revive, intended to deny it in all cases where either party to the record was dead. On the contrary, we cannot doubt that, properly construed, the act does substantially give the right. The words are, "by service of a summons on the debtor." Now, it seems to us that, in view of the manifest intention, the word "debtor" was here used as a generic term, in condensed and general form, to embrace all proceedings necessary to carry into effect the interest on that side, on the familiar principle that, upon the death of a party, his rights or obligations devolve on his personal representatives. This was not an original proceeding against the executor individually, but a step in regard to an obligation incurred by the testator in his lifetime.

Besides, what meaning should be given to the words which immediately follow,—"by service of a summons on the debtor, as provided by law?" It cannot be supposed that the words "as provided by law" were used without some purpose, and it could not have been considered necessary simply to declare that the manner of service on the debtor should be legal, for that was involved in the requirement itself. But it may have been considered proper to use an expression so comprehensive "as provided by law," in order to meet some such state of facts as has occurred here, in the death of the defendant in execution, making it necessary to revive the judgment against his executor, "as required by law." The same act of 1873 not only contains the provision we have been considering as to "reviving judgments," which is 310 of the Code, but also another provision as to the renewing of executions, which is now 311 of the Code. It will be observed, as to "service on the debtor," these two provisions are identical, except for the phrase, in 310, "as provided by law," is substituted, in 311, that of "his heirs, executors, and administrators." We cannot conceive a reason for allowing an execution to be renewed if the judgment on which it issued could not be revived. "The judgment and execution on it are very closely connected. The execution is only process to enforce the judgment, and it cannot have active energy unless the underlying judgment has a lien. The questions as to them are in one sense identical. The claim to

renew the execution necessarily involves the right to revive the judgment." See *Adams v. Richardson*, 32 S. C. 139, 10 S. E. 931; *Leitner v. Metz*, 32 S. C. 387, 10 S. E. 1082; *Bolt v. Dawkins*, 16 S. C. 198. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the circuit court, for such further proceedings as may be deemed proper.

McIVER, C. J., and POPE, J., concur.

STATE v. JONES et al.

(Supreme Court of North Carolina. Nov. 28, 1893.)

HABEAS CORPUS—ISSUANCE—HEARING—CONTINUANCE—RETURN—EVIDENCE—BURDEN OF PROOF.

1. Under Code, § 1635, providing that, where it appears from the return to a writ of habeas corpus that the party named therein is detained on any criminal accusation, the court may, if he think proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ shall have been returned or shall be made returnable be given to the district solicitor of the county in which the person prosecuting the writ is detained, the court may, on the return to such writ, continue the cause for a day, to give the solicitor time to examine into it.

2. Where, on the return to a writ of habeas corpus, it appeared that petitioners were in custody on a mittimus, regular in every way, from a justice, for failure to give bond for their appearance at the next term of the superior court to answer a criminal charge of which that court had jurisdiction, the burden was on petitioners to show wherein their detention was illegal, and not on the state to show that they were lawfully in custody, the production of the mittimus being sufficient, *prima facie*, to show a legal detention.

Application by Thomas Jones and others for certiorari to review the action of Bryan, judge of the superior court, in refusing to discharge petitioners on habeas corpus. Denied.

This is an application for a certiorari to review the action of Bryan, judge, in refusing to discharge the petitioners on habeas corpus. Notice was given, as required by rule 43 of this court, (12 S. E. Rep. ix.) the time being shortened by consent of the attorney general. The petitioners filed a certified copy of the record and proceedings as a part of their application. From them it appears that the petitioners were arrested, and brought before a justice of the peace, upon an affidavit and warrant for unlawfully disposing of mortgaged property, under Code, § 1089, and upon the trial the justice bound them over to the superior court in the sum of \$200. Upon their failure to give the bond, they were sent to jail, under a mittimus regular in every respect. The petitioners thereafter applied to the judge for a writ of habeas corpus, upon a petition which sets out that they had been committed to jail by virtue of a mittimus from a justice of the peace, (annexing a

copy,) but averring that there was no evidence before the justice that any crime had been committed in said county, and that the committal was made through the ignorance or malpractice of the justice. Upon the return, the sheriff produced the petitioners, and made his return, setting forth the mittimus as the cause of the detention. The court continued the cause till next morning, that the solicitor might have some time to examine into the matter, the petitioners giving bond in the sum of \$100 each for their appearance. To this continuance the petitioners, through their counsel, excepted. On the return, it appearing that the detention was upon a mittimus from a justice of the peace, for the failure to give bond on a charge for unlawfully disposing of mortgaged property, the court ruled that the burden was on the petitioners to show that they were illegally restrained of their liberty. To this the petitioners excepted, and appealed. The petitioners refusing to proceed with their evidence, the court refused to discharge them, and they were permitted to go upon their bond already given.

Geo. M. Lindsay and E. C. Smith, for petitioners. The Attorney General, for the State.

CLARK, J. The learned counsel for the petitioners properly and frankly admitted that this was a case of "novel impression." The continuance of the hearing till the next morning was not subject to exception. It is difficult to see how it injured the petitioners, who were admitted to bail, or how, if injurious, this could be remedied by an appeal. It is *res acta*, and cannot be undone. Besides, the delay was to give the solicitor opportunity to examine into the case, and was expressly authorized by Code, § 1635.¹

Upon the return of the sheriff, it appeared that the petitioners were in custody upon a mittimus, (which, indeed, was also set out in the application for habeas corpus,) regular in every way, from a justice of the peace, for failure to give bond for their appearance at the next term of the superior court to answer a criminal charge of which that court had jurisdiction. Nothing else appearing, the detention was clearly legal. The court thereupon called upon the petitioners to show wherein it was illegal. They declined to furnish him any evidence, but contended that the burden was upon the state to show that they were lawfully in custody. The state had already done so. It was not

called upon to go further till testimony to the contrary was offered. The sheriff knew probably nothing whatever of the detention except the mittimus. He was not called upon to bring up the witnesses, to show what they testified to, or to prove that the petitioners were guilty of the charge. That fact will be inquired into by a grand jury, and afterwards by a petit jury, if a true bill should be found, at the next term of the court. The presumption of innocence applies only upon such trial, and does not avail to furnish a presumption that the detention of a party upon regular process, when the committing officer has jurisdiction, is illegal, and to call upon the state in a proceeding like this to show that the defendant is guilty in order to justify the detention. The detention is to give opportunity for a jury to pass upon the question of the defendant's guilt. In *State v. Herndon*, 107 N. C. 934, 12 S. E. Rep. 258, the judge refused to hear any evidence, deeming the commitment (there, upon a true bill found by a grand jury) conclusive of probable cause. The court held that the strong presumption was in favor of the correctness of the action of the grand jury, but that it was not conclusive, since there might be other evidence, not before them; hence that it was error to refuse to hear evidence, but that in no event, after indictment found, could the court discharge the prisoner. It might, in a proper case, admit to bail. But here the court did not refuse to hear evidence. It asked for it. The production of the mittimus was sufficient *prima facie* to show a legal detention. The petitioners had upon them the burden of showing evidence to rebut this, and the court made all the inquiry it was called upon to make (Code, § 1644) when it told them to proceed with their evidence, which they refused to do. If the petitioners had shown that there was no evidence at all before the justice, the judge could examine into the case *de novo*, unless they had waived the examination before the committing officer, (9 Amer. & Eng. Enc. Law, 197,) and bind over or discharge them; or, if the facts proved did not constitute a crime, he might discharge them, or, if the bail was excessive in amount, reduce it. There may arise cases where the court, *ex mero motu*, as it has power to do, may issue the writ. (Code, § 1632;) and of course it may in all cases summon witnesses, and investigate whether the *prima facie* case of legal detention is not rebutted. But the present case does not raise a question of the power to do this. The petitioners are in court. There is nothing that indicates that they are weak, helpless, or ignorant of their rights. Indeed, they are represented by counsel. The judge does not refuse to hear testimony. He calls upon the state to show the cause of the detention. This it does satisfactorily by the sheriff's return. The court then asks the petitioners for their evi-

¹ Code, § 1635, provides that, when it appears from the return to a writ of habeas corpus that the party named therein is detained on any criminal accusation, the court may, if he think proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ shall have been returned, or shall be made returnable, be given to the district solicitor of the county in which the person prosecuting the writ is detained.

dence. They refuse to give any. The court could do no otherwise than to refuse to discharge them. Code, § 1645. It seems, indeed, that the petitioners in fact are not even in custody, but are now out on bail. They have no ground to complain in any particular. Petition dismissed.

LONG v. WALDRAVEN et al.

(Supreme Court of North Carolina. Nov. 28, 1893.)

WILLS—CONSTRUCTION—LIFE ESTATE—CHANGE TO FEE BY TESTAMENTARY POWER.

Where testator's will gave to his widow an estate for life in all his property, and the power to dispose of one-third by will, and the widow died intestate, her heirs and next of kin were not entitled to a third interest in testator's property, as the power of disposition did not turn the widow's life estate into a fee.

Appeal from superior court, Forsyth county; Winston, Judge.

Action by John M. Long, as executor of John B. Doub, deceased, against Martha S. Waldraven and others, as devisees and legatees under testator's will, and E. C. Dull and others, as next of kin of testator's intestate widow, for a construction of the will. From a decree for the devisees and legatees, the next of kin appeal. Affirmed.

Testator's will provided: "(1) It is my will that my just debts and burial expenses be paid by my executor, hereinafter named, out of my estate, as soon after my decease as shall by him be found convenient. (2) That all my estate, consisting of real and personal property, be given unto my wife, Minerva S. Doub, during her natural life. (3) That after the death of my wife, Minerva S. Doub, my estate shall be equally divided between the heirs of my brothers and sisters, with the exception of one-third of my estate, which I leave at the disposal of my wife, Minerva S. Doub, to be left as she may will."

Jones & Kerner and Watson & Buxton, for appellants. Eller & Starbuck for appellee.

BURWELL, J. The appellants are the next of kin of Minerva S. Doub, whose husband, John B. Doub, by his will, directed that all his estate, consisting of real and personal property, should be given unto his wife during her natural life, and in the third item of his will said: "It is my will that after the death of my wife, Minerva S. Doub, my estate shall be equally divided between the heirs of my brothers and sisters, with the exception of one-third of my estate, which I leave at the disposal of my wife, Minerva S. Doub, to be left as she may will." The testator thus gave to his wife an estate for life in all his property, and the power to dispose of one-third of it by will. She failed to exercise that power.

Her estate in the whole property was distinctly and unequivocally limited by her life. There are no words in the will that in any way enlarge that estate, or enhance her rights in the property while she lived.

"A devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. But where the estate is given for life, only, the devisee takes only an estate for life, though a power of disposition or to appoint the fee by deed or will be annexed, unless there be some manifest and general intent of the testator which would be defeated by adhering to the particular intent. Words of implication do not merge or destroy an express estate for life, unless it becomes absolutely necessary to uphold some manifest general intent." Church v. Disbrow, 52 Pa. St. 219.

This rule of interpretation has been approved by this court in Bass v. Bass, 78 N. C. 374; Patrick v. Morehead, 85 N. C. 62; and other cases.

We find in this will no words that, either expressly or by implication, manifest any general intent that would be defeated by adhering to the particular intent, so clearly expressed, that his wife should have only an estate for life. She was not to be allowed to consume any part of the corpus of the fund. Had that right been conferred upon her, it would be inconsistent with the notion that a life estate, only, was given. Church v. Disbrow, supra. The testator did not direct that one-third of his estate should, upon the death of his wife, go to whomsoever she should think proper to make her heir or heirs, in which event it might be said, perhaps, as in Shermer v. Shermer, 1 Wash. (Va.) 266, that the wife, by suffering her legal representatives to succeed her, actually made them her heir or heirs, as much so as if she had pointed them out by an express devise. Hence, this case must be added to that line of cases which, as was said in Shermer v. Shermer, supra, tend to prove "that an express estate for life to the wife, with a power to dispose of the fee, shall not turn her estate for life into a fee." What has been said disposes of the only question brought before us by this appeal. Affirmed.

PASS v. SHINE.

(Supreme Court of North Carolina. Nov. 7, 1893.)

INTEREST—RATE AFTER MATURITY OF NOTE—VALIDITY OF AGREEMENT IN MORTGAGE.

An agreement in a mortgage is valid, which requires the note which the mortgage secures, and which specifies no rate of interest, to bear interest after maturity at a legal rate higher than the law allows before maturity on such a note.

Appeal from superior court, Duplin county; Henry R. Bryan, Judge.

Action by Mary E. Pass, as executrix of James C. Pass, against James F. Shine, to foreclose a mortgage. Judgment for plaintiff. Defendant appeals. Affirmed.

H. R. Kornegay, for appellant. W. R. Allen, for appellee.

AVERY, J. The defendant might have lawfully agreed, by the terms of the note itself, to pay interest at the rate of 8 per cent. from the date of its execution. By failing to specify a higher rate, he, in contemplation of law, intended that the debt should bear only 6 per cent. interest until maturity. To secure this debt he executed a deed, conveying his own land, in which his wife (now dead) joined. The action is brought against James F. Shine, only, to foreclose the mortgage after default in the payment of the note. We can conceive of no reason why the defendant could not lawfully contract in the deed itself, as he could have agreed in the note, that the rate of interest should be 8 per cent. after maturity. It has generally been conceded by the courts of this country that interest "is allowable as damages for default in the performance of a contract to pay money." 11 Amer. & Eng. Enc. Law, 383. By special agreement a lawful rate may be paid from the date of contracting a debt till it becomes due. The fact that the creditor is content with a lower rate before maturity does not affect his right to demand, under a special agreement, a higher rate, not exceeding the limit fixed by law, after maturity. The judgment is affirmed.

WOOTEN et al. v. OUTLAW et al.

(Supreme Court of North Carolina. Nov. 7, 1893.)

EVIDENCE—DECLARATIONS.

In an action on a note by the assignee, declarations of the payee that the maker owed him only a certain amount are inadmissible, it not being shown that they were made before the assignment, and therefore against interest.

Appeal from superior court, Duplin county; Bryan, Judge.

Action by Simeon Wooten and others against N. W. Outlaw and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

The action was for the foreclosure of a mortgage made by F. M. Outlaw and wife to N. B. Outlaw, and by him assigned to the plaintiff Simeon Wooten. F. M. Outlaw, the mortgagor, is dead, and his widow and heirs at law are the defendants. It was admitted upon the trial that the said F. M. Outlaw executed the note and mortgage as alleged in the complaint, and that they were transferred to the plaintiff Wooten prior to April 15, 1886. The defendants relied upon the sole defense of payment. One Arnett, a witness for the defendants, testified that

after the death of F. M. Outlaw he heard N. B. Outlaw say that F. M. Outlaw owed him \$70 or \$80, and that he heard him say this seven or eight years ago. Upon cross-examination he said it might not have been more than six years since he heard the above conversation. This evidence was objected to by the plaintiffs upon the ground that it was not shown that this conversation occurred prior to the transfer of the note and mortgage to the plaintiff Wooten, and that the declarations of N. B. Outlaw made after the transfer were incompetent. Objection sustained, and the defendants excepted. There was other testimony tending to show credits of \$100 and of \$25 upon the note, and these credits, as also one of \$41.80, were admitted. The issue submitted was, "Has the note declared on been paid?" to which the jury responded, "No." His honor gave judgment for the balance, after deducting the credits above set out and interest, and for foreclosure of the mortgage. Defendants appealed.

H. R. Kornegay, for appellants. W. R. Allen, for appellees.

MacRAE, J. By the admissions of the parties, all other issues except that arising upon the plea of payment were eliminated. Both of the credits claimed by defendants were allowed, and an additional credit of \$41.80 was also given. There was no testimony showing the dates of said credits, and a calculation will show that in the judgment these credits were allowed as of the times at which they were admitted in the complaint. As to the credit of \$25, the testimony does not enlighten us as to the time it should have been entered, but it will appear to have been given about the same time that the credit of \$100 was allowed. The rejected testimony was not competent unless it was made as a declaration against interest, while N. B. Outlaw was the holder of the note and mortgage, and the defendants failed to show that he was still the owner at the time of the alleged declarations. Indeed, the rejection of this testimony can work no harm to the defendants, for, if admitted, it would be consistent with the other testimony in the action. No error.

McCASKILL et al. v. CURRIE.

(Supreme Court of North Carolina. Nov. 14, 1893.)

SETTING ASIDE VERDICT—INCONSISTENT FINDINGS.

In an action to set aside a deed to defendant from R., plaintiff's ancestor, as to a 150-acre tract therein described, the following issues were submitted, and to both the jury answered, "Yes:" Did defendant procure the deed from R. by false representation as to the 150-acre tract? And did defendant, after execution of the deed, without R.'s consent, insert therein the 150-acre tract? Held that, as both findings would support the same judgment for

the same party, there was not such inconsistency therein as would warrant the court in setting aside the verdict, and that a judgment should have been rendered for plaintiff. MacRae, J., dissenting.

Appeal from superior court, Moore county; Connor, Judge.

Action by John W. McCaskill and others against James L. Currie to set aside a deed of land to defendant executed by Alexander Robinson, plaintiff's ancestor. The court set aside the verdict, and plaintiffs appeal. Reversed.

The following issues were submitted to the jury, to both of which the jury responded, "Yes:" "(1) Did the defendant procure the deed from Alexander Robinson by undue influence or false representation as to the 150-acre tract? (2) Did the defendant, after the execution of the deed, fraudulently, and without the knowledge and consent of Alexander Robinson, insert in said deed the 150-acre tract."

Black & Adams, for appellants. J. W. Hinsdale and W. E. Murchison, for appellee.

AVERY, J. Where the verdict of a jury is either so inconsistent or so indefinite that the court cannot determine, upon the pleadings and findings, what judgment should be rendered in favor of a given party, or which of the parties is entitled to judgment, it must be set aside, and a new trial awarded. *Allen v. Sallinger*, 105 N. C. 339, 10 S. E. Rep. 1020; *Crews v. Crews*, 64 N. C. 536. The same result must follow where findings of the jury are irreconcilably inconsistent with the admissions in the pleadings. *Tankard v. Tankard*, 79 N. C. 54. A careful review of the cases in which this court has given its approval to setting aside verdicts on account of inconsistent findings discloses the fact that the rulings have invariably rested upon the ground that there were two responses to different issues in each case, one of which would support a decree for the defendant, while the other would entitle the plaintiff to recover; so that the court could not proceed to judgment, because there was no principle of law which empowered the judge to choose between two contestants, both of whom had been declared by the jury to be the prevailing party. *Mitchell v. Brown*, 88 N. C. 156; *Bank v. Alexander*, 84 N. C. 30; *Morrison v. Watson*, 95 N. C. 479; *Turrentine v. Railroad*, 92 N. C. 638; *Porter v. Railroad Co.*, 97 N. C. 66, 2 S. E. Rep. 581; *Allen v. Sallinger*, supra; *Puffer v. Lucas*, 107 N. C. 322, 12 S. E. Rep. 130, 464. But when the verdict points out who is the prevailing party, and determines distinctly the facts upon which the nature and measure of his redress depend, the court is not precluded from pronouncing the sentence of the law upon the findings, because, upon two allegations in the complaint, in the nature of separate counts in a declara-

tion, or distinct grounds of action, issues have been framed and responses returned which are not in perfect harmony with each other, when it appears that upon either finding, considered separately, the same party (here the plaintiff) would be entitled to precisely the same judgment. In the case at bar, whether the defendant inserted the description of the 150-acre tract of land in the deed before it was signed, and, by undue influence or false representation, induced the grantor to execute it in that shape, or whether, after execution, he forged the portion of the deed embracing the calls of that tract, in either event the court would declare the deed fraudulent and void as a conveyance of the 150-acre tract, and adjudge that the plaintiff recover the possession, and costs of the action. Indeed, we can readily understand how the jury might have been misled so far as to intend by the response to the first issue to find that the defendant represented to Alexander Robinson that he was conveying only the 80-acre tract, and afterwards altered the deed by inserting the description of the other tract. If the judge who presided in the court below entertained any doubt about the weight of the evidence, and thought that the findings of the jury upon both issues, together with other circumstances, indicated that they were unduly biased in favor of the plaintiff, he might have set aside the verdict, in the exercise of a sound discretion, and the order would not have been reviewable here. But we do not think that the verdict is so contradictory or inconsistent that the court could not see what judgment should be entered. Mere informality will not vitiate a verdict, if it appears that no injustice will result from an adjudication upon its substance or general purport. *Hawkins v. House*, 65 N. C. 616; *McMahan v. Miller*, 82 N. C. 321; *Walker v. Mebane*, 90 N. C. 259.

We have extended our examination of authorities upon the practice in cases of this kind to the text writers and decisions of other courts, and we have not found any case where two findings, which would support precisely the same judgment in favor of the same party, have been set aside on the ground of inconsistency in the verdict. *Potter v. Hiscox*, 30 Conn. 518; *Hil. New Trials*, p. 148. The supreme court of New York, in the case of *Hyatt v. Railroad*, 6 Hun. 306, held that a verdict was inconsistent where the jury assessed punitive damages against a railway company on account of an assault on the plaintiff by its conductor, who was a codefendant, but did not find a verdict against the conductor, because, ex necessitate, if the conductor was not in fault, the company was not liable. The finding in favor of the conductor necessarily meant that the plaintiff was entitled to recover nothing against the corporation, while the assessment of damages against the com-

pany was a basis for a judgment for the amount against it. The verdict was set aside because, in one aspect of it, the plaintiff was entitled to recover, while in another he was not. The test, therefore, is whether there are two phases of a verdict; the one entitling the one party, and the other the adverse party, to a judgment in his favor. The judgment of the court is reversed, and the case remanded, to the end that judgment may be rendered upon the verdict in favor of the plaintiff. Reversed.

MACRAE, J., (dissenting.) I am constrained to dissent from the conclusion reached by a majority of the court, and to concur in the view taken by the learned judge who tried the case below. It seems to me that the responses to the two issues are so inconsistent and illogical that they cannot stand together, and, as the court could not select either one as against the other, both should be rejected. The response to the first issue necessarily negatives the second, for, if the defendant procured the deed from Alexander Robinson by undue influence or false representation as to the 150-acre tract, it was physically impossible that he should have inserted the calls of this tract in the deed after its execution. If, on the other hand, the defendant fraudulently, and without the knowledge and consent of Alexander Robinson, inserted in said deed the 150-acre tract, it was equally impossible that he should have procured the deed from Robinson by undue influence and fraudulent representation as to the 150 acres. So that by the verdict we have, in effect, an affirmative and a negative response to each issue.

ATKINSON v. ASHEVILLE STREET RY. CO.

(Supreme Court of North Carolina. Nov. 14, 1893.)

CORPORATIONS — VALIDITY OF FRANCHISE — COLLATERAL ATTACK — PRACTICE ON APPEAL.

1. Plaintiff alleged that, being the owner of a franchise to build and operate a street railway, he delivered an assignment of it in escrow to another person, to be delivered to one D. after the latter had built certain lines of track thereunder, that it was wrongfully delivered to said D. before he had built any lines as agreed, and that defendant company, with full knowledge of the facts, had bought it from D. Plaintiff asked that the assignment to D. be declared void, and that defendant be enjoined from operating under such franchise. The franchise was in terms granted to "F. and his associates, to be known as the A. Company." *Held*, that defendants could not in that action attack the franchise on the ground that it was an invalid attempt on the part of the city to form a corporation, and at the same time grant a street-railway license thereto.

2. A statement, in the case on appeal, that notice of appeal was waived, cannot be contradicted for the first time on argument in the appellate court.

3. The record need not show that an appeal was duly entered, when it affirmatively ap-

pears from the case on appeal, which bears date within the time within which an appeal could be taken, that the appeal was taken, and notice thereof waived.

Appeal from superior court, Buncombe county; John Gray Bynum, Judge.

Action by Natt Atkinson against the Asheville Street-Railway Company to annul the delivery of a certain instrument assigning a franchise, and to restrain defendant from operating under such franchise. From a judgment for defendant, plaintiff appeals. Reversed.

The complaint was as follows:

"The plaintiff, complaining of the defendant, alleges: First. That the city of Asheville is a body politic and corporate, duly chartered and organized under and by virtue of an act of the general assembly of North Carolina, entitled 'An act to amend the charter of the town of Asheville,' ratified the 8th day of March, A. D. 1883, and the acts of which that act is amendatory, and the acts amending the same. Second. That on the 4th day of March, A. D. 1888, the plaintiff was the owner of a certain license privilege and franchise to operate a street railway in the city of Asheville, commonly known as the 'Farrinholt Charter,' the same being a license privilege and franchise granted by the said the city of Asheville, by an ordinance duly enacted, passed, and ratified by the board of aldermen of the said the city of Asheville, to one L. A. Farrinholt and his associates, and by the said L. A. Farrinholt and his associates assigned to plaintiff, for value. A copy of said ordinance is hereto attached, marked 'Exhibit A,' and is hereby made a part of this complaint. Third. That on the said 4th day of March, A. D. 1888, the plaintiff was, and ever since has been, the owner of valuable real estate in and near the said city of Asheville, some lots of which lie near Chestnut street and Merrimon avenue, in said city, and some lots of which lie near Depot street, in said city, and all of which would have been greatly enhanced in value by the building and operating of a street railway on said streets and said avenue, and the greatest, if not the only, object the plaintiff had, outside of the general welfare of said city, in purchasing the said Farrinholt charter, was to insure the building and operating of a street railway along said Chestnut and Depot streets and Merrimon avenue; and the plaintiff, in order to prevent the building of other lines of street railroad on only a part of the streets named in the said Farrinholt charter, the building of which would have rendered the building and operating of the street railway on all the streets therein named as aforesaid unprofitable, and in this way would have made it impossible to raise the necessary capital to build a street railroad on the streets therein named as aforesaid, deposited with the said city of Asheville the sum of one thousand dollars as a

guaranty that the plaintiff would build, or cause to be built, a railroad on all of said streets so named as aforesaid, (all of which will more fully appear upon reference to said city's receipt for said money, a copy of which is hereto attached, and hereby made a part of this complaint,) and thereby induced the said city to refuse permission to the parties desiring it to build a railway on only a part of said streets, leaving the said Chestnut and Depot streets and Merrimon avenue without railroad facilities, [the said city being about to grant such permission on the ground that the plaintiff, as the said city and said parties alleged, could not command the means to build any road, and that a road on part of said streets was better than no road at all.] Fourth. That in order to accomplish the desire of plaintiff that street railroads should run on all of the streets named in the said Farrinholt charter, and especially that such railroads should be built and operated on said Chestnut and Depot streets and Merrimon avenue, the plaintiff entered into an agreement and contract with one E. D. Davidson, who, as plaintiff is informed and believes, is insolvent, whereby the said E. D. Davidson, in consideration of the assignment to him of the said Farrinholt charter, agreed and bound himself to build and operate a street railroad on all the streets named in the said Farrinholt charter; and, in order to insure the faithful performance of said contract on the part of the said E. D. Davidson, the assignment of the said Farrinholt charter was not delivered to him, but was, by agreement with the said E. D. Davidson, delivered to J. G. Martin to be held by him in escrow, and by him delivered to the said E. D. Davidson only after the said E. D. Davidson had fully complied with his contract in reference to the building and operating of said railroad on said streets named in said Farrinholt charter, and in other respects; and that the said J. G. Martin accepted the trust thus reposed in him, and received the said assignment in escrow for the purposes aforesaid,—all of which will more fully appear by reference to a certain writing, a copy of which is hereto attached and hereby made a part of this complaint, and marked 'Exhibit C.' Fifth. That, notwithstanding the solemn agreement on the part of the said J. G. Martin that he would hold the said assignment for the purposes set forth in said Exhibit C, he has long since delivered said assignment to said E. D. Davidson, although, as the said J. G. Martin well knew, the said E. D. Davidson had not then, nor has he yet, built or begun to build any street railroad or other railroad on the said Chestnut and Depot streets and Merrimon avenue, or either of them, and although no street or other railroad has ever been built or begun by any person or persons, or by any corporation or corporations, on said last-named streets or said last-named

avenue; and, the time within which the said E. D. Davidson agreed to build or begin to operate a street railroad on all of the streets named in the said Farrinholt charter having long since expired, the plaintiff has no reason to hope that the said railroad will ever be built on either of said last-named streets or on said last-named avenue, and by the breach of trust on the part of the said J. G. Martin hereinbefore set forth the plaintiff has been greatly damaged. Sixth. That the defendant, which is a corporation chartered and organized by and under the laws of North Carolina, purchased the said license privilege and franchise known as the 'Farrinholt Charter,' as aforesaid, from the said E. D. Davidson, with full knowledge of all the facts hereinbefore alleged. Plaintiff therefore prays judgment that the delivery of the assignment referred to in the foregoing complaint, by J. G. Martin to E. D. Davidson, be, and ever shall be, void, and that the plaintiff is the owner of the license privilege and franchise described in the foregoing complaint, and that the defendant be perpetually enjoined from ever using, exercising, or operating under the said license privilege and franchise, and for such other further relief as the facts set forth in the foregoing complaint will warrant."

Exhibit A was in part as follows: "The following, granting the Asheville Street-Railway and Transfer Company the privilege of building a street-railway system, was unanimously adopted on its first reading, viz.: Be it ordained by the board of aldermen of the city of Asheville that L. A. Farrinholt and his associates, to be known as the Asheville Street-Railway and Transfer Company, are hereby authorized and permitted to make, construct, maintain, and use a single-track railway for the purpose of conducting a general passenger and transfer business, under such rules and subject to such provisions as hereinafter ordained, along the following streets in the city of Asheville. * * *

Summers & Lewis, J. S. Adams, and Chas. A. Moore, for appellant. F. A. Sondley, for appellee.

CLARK, J. The so-called "Farrinholt Charter" is simply a license by the city to lay down a railway track on certain streets mentioned, granted to individuals named, who of course could act as a corporation only upon duly taking out letters of incorporation before the clerk, or obtaining a charter from the general assembly. The question whether such incorporation has been duly obtained or whether those parties have attempted to exercise corporate functions without it, is not raised in this action, and could not be in this collateral way. The city authorities were empowered to issue the license. Elliott, Roads & S. 329, 334;

City of Burlington v. Burlington St. Ry. Co., 31 Amer. Rep. 145; *Railroad Co. v. Richmond*, 96 U. S. 521. The complaint avers that it was assigned by the plaintiff, then owner of the license, in escrow to Martin, who, in breach of the trust reposed in him, has conveyed it to the defendant, who is endeavoring to operate under it. It was error to hold that a cause of action is not set out. The case on appeal recites: "Plaintiff excepted and appealed. Notice of appeal waived." The judge, in a memorandum appearing in the transcript on appeal, says that his "recollection is that the plaintiff asked an appeal, and, if the failure to make the entries was his inadvertence, he cannot allow plaintiff to be prejudiced," and grants defendant "leave to file counter statement, as it had asked to do." This, it seems, the defendant did not do, and the judge adopted the case on appeal prepared by appellant. The waiver is neither controverted, nor is there a denial that an appeal was in fact taken, though opportunity was given defendant, by leave, to file a counter case. There is nothing beyond the bare suggestion in defendant's printed argument or brief that notice of appeal was not served, and that entry of appeal was not made. But this neither denies taking the appeal nor waiver of notice; nor, if it did, does it do so in a legal mode. If notice was waived, why should it be served? And if appeal was actually taken, whether it was entered or not, becomes less material. If there had been a denial in a legal way, and at the proper time, of a waiver, the court could not recognize the waiver unless in writing. *Sondley v. City of Asheville*, 112 N. C. 694, 17 S. E. Rep. 534, in which case there were contradictory affidavits, and the court disregarded the alleged verbal agreement, under rule 39, (12 S. E. Rep. ix.) and repeated rulings of this court. Besides, the denial of a waiver should have been made below, and not, for the first time, by a suggestion in the argument in this court, and in contradiction of the case on appeal adopted by the judge. *Walker v. Scott*, 102 N. C. 487, 9 S. E. Rep. 488, cited in *State v. Price*, 110 N. C. 599, 15 S. E. Rep. 116. Strictly and properly the record should show that the appeal was duly entered; but that is not imperative if it appears, as here, affirmatively, that the appeal in fact was taken and notice was waived. *Fore v. Railroad Co.*, 101 N. C. 526, 8 S. E. Rep. 335. Here the case on appeal recites that the defendant excepted and appealed, and that notice of appeal was waived. This, not being controverted by the appellee, even if it had not been adopted by the judge, is evidence of those facts. Besides, in addition, the case itself bears date September 10, 1892,—within the time within which the appeal could be taken. This distinguishes this case from *Moore v. Vanderburg*, 90 N. C. 10; *Wilson*

v. Seagle, 84 N. C. 112, and *Spence v. Tapscott*, 92 N. C. 577, relied on by appellee. The motion to dismiss appeal is denied. In dismissing the action below there was error.

STATE v. STAFFORD.

(Supreme Court of North Carolina. Nov. 14, 1893.)

ASSAULT AND BATTERY—TEACHER AND PUPIL.

1. A warrant against a school-teacher charging that he did unmercifully whip a child, inflicting bruises on her person, sufficiently charges a battery, without setting out the *quo animo*, which could be shown by way of avoidance if it were pleaded in defense that the parties were teacher and pupil.

2. A warrant charging that defendant inflicted bruises on the person of the child assaulted does not allege serious injury, so as to deprive the justice of the peace of jurisdiction.

3. On appeal from a conviction in a justice's court, the trial being *de novo*, the superior court, on conviction, may impose a higher or heavier fine than was adjudged below, up to the limit of the justice's power of punishment.

Appeal from superior court, Moore county; Whitaker, Judge.

E. W. Stafford, convicted of assault and battery, appeals. Affirmed.

The Attorney General, for the State.

CLARK, J. The defendant, a school-teacher, was convicted before a magistrate for whipping one of his scholars, and fined \$40. On appeal to the superior court he was again convicted, and was fined by the judge \$50. There were no exceptions to evidence nor to the charge. The only exception taken was to the refusal of a motion to dismiss, made upon the ground of a want of jurisdiction.

We were not favored with an argument on behalf of defendant. It may be that the motion to dismiss was based on the ground that the courts have no jurisdiction in cases of chastisement inflicted by teachers upon their pupils. In *State v. Pendergrass*, 19 N. C. 365, it is held that the law confides to school masters and teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them criminally responsible unless the punishment be such as to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions. Here the warrant charges that the defendant "did unmercifully whip" the child, "inflicting bruises on her person." It is not necessary that the *quo animo* should be charged. The warrant sufficiently sets out a battery. When the defense is set up that it was inflicted by a teacher upon his pupil, this defense can be invalidated by proof of malice, or anger, or excessiveness. The case on appeal states that there was evidence "tending to show that the punishment was immoderate, and was inflicted to gratify defendant's malice and out of anger." There was evidence for defendant

tending to show the contrary, but the case states that the court left the conflicting evidence to the jury with appropriate instructions, to which no exception was taken. The *quo animo* thus passed upon by the jury distinguishes the facts of this case from those in *State v. Pendergrass*, *supra*. If the objection to the jurisdiction proceeded on the ground that the magistrate had no jurisdiction, it is sufficient to say that there is nothing in the warrant nor in the evidence to oust his original jurisdiction. The words in the warrant, "inflicting bruises on her person," are not a sufficient allegation of serious injury to deprive the justice of jurisdiction. The evidence, as far as set out, falls far short of the facts in *State v. Huntley*, 91 N. C. 617. The trial in the superior court being *de novo*, it was competent for the judge, in his discretion, to lay a lighter or heavier penalty than the sentence of the justice, provided, of course, he did not exceed the limit of punishment which the magistrate could have imposed. *State v. Johnson*, 94 N. C. 863. No error.

TRUSTEES OF WADSWORTHVILLE POOR SCHOOL v. JENNINGS.¹

(Supreme Court of South Carolina. Nov. 29, 1893.)

LANDLORD AND TENANT — DISAVOWAL — NOTICE —
RECOVERY OF POSSESSION — PRESUMPTION OF
GRANT — LIMITATIONS — EXEMPTION OF WADS-
WORTHVILLE POOR SCHOOL.

1. Where a tenant for years disavows his tenancy by conveying the leased land by deed in fee simple, the landlord has the right to protect his title by regaining possession without waiting for the termination of the lease.

2. Possession under a deed in fee simple from a tenant, and the recordation of such deed, is a sufficient notice to the landlord of the disavowal of tenancy by the tenant. *McIver*, C. J., dissenting.

3. Adverse possession for over 20 years under a deed in fee simple from a tenant creates a rebuttable presumption of law of a grant from the landlord. *Smith v. Asbell*, 2 Stro. 146, followed.

4. Lands held in trust for the Wadsworthville Poor School were leased for years, and the tenant conveyed them by deed in fee simple. *Held*, that Act Dec. 14, 1805, relieving such lands from the operation of the statutes of limitation, was not a bar to the defense of adverse possession under the deed, where the presumption of a grant from the landlord was not rebutted by the trustees in an action to recover the land. *Trustees v. Meetze*, 4 Rich. Law, 50, and *Same v. McCully*, 11 Rich. Law, 429, followed.

Appeal from common pleas circuit court of Greenville county; James Aldrich, Judge.

Action by the Trustees of Wadsworthville Poor School against L. I. Jennings for the recovery of land. Judgment for defendant. Plaintiff appeals. Affirmed.

Jos. A. McCullough, for appellant. Cothran, Wells, Ansel & Cothran and Haynsworth & Parker, for respondent.

¹ For opinion on rehearing, see 18 S. E. 891. v.188.e.no.11—17

POPE, J. Under the will of Thomas Wadsworth, who died in 1791, while a citizen of Charleston, in this state, certain lands within the limits of this commonwealth were devised to trustees to maintain and support a free school for poor children residing within the limits of Maj. Dunlap's battalion of the Saluda regiment, within Laurens county. The general assembly of this state, appreciating the spirit of this deviser, and the better to protect these lands from the rapacity and cupidity of those persons who would likely seek an advantage of the trustees under this will, passed an act on the 14th day of December, 1805, whereby these lands were relieved from the operation of the act of limitation. See 5 St. at Large, 496. Again, at the request of the trustees under the will of Mr. Wadsworth, the general assembly, on the 20th day of December, 1810, passed an act whereby these trustees and their successors in office were incorporated by the name of the Trustees of the Wadsworthville Poor School, with the usual privileges enjoyed by similar corporations. See 5 St. at Large, 621, 622. This corporation, thus created, on the 15th day of April, 1818, leased 330 acres of the lands devised under the will of Thomas Wadsworth unto one Thomas G. Walker for the term of 75 years; the same beginning on the 12th day of December, 1815, and ending on the 12th day of December, 1890. This lease was for valuable consideration, and was by a deed therefor, which deed of lease was duly recorded in the office of the register of mesne conveyance for Greenville district, (now county,) where the said leased land was situated. This lease was by Thomas G. Walker assigned to one David McNeely on the 19th October, 1821, and David McNeely assigned the same to one John P. Pool on the 15th day of February, 1847. Afterwards, John P. Pool, by his deed therefor, conveyed 100 acres in fee simple, as it is agreed by the parties to this appeal, to Fagan E. Martin, but in the deed itself recited all the foregoing facts, and this deed was duly recorded in the office of the register of mesne conveyance on 30th January, 1850. Under a judgment against Fagan E. Martin, this land was sold, as Martin's property, 6th January, 1857, by the sheriff of Greenville district, to Charles J. Elford. After Mr. Elford's death, and in the settlement of his estate, this land was sold and conveyed by the commissioner in equity to Beeco on the 7th October, 1867. Beeco sold and conveyed to Choice January 21, 1876. Choice sold and conveyed to Davis January 21, 1876. Davis sold and conveyed to Kennemore and Tate December 4, 1879. Kennemore purchased by deed therefor Tate's interest. Kennemore sold and conveyed a part of the land to McGee 1st January, 1891. McGee sold his part by deed therefor to L. I. Jennings on 23d February, 1891. Kennemore sold his part by deed to L. I. Jennings on

23d February, 1891. All these several deeds were duly recorded in the office of the register of mesne conveyance for Greenville county.

On the 25th day of April, 1892, in the court of common pleas for Greenville county, the plaintiff, the Trustees of the Wadsworthville Poor School, brought an action against the defendant, L. I. Jennings, to recover $62\frac{1}{4}$ acres of the land, and in the complaint disclosed plaintiff's title, the lease, and its termination, demanding the recovery of the land, and \$200 as rents and profits. The defendant, in his answer, admitted the possession of the land in controversy, but denied plaintiff's title and right to recover land, or rents and profits; further, that beginning on the 4th December, 1879, he had been in the exclusive and continuous possession of the land sued for, claiming the same as his own adversely to the plaintiff and all the world; further, that he, and those under whom he claims, had been in the continuous, adverse possession of the premises for 40 years, claiming the same as their own, and holding adversely to the whole world; further, purchase for valuable consideration without notice, and adverse possession thereunder for more than 10 years; that Kenne-more, through whom he claimed, had made valuable improvements, in value \$1,000, and that he believed he had a good title in fee in said premises, which sum he claims of the plaintiff; and, lastly, that the defendant, and those under whom he claims, have had exclusive, adverse, and continuous possession of the premises in dispute, claiming a fee-simple title against all the world, for over 20 years.

On the 3d day of December, 1892, the action came on for trial before Judge Aldrich and a jury, in the court of common pleas at Greenville, when a verdict was rendered for the defendant. After a verdict had been found for defendant, plaintiff moved for a new trial upon the minutes. This motion being denied, a judgment was duly entered, from which the plaintiff now appeals upon the following grounds: (1) Because the presiding judge erred in instructing the jury "that if one or more of these purchasers from Walker took a fee-simple deed, and went into possession of it, claiming that he had the entire and exclusive right to that land,—went into it and took possession of it under such deed,—and made it known, or this fact became known, to the trustees, the plaintiff here, then their title by adverse possession began to run," whereas, he should have charged, as argued by the plaintiff, (a) that neither Walker, nor any one claiming through him, could plead adverse possession during the term of the aforesaid lease; (b) that, by reason of the act suspending the statute of limitations as to these lands, no person could plead, as against the plaintiff, title by adverse possession; (c) that before the said Walker, or any one claiming through

him, could avail himself of title by prescription or presumption, he would have to show that his holding was not permissive, and this he could not do during the term of the aforesaid lease; and (d) that in no case can a tenant dispute the title of his landlord until he has surrendered possession of the lands to his landlord, giving clear and unequivocal notice of his intention to hold adversely and re-enter in his new capacity. Not until then would he begin to hold adversely. (2) Because his honor erred in instructing the jury: "If the plaintiff had notice of it that there was somebody in possession of their lands, claiming it as their own, they had a right to bring their action against them as trespassers; and if they had a right to sue him, and he was not sued, and they allowed him to stay there for forty years, that trespass would ripen into a good title,"—because (a) plaintiff could not bring action of ejectment until the termination of the said lease; (b) if plaintiff had had such cause of action, that would not convert the holding of the party in possession under that lease from permissive to adverse; (c) there could be no such adverse holding of these lands as could ripen into title; (d) Walker, and all claiming through him, were estopped from disputing plaintiff's title. (3) Because his honor erred in charging the jury: "Did Jennings, or any one of his ancestors, go in there, and take possession under that title, and was that fact known to the trustees? If the trustees knew that such a party was in possession of that land, claiming a title adverse to them, they should have acted, and, if they stood by for 20 or 40 years, they slept on their rights,"—because (a) the said law was wholly inapplicable to the facts proven in this case, inasmuch as there was no proof whatever, either on the part of plaintiff or defendant, that the plaintiff knew at any time that there was any person in possession of these lands, holding adverse to them; (b) they were not estopped from suing for the said lands at any time. (4) His honor erred in charging the jury that the defendant, Jennings, could avail himself, by way of purchase, of any right, title, or interest in any one through whom he claimed might have had by adverse possession, because (a) a person, to avail himself of the plea of title by adverse possession or prescription, must show that he, as well as those through whom he claims, held adversely. (5) His honor erred in instructing the jury, as law applicable to this case: "If one goes into possession of land under color of title, or acquires possession of land, and holds it for 20 years, or when a man has possession of lands, and holds it for 4 or 5 years, and he conveys it to another, who holds it under his title, and so on for 20 years, and you establish a continuous holding for 20 years, if that possession and title was continuous and adverse, as it states here, for the period of 40 years or 20 years, that would presume a grant,"—because (a) there

was no room for any such presumptions in this case. (6) Because the charge of his honor was not only erroneous, but conflicting, confusing and misleading, inasmuch as he instructed the jury, in one portion of his charge, that a tenant would have to yield to his landlord the possession of his lands before he could hold adverse to him, and, after having charged that those taking under Walker took subject to his rights and disabilities, in a subsequent portion thereof he charged that if Jennings, or any of his ancestors, went into possession of that land under fee-simple deed, or held it adversely, and the plaintiff knew of that fact, the statute would begin to run against the plaintiff. (7) Because the circuit judge erred in refusing plaintiff's motion for a new trial, as the verdict of the jury was without a jot or tittle of evidence to support it.

It now remains that we should present our conclusions upon the several grounds of appeal. It being an appeal from the law side of the court below, we are, by law, confined to errors of law in the circuit judge, and these errors are confined to his charge to the jury, there being no exceptions to any refusal by the judge to charge any requests on either side.

We have devoted unusual care to the investigation of the principles of the law of real property in this state, for the discussion of the several questions by the respective parties to this appeal have made such a course on our part necessary, by reason of the ability and research of counsel here engaged. Time will not allow us to reproduce the law which was consulted in such investigation in this opinion. That, at times, we were doubtful whether the circuit judge had not erred in some of his instructions to the jury, we freely admit. A careful comparison of the views of the circuit judge with those embodied in the judgments of our own court of last resort in previous similar cases has enabled us to reach a conclusion in accord with that expressed by the circuit judge.

In his charge to the jury in the case at bar by the circuit judge, and from which there is no appeal, the deed from the plaintiff corporation, under which Thomas G. Walker obtained possession of the land in dispute, was declared to be a lease for a term of years, which expired on the 12th day of December, 1890. This lease was duly recorded in the office of the register of mesne conveyance for Greenville county, wherein the land was situated, in 1823,—many years before any rights of the defendant, or those through whom he claims, originated. There can be no question but that a lessee is precluded from a denial of the title of his landlord. Indeed, the possession of the lessee is that of his landlord. It is permissive, and not adverse. It is equally certain that under the law the lessee has no seisin of the land, and without seisin, either actual or constructive, there can be no title to land.

A lessee has no estate in the lands devised to him. His term, under the law, is but a chose in action, or chattel interest. The right of the landlord, as against the lessee or his assigns, to obtain possession of the lands devised, must usually be preceded by an entry thereon. It is in regard to this right of entry by the landlord during the continuance of the lease that so much legal learning has been employed during the last centuries. Herein are involved the doctrines of forfeitures arising from the breach of conditions or covenants contained in the lease, or such covenants running with the land as the law itself implies. In the case at bar the lease expresses no covenants by the lessee. The single covenant is by the plaintiff corporation, whereby possession of the leased premises to Walker, his executors and assigns, is warranted during the term. There is no restriction upon Walker, the original lessee, to assign or sublet the term. Accordingly, he does assign the lease, and by successive assignments, duly made, the lease vests in John P. Pool. By the case it is agreed that Pool, by deed in fee simple, conveyed this leased land to one Fagan E. Martin in the year 1850, and that such deed was duly recorded in the office of the register of mesne conveyance for Greenville county, (then district), and that the said Martin entered into possession under such deed. We would remark, in passing, that we do not mean to commit ourselves to the construction of this deed as amounting to one in fee simple, for of this we may doubt whether, in strictness of law, in view of its terms, anything more than an assignment of the original lease was contemplated or expressed by the parties. The parties to the appeal, however, have stipulated that the terms of this deed were those usual in one conveying an estate in fee simple, and we suppose we are bound to give effect to their agreements; and this we the more readily do, inasmuch as the entire deed is not exhibited in the case. In 1857, C. J. Elford, at sheriff's sale, purchased Martin's entire estate in the land. His deed therefor was duly recorded. Elford, that year, (1857,) conveyed to one Thomas H. Cole as in fee simple. This deed was duly recorded. Said Cole reconveyed to Elford by deed in fee simple in 1867, which deed was duly recorded. Elford having died in the year 1867, the court of equity, under a bill filed by his widow and executrix as complainant against his heirs at law and creditors as defendants, sold the lands, and a deed in the form of a fee-simple deed was made to the purchaser, one Miles R. Beeco, for this land, which deed was duly recorded. Beeco entered upon possession under his deed. And so deeds in fee simple were made from purchaser to purchaser, successively, until title rested in the present defendant. Valuable improvements were placed upon the premises by one of the intermediate purchasers.

It is contended by the appellant that, inasmuch as he has traced title to itself and thereafter by lease, the possession of the lands to one Walker, whose assignment was traced as far and into one John P. Pool, although Pool conveyed by a deed in fee simple to one Fagan E. Martin, (from whom such possession was derived by others, successively, by deeds in fee simple, down to the defendant,) the possession of defendant is plaintiff's possession, and he is entitled to recover, the lease having expired before action brought. To establish this proposition he maintains, most earnestly, that as, by the terms of the original lease, Walker was allowed to assign his term, and did actually do so, such assignee was, by operation of law, bound to hold possession for the original landlord. Such does seem to be the law governing leasehold estates. This distinction exists between a subletting and an assignment of the lease: If a lessee sublets, his tenant is bound to his lessor; but, if a lessee assigns the lease, then the original lessee is evicted, and the relation of landlord and tenant subsists between the owner as landlord, and the assignee as lessee, subject to all the provisions of the original lease. By an examination of the lease in the case at bar, it will be found that no covenant is expressed that possession will be surrendered by the lessee or his assignee, to the landlord, at the expiration of the lease, to wit, on the 12th day of December, 1890. On investigation, we find that it is an open question in this country whether a covenant runs with the land to surrender the demised land at the end of the term in the hands of an assignee, and when the lease contains no such covenant, is implied by law. So it was held in Massachusetts, (*Sargent v. Smith*, 12 Gray, 428,) though an English case holds directly that such a covenant is not implied by law, (*Doe v. Seaton*, 2 Crompt. M. & R. 730.) Still, it is settled law that at the expiration of the term the landlord may regain possession of his lands on demand, if he can; by suit, if he must. Hence, it would seem that the appellant can maintain this proposition. The authorities directly hold that a lessee can legally only assign such an interest as is covered by his lease, and that this is true, no matter what may be the form of the deed whereby he (the lessee) conveys. Mr. Tyler, in his work on Ejectment and Adverse Possession, at page 208, says: "When the relation of landlord and tenant is once established, it attaches to all persons who succeed to the possession of the premises through or under the first tenant, and they are all as much bound by the covenants and agreements of the original lessee as though they were their own." Again, at page 881, the same author holds: "And the rule that where the relation of landlord and tenant exists, a conveyance by the latter of the demised premises cannot operate as the basis of an adverse possession, so as to bar the

former of his ejectment, means the conventional relation of landlord and tenant, when some rent or return is in fact reserved to the former, not a relation arising from mere operation of law, as when one makes a grant, and by the omission of the technical word 'heirs' an estate for life only passes." So, too, Mr. Washburn, in his work on the Law of Real Property, at page 486, says: "So, if a tenant under a lease were to convey the estate in fee to a third party, he would have no better right to contest the title of the lessor than the lessee himself." Mr. Angell, in his work on Limitations, thus states the rule, (page 456:) "It seems to be also settled that, when the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant, immediately or remotely, and that a succeeding tenant is as much disqualified to set up his possession against the original landlord as the first tenant." Nor do we perceive any difficulty to the plaintiff corporation by the purchase by Elford, at sheriff's sale, of Fagan E. Martin's interest in the land; for unquestionably, if Martin, as assignee of the lease, held the lands in question as a tenant to the original landlord, (the plaintiff corporation,) the sheriff could only legally convey such an estate as was in Martin, and Elford would, by his purchase, assume all the relations to the landlord, with all their legal consequences, and is estopped from denying the tenancy. *Willison v. Watkins*, 3 Pet. 50.

With all these concessions, however, the appellant does not find his way clear to a recovery, for such provisions only apply to a continuous, unbroken tenancy, wherein the relation of landlord and tenant subsists, as such, in law and fact; to those instances where an adverse use of the leased premises do not operate as a bar to their recovery by the landlord. The appellant, with ability, contends that, in order to enable a tenant to controvert his landlord's title, he must first deliver up possession of the leased premises to his landlord; that the tenant cannot disclaim his tenancy, or put himself in the position of an adverse claimant, or originate in another any such adverse holding while the tenant withholds possession from his landlord. Indeed, he goes so far as to suggest that the doctrine of disclaimer, and also surrender by parol, can never be applied to the relation of landlord and tenant created by deed, but that such doctrines only apply to such instances as tenancies at will, or such as are created by parol. He cites the cases of *Love v. Dennis*, Harp. 70; *Whaley v. Whaley*, 1 Speer, 225; *Syme v. Sanders*, 4 Strob. 196; *Wilson v. Weathersby*, 1 Nott. & McC. 373; *Williams v. Morris*, 95 U. S. 444; *Floyd v. Mintsey*, 7 Rich. Law. 188; *Thomson v. Peake*, Id. 353. It must be admitted that these cases are instances of tenancies not created by deed. He would include, also, *Willison v. Watkins*, supra, and *Zeller's Lessee v. Eckert*, 4 How. 289;

but, as we remember these two cases last cited, in the former possession was obtained by Willison under a power of attorney from the owner; and, in the latter, possession was derived by devisor's widow under a provision of her husband's will, by which he devised the fee to his son, but carved out an estate for years for his widow; and in both these cases the United States supreme court sustained the title of the tenant, and those claiming under him, under a disclaimer of landlord's title and other circumstances.

Under the view we take of the law of this state governing cases of the character of that at bar, we are not left to deal with all these refinements of the law; for we take it that it is now fully established that wherever the relation of landlord and tenant is terminated by any hostile act,—such as the conveyance of the lands demised to the tenant for years, during such term, to another in fee simple,—it becomes the bounden duty of the landlord to protect his title by regaining possession; that the statute of limitations cuts no figure as affording a protection against the rights of the landlord, for the simple reason that statutes of limitations only apply to those instances where the possession is tortious *ab initio*, whereas in the other instance we shall hereafter unfold the possession *ab initio* is not tortious.

It need not be that the first possession shall be under deed, though in the case at bar it was so. The theory of the law, in such cases, is that the possession of the land is such as includes a seisin of the premises, and such seisin in the person in possession of the land is incompatible with possession as a tenant, and after the lapse of 20 years such possession under a claim of title will draw to it the presumption of a grant from the true owner in fee. Of course, this possession must be adverse, open, continuous. The court of last resort in this state, in an action wherein the present plaintiff corporation was plaintiff, (*Trustees v. Meetze*, 4 Rich. Law, 50,) held that the deed of Rall, the lessee of plaintiff, whereby he conveyed the land demised to him unto Meetze by a fee-simple deed, was a disclaimer of Rall's tenancy, and the plaintiff might have sued without notice to quit, and before the termination of the lease; but in the case cited Meetze failed in his defense because the 20 years had not elapsed since the making of the deed from Rall to him. The doctrine of presumption of title arising from great lapse of time—20 years or more—has been recognized and enforced in this state for many years, and in many cases. *McClure v. Hill*, 2 Mill, Const. 425; *Smith v. Asbell*, 2 Strob. 141; *McLeod v. Rogers*, 2 Rich. Law, 22; *Trustees v. McCully*, 11 Rich. Law, 429; *Thompson v. Brannon*, 14 S. C. 552. In the case in 11 Rich. Law, 429, Judge Ward-

law, in delivering the opinion of the court, among other things, said: "The presumption is founded upon the supposed acquiescence of the person shown to have been the former owner, and infers such transfer of his right as legalized the enjoyment." But it is apprehended that the presumption need not necessarily be founded upon the supposed acquiescence of the person shown to have been the former owner. It may be bottomed upon the presumption of any other title to the premises, which could, by being united to possession, give good title to lands.

It may be well to notice the distinction as to the extent and effect of this presumption as drawn by Judge Wardlaw in the case in 11 Rich. Law, 429, and that on the same subject by Judge Evans in *Smith v. Asbell*, 2 Strob. 148. Judge Wardlaw seems to give force to the presumption as one of fact that by operation of law has acquired such an artificial force that the jury may be instructed to allow it a controlling influence. His words, in this connection, are: "The presumption of title arising from long, continuous possession, unquestioned and unexplained, was not held to be a presumption *juris et de jure*, irrefutable, such as the court might make, nor even one that the jury were bound to make without regard to the circumstances which contradicted it; but it was considered a presumption of fact to which an artificial force is ascribed by the law, and which the jury were recommended to make, not because they believed the fact, but because it is wise and expedient to respect what is consecrated by time, and to give the same measure to all in the same condition, by giving effect to the fixed period of 20 years as a rule, instead of producing the uncertainty and inequality which must result from the various impressions which circumstantial evidence makes upon various minds. See *McClure v. Hill*, 2 Mill, Const. 425; *Hillary v. Waller*, 12 Ves. 268. This presumption is like the presumption of the payment of a bond after twenty years unexplained, and like the presumption of right that arises from the enjoyment of an easement for twenty years." Judge Evans, in the case cited from 2 Strob. 148, said: "In the elementary books (see *Starkie, Ev.* pt. 4, p. 1240) presumptions are said to be of three kinds: First. Presumptions of law, which correspond with the *praesumptio juris et de jure* of the civilians. These are conclusive, and cannot be rebutted. Second. Presumptions of law and fact. These are like the *praesumptio juris* of the civil law. Of these the presumption of payment of a bond or of a grant after 20 years is an illustration. The third kind are presumptions of fact, and are mere inferences, calculated to produce belief, and have no legal efficacy beyond their tendency to satisfy the mind of the truth of the alleged fact. * * *

But presumptions of law are like the

statutes of limitations. They are artificial rules, which have a legal effect independent of any belief, and stand in the place of proof until the contrary be shown. The presumption in the case under consideration, if it exists, belongs to this class, and the question we are to decide is whether there was anything in the case which required of the circuit court the instruction to the jury that they might presume the existence of the deed in question. The rule laid down in *McClure v. Hill*, 2 Mill, Const. 420, is that a continuous, adverse possession of twenty years raises the presumption of a grant in the absence of any of those facts which go to rebut the presumption. This rule has been followed in all the subsequent cases. * * * The facts necessary to authorize the presumption are that the possession was adverse, and that it was continuous for twenty years." The distinction between the views of these two judges, both eminent and safe advisors, seems to us to consist in this: That Judge Wardlaw seems to leave it as a fact to be treated of by the jury as they may deem best; or, in other words, that the jury are at liberty to disregard it in making up their verdict. Not so with Judge Evans, for, if the presumption is not rebutted by proof of facts that negative its existence, the jury must accept it as conclusive in an issue of title. It seems to us the views of Judge Evans are more consistent than those of Judge Wardlaw, for, if the presumption arises from possession for 20 years, which is adverse, open, and continuous during those years, and which presumption is not rebutted by proof of any facts, it should be regarded as a rule of law, and not, therefore, to be disregarded by the jury. By this course the same measure is meted out to all alike.

The propriety of such a rule is very well set forth in the opinion of Mr. Justice Baldwin in *Willison v. Watkins*, 3 Pet. 52, 53, who had referred to the cases of mortgagor retaining possession after breach of condition; the cases of tenants in common where one tenant, whose possession was for all other tenants in common, denies the tenure, ousts the other tenants, and receives all the rents and profits to his own exclusive use; and also trustees, who disavow their trusts; and those cases of fraud after its discovery, —then said: "All these principles bear directly on the case now before us. They are well settled and unquestioned rules in all courts of law and equity, and necessarily lead to the same conclusion to which this court has arrived. The relations created by a lease are not more sacred than those of a trust or of a mortgage. By setting up or attorning to a title adverse to his landlord, the tenant commits a fraud as much as by the breach of any other trust. Why, then, should the statute not protect him as well as any other fraudulent trustee from the time the fraud is discovered or known to the

landlord? If he suffers the tenant to retain possession twenty years after a tenancy is disavowed, and cannot account for his delay in bringing his suit, why should he be exempted from the operation of the statute more than the mortgagor or the mortgagee? We can perceive no good reasons for allowing this peculiar and exclusive privilege to a lessor. We can find no rule of law or equity which makes it a matter of duty to do it, and have no hesitation in deciding that in this case the statute of limitations is a bar to the plaintiff's action." Before going further, it may be well to recur a moment to the proposition of law regulating the force and effect of presumptions, for in that connection we remarked that they were rebuttable by proof of facts inconsistent with such presumptions. We mean that if, when such a presumption is relied upon, it is proved that during the pendency of the lease and during the period of time claimed to raise the presumption, any admission of title in the landlord, such as the payment of rent, or like circumstance, can be proved, it will rebut such presumption. Any proof in fact that negatives the adverse holding and its continuity, will defeat the presumption.

As before remarked, the legislature of this state has prevented any plea of the statute of limitations to defeat the plaintiff corporation's rights in these Wadsworth lands, but by two decisions of the court of last resort in this state, and to both of which actions this plaintiff corporation was party plaintiff, (we refer to *Trustees v. Meetze*, supra, and to *Trustees v. McCully*, supra,) it was held that although the statute of limitations could not be pleaded to bar such plaintiff corporations, yet that the legislature did not interdict the defense of the presumption of title or grant arising from 20 years' adverse, open, and continuous possession, which was not rebutted by proof of facts inconsistent with such presumption. In the latter case just cited it was held: "The presumption is independent of the statute of limitations. It applies to subjects not within the statute, and it depends upon principles which would operate if there was no such statute. * * * The period of twenty years was originally adopted in analogy to the English statute of limitations, but it has no connection with our statute. It would be a great stretch of the special indulgence given by the suspending act to say that thereby the plaintiff was not only shielded against the effect of ten years' possession, (five in 1805,) but was indemnified against all the effect of time and acquiescence."

Again, it has seemed to us that the character of this adverse holding, originating in the possession of the premises under a deed purporting to convey these premises in fee simple, and promptly placed upon record in the office of the registry of mesne conveyance in the proper county more than 40 years before this action was brought, is entitled to

great weight. Not such as obtains from a matter of record as it is known in the law. The registry of deeds does not rank in this way; for only judgments of courts of record, when entered upon the records of such courts, can claim this distinction. But we mean that notice is given by recording in the office of the registry of mesne conveyance, and especially the deed from a vendor to a vendee. By a deed of conveyance in fee simple the vendor separates himself from the land conveyed, and the vendee under such deed has no further connection with his vendor, the purchase money having been paid. Chief Justice Marshall, in *Blight's Lessee v. Rochester*, 7 Wheat. 535, very aptly brings this in view when he says, at page 547: "The propriety of applying the doctrines between lessor and lessee to a vendor and vendee may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon, in consequence of some covenant of warranty in his deed. The property having become, by the sale, the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or the spirit of the contract violated by it."

We have endeavored to make our meaning plain in regard to the effect of these deeds of conveyance in fee simple. We regard the first of such conveyances as a fraud upon the rights of the landlord, and as giving him a right of action to recover possession of such leased premises immediately after the execution of such deed, and that such right of action, if brought at any time within 20 years immediately following the execution of such deed, would have restored the land demised to the plaintiff corporation. This brings us up squarely to the question, when was he bound to take notice of such deed? Unquestionably, if the fact of the execution of the deed had been brought to the actual attention of the plaintiff corporation at its date, he would have been so bound. But will not the possession be under the deed, and its being recorded in the office of the register of mesne conveyance for Greenville county, have a similar effect? We think so.

It was unfortunate for the plaintiff corporation that the rent for the term was a sum in gross paid by the tenant at the beginning of the lease, for the reservation of a yearly rent or "one barley corn" was purely nominal. If the rent had been reserved to be paid annually, the landlord would have looked more closely after his rights in the premises. But the landlord and his tenant had the right to contract as they did, and, if these misfortunes had not occurred, the

landlord's right to have recovered the demised premises at the expiration of the lease (1890) would have been unquestioned. The grand object of the creation of the trustees into a body corporate was to enable them all the more readily to discharge the trusts created by the will of Thomas Wadsworth, deceased. The corporation is liable, under the law, to sue, and to be sued. They can recover their rights under the law as well as can private individuals, and they are as liable to lose those rights by a failure to sue as are private individuals, except as affected by statutes of limitations. This presumption would have matured against a private individual. So it will against such corporation. We must overrule all the grounds of appeal numbered, respectively, 1, 2, 3, 4, 5, 6.

The appellant complains that the circuit judge should have granted a new trial. So far as this request of appellant relates to questions of fact, this court is powerless to interfere. So far as it relates to misconceptions of the law by the circuit judge, from what we have already said, no error is to be imputed to the judge. It is the judgment of this court that the judgment of the circuit court be affirmed.

McGOWAN, J. Under the authority of the decided cases, I concur.

McIVER, O. J. I concur in the result reached in this case, though, I must confess, after much hesitation. It seems to me that, inasmuch as a grantor cannot convey any greater estate or interest than that which is vested in him, the several conveyances, purporting to be deeds in fee simple, operated only as assignments of the original lease to Walker; and hence the several holders under those deeds, including the defendant, held under that lease, and their possession was, therefore, permissive, and not adverse. At least this was so until some act was done amounting to a forfeiture of the lease, of which the plaintiff had notice, more than 20 years before the commencement of this action. I was unable to see how the plaintiff could maintain an action against any one of the several holders of the land before the termination of the lease, for all that the defendant would have to do in such a case would be to throw himself upon his rights as assignee of the lease, and thus defeat the action. But the case of *Trustees v. Meetze*, 4 Rich. Law, 50, decides, as I understand it, that the lease to Rall "did not prevent the plaintiffs from suing the defendant, whose possession under the conveyance in fee simple from Rall was clearly adverse. The conveyance in fee simple was a disclaimer of Rall's tenancy, and the plaintiffs might sue without notice to quit, and before the termination of the lease," provided the plaintiffs had notice of such adverse holding; for it will be observed that the third instruction to the jury (affirmed by the court of ap-

peals) was that, "if Rall's possession was permissive, his declaration to Taylor (even if made after the supposed lease) that he would claim under the statute of limitations, could not convert his permissive possession into an adverse possession, without notice to the plaintiffs of such adverse holding." This case, therefore, is decisive of the point, and my doubts must yield to its authority.

Another point of doubt is the question of notice to the plaintiff that the several parties were claiming to hold the land adversely under the fee-simple deeds. I do not think that the record of these deeds operated as constructive notice to the plaintiff, for, as I understand the rule, a party is bound to look up, but not down, the line. As is said in 20 Amer. & Eng. Enc. Law, 596: "The operation of the record as notice is prospective and not retrospective." Hence as is there said: "A prior mortgagee cannot be charged with notice of, and cannot be affected by a subsequent mortgage or deed by the mere record thereof." See, also, *Lake v. Shumate*, 20 S. C. 32, to the same effect. The jury having been instructed in accordance with this view, it then became a pure question of fact as to whether the plaintiff had actual notice, and, if they erred in their finding as to such fact, such error is beyond our reach. The remedy was by a motion before the circuit judge for a new trial, which seems to have been unsuccessfully resorted to. If in fact there was no evidence of such notice, (which I must say seems to me was the case,) then the circuit judge should have granted a new trial; but, even if there was error in this respect, this court has often held that it was without jurisdiction to correct such error.

G. OBER & SONS CO. v. BLALOCK.

(Supreme Court of South Carolina. Nov. 13, 1893.)

SALE—WARRANTY—PLEADINGS—WITNESS.

1. The right of a foreign corporation to sue in the courts of South Carolina cannot be questioned by a general demurrer.

2. The board of trustees of Clemson College having, by act of the legislature, been made the custodian of records of the former department of agriculture, the president of that board is competent to identify the record of the analysis of certain fertilizers made by the department of agriculture.

3. Where a fertilizer sold contains the ingredients represented, the seller is not liable to the buyer for a failure of the article to produce the desired results, in the absence of an express warranty as to such results.

Appeal from common pleas circuit court of Laurens county; J. J. Norton, Judge.

Action by the G. Ober & Sons Company against James S. Blalock for the price of goods sold and delivered. Plaintiff had judgment, and defendant appeals. Affirmed.

After verdict for plaintiff, defendant moved for a new trial on the grounds (1) that the verdict of the jury is against the weight of

evidence; (2) for errors in the charge of the presiding judge; and (3) error on the part of the jury, in finding interest for plaintiff on the amount. This motion was overruled, and judgment was entered on the verdict.

Following are defendant's assignments of error:

"(1) Because the presiding judge erred in refusing to sustain the oral demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; complaint showing on its face that the action was brought in the name of a foreign corporation, that the contract was made in this state by said corporation, and yet failing to show that, under its charter, it had the right to make such a contract, and had the right to sue in the courts of this state.

"(2) Because he erred in not sustaining the said demurrer, when it did not appear from the complaint that the plaintiff ever made any contract with defendant.

"(3) Because the presiding judge erred in stating in open court, during the progress of this trial, that the plaintiff had proved that the guano furnished to the defendant did contain the ingredients that it professed that it contained, when it is submitted that was the question of fact in the case, and one which he should have left the jury to decide.

"(4) Because he erred in stating, during the progress of the trial, that the plaintiff company agreed to furnish to the defendant certain fertilizer, of known ingredients, and did not agree to guaranty any results, there being no evidence to support such a conclusion.

"(5) Because he erred in stating, during the progress of the trial: 'It seems to me that the state chemist being appointed for the further protection of the farmer, and having examined the fertilizer, it is presumed to be correct, and that presumption must be overcome.'

"(6) Because he erred in stating that the tags showed that the state chemist had examined the guano, and that it was all right.

"(7) Because he erred in allowing R. W. Simpson, a witness for the plaintiff, to testify as to the analysis made by the state chemist.

"(8) Because the presiding judge erred in charging the jury that the defendant's attorneys conceded that, if the guano was properly compounded, then there was no guaranty as to results.

"(9) Because he erred in charging the jury that the defendant's counsel admitted that the brand of guano used by defendant produced good results in other places.

"(10) Because he erred in charging the jury: 'I charge you that, if you find that the guano purchased by Mr. Blalock did contain the ingredients which he alleges that it contained,—at least, so much of the valuable ingredients as he alleges that it contained,—then you ought to find a verdict for the plaintiff.'

"(11) Because he erred in charging the

jury: 'If you think that the fertilizer did not wholly fail, but failed in part, to combine the constituent elements,—that is, that they were not in such proportions as to be of full value, if it had been partly compounded according to the formula, but were yet of some value to Mr. Blalock,—then you ought to find so much as you think they were of value to him.'

"(12) Because he erred in refusing to charge defendant's first, second, and third requests to charge.

"(13) Because he erred in charging the jury that if the guano used by defendant came up to the analysis, and if it contained the ingredients it was warranted to contain, the said defendant would be bound to pay for it, even though it proved to be of no value to him whatever.

"(14) Because he erred in charging the jury: 'I suppose that your common sense would teach you that, to make the seller of fertilizers responsible for the benefit to be derived by the purchaser from it, it must have been used under circumstances which would produce a proper result. If there was a season without rain, for instance, entirely, of course no amount of fertilization would make the cotton sprout in the hill, and grow, or if, as soon as the cotton was up, there should be no more rain, of course the plant would wither away and die.'—it being respectfully submitted that such language was in the nature of an argument to the jury, and testimony in behalf of the plaintiff.

"(15) Because he erred in charging plaintiff's first, second, and third requests to charge.

"(16) Because he erred in refusing to grant the motion for a new trial nisi on the ground that the jury improperly gave the plaintiff interest on its claim.

"(17) Because the presiding judge erred in charging, after reading the contract set out in the complaint: 'That I construe to be a contract for the delivery of a certain article—that is, Farmers' Standard Phosphate—manufactured by, or under the formula of, G. Ober & Sons Company. It is not stated in the contract what the ingredients should be. It is not stated what the results should be. But we have evidence outside of that what the formula, or what per cent. of the different valuable substances in this fertilizer should be, and we have no statement of any guaranteed results.'

"(18) Because he erred in charging the jury that, as a matter of law, there was no implied warranty of good results, on the part of plaintiff, as to the guano."

Ferguson & Featherstone, for appellant.
Simpson & Barksdale, for respondent.

McGOWAN, J. The plaintiff, (respondent,) according to the allegations of the complaint, is a body corporate and politic, by and under

the laws of the state of Maryland, and is competent to sue in the courts of the state of South Carolina. The corporation was the manufacturer of a certain brand of fertilizer, known as "Farmers' Standard Phosphate," and on January 13, 1890, sold to James S. Blalock 10 tons of said fertilizer at \$25 per ton, delivered at Goldsville, S. C. The contract is set out in full in the complaint, and is in the form of a proposition in writing, accepted by the defendant, as follows: "Baltimore. January 13, 1890. Dear Sir: We will ship you ten tons of our Farmers' Standard Phosphate, or as much more as may be mutually satisfactory, at twenty-five dollars per ton of two thousand (2,000) pounds, in bags, on board of cars or boat at Goldsville, S. C., to be settled for by your note or notes, to average due November 1, 1890, and payable at our office, Baltimore, Md.," etc. This offer was accepted in writing. The article was furnished according to the contract, but Blalock declined to give his note, and refused to pay for the fertilizer. The plaintiff brought his action on the contract, and the defendant interposed the defense that the fertilizer proved to be worthless,—produced no good "results,"—and set up a counterclaim for damages sustained by reason of the alleged worthlessness of the guano. The issues were tried before Judge Norton and a jury. Under the charge of the judge, the jury found for the plaintiff the amount sued for, and interest from the time the note was to have been given. The defendant moved for a new trial on the grounds stated in the brief, but the motion was refused, and the case comes to this court upon various exceptions. Both parties made requests to charge, some of which were charged, and others refused, in whole or in part. They are all in the record, and we will only consider such of them as are objected to, in connection with the exceptions. The exceptions are long and numerous, (18 in number,) and we will endeavor to condense them by following the classification adopted in the argument of appellant's counsel.

Exception 1, relating to the refusal of the judge to sustain the oral demurrer, and 12, complaining of error in refusing to charge defendant's first and second requests, will be considered together. The first of these requests was "that the plaintiff must show that, under its charter, it has the right to make such a contract as is sued on here, and, if it fails to show that by the evidence, the jury should find for the defendant." The second request was "that the plaintiff must show by the evidence that it has the right, under its charter, to sue in the courts of South Carolina, and if it fails to show this the jury should find for the defendant," etc.

First, then, as to the oral demurrer: The complaint alleged that the plaintiff was a corporation of Maryland, and competent to sue in the courts of South Carolina. These

were matters which related to the plaintiff's right to sue, but were really no part of its cause of action, and therefore could not be put in issue by a mere "general denial," but for that purpose a specific denial was necessary. There was no specific denial here as to the plaintiff being a corporation with the right to sue in this state, for the statement, "no knowledge or information sufficient to form a belief," etc., is only another form of a general denial. As to these points, then, the defendant made no adequate issue. They were, in effect, admitted by the pleadings, and, of course, the judge was right in overruling, to that extent, the oral demurrer. See *Steamship Co. v. Rodgers*, 21 S. C. 27, and *Lumber Co. v. Risley*, 25 S. C. 309, and authorities cited. But it is urged that the complaint did not allege that the plaintiff corporation had the right to enter into the contract herein stated, in the state of South Carolina, and the general denial must be considered as sufficient to put in issue the whole case, including this right. It was necessary for the plaintiff to prove it before it could recover. As it seems to us, the admission of the right to sue would necessarily carry with it the right to contract. The right insisted on pertains to the right to sue, and not to the plaintiff's cause of action. Besides it is well settled now, in this state, that a corporation created by the laws of one state may lawfully do business in another state, unless forbidden by its charter, or by the laws of such other state. "Nor are we aware of any law or public policy of this state either expressly or impliedly prohibiting such a corporation from doing business in this state." *Ex parte Benson*, 18 S. C. 43; *Kerchner v. Gettys*, Id. 525; *Bank v. Earle*, 13 Pet. 519.

Exception 2 was not pressed, and 3, 4, 5, and 6 complain that the judge expressed his opinion on certain facts, as follows: "(1) That the plaintiff had proved that the guano furnished did contain the ingredients that it professed to have. (2) That the company agreed to furnish to the defendant a certain fertilizer, of known ingredients, and did not agree to guaranty results. (3) 'It seems to me that the state chemist, being appointed for the further protection of the farmers, and having examined the fertilizer, it is presumed to be correct, and that presumption must be overcome.' (4) In stating that the tags showed that the state chemist had examined the guano, and that it was all right," etc. The point is made that in the particulars above indicated the judge violated section 28, art. 4, of the constitution, which "prohibits judges from charging juries as to matters of fact." We have read the whole charge carefully, and we think there is some misapprehension as to the precise meaning and extent of the remarks attributed to the judge, taken, as they are, from the context. But, without going into that, we think it is enough to say that it

was the duty of the judge to construe the written contract of the parties, and that the remarks were not made in charging the jury, but in hearing argument, and making rulings as to the admissibility of evidence, during the progress of the case. The judge was not expressing an opinion upon any of the points made, which, by any possibility, could reach and influence the jury, especially as, in his charge to the jury, he carefully explained all the points referred to. See *State v. Atkinson*, 33 S. C. 101, 11 S. E. Rep. 693, and *State v. Turner*, 36 S. C. 534, 15 S. E. Rep. 602.

Exception 7 charges that the judge erred in allowing R. W. Simpson, a witness for the plaintiff, to testify as to the analysis made by the state chemist. It does not seem to be denied that Mr. Simpson was a competent witness, and that he could prove the record of the analysis which showed the ingredients, and by whom made. The witness testified as follows: "Am president of the board of trustees of Clemson College. The board has in its possession, and under its control, the books and records of the department formerly known as the 'Department of Agriculture for South Carolina.' These books and records show the inspection and analysis of such fertilizers as were inspected in South Carolina during the seasons of 1889 and 1890. They show the inspection and analysis of the Farmers' Standard Phosphate manufactured by G. Ober & Sons Company for the season of 1889 and 1890. It was inspected March 1, 1890, at Grier, S. C., by S. W. Vause, agent of the department of agriculture. I have, amongst the books and records above referred to, a record of the inspection and analysis of the Farmers' Standard Phosphate for the season of 1889 and 1890, [giving full copy of analysis by Prof. Burney, of the South Carolina College,]" etc. By an act of the legislature, December, 1890, the board of trustees of Clemson College was made the custodian and keeper of all the books and records of the former department of agriculture. "Attested copies of records, signed by the keepers of such records respectively, shall be deemed and allowed as good evidence, in any of the courts of this state as the original could or might have been if produced to the said courts." See section 2217 of the General Statutes.

Exceptions 8 and 9, concerning alleged statements of the judge as to what he understood to have been "admitted" by defendant's counsel, were withdrawn. •

Exceptions 10, 13, 15, 17, and 18, and so much of 11 as relates to defendant's third request to charge, virtually raise but one question of law, and may be considered together. The judge was requested to charge "that in this state a sound price warrants a sound commodity, and, if the commodity should prove to be of no value, the party buying has a right to refuse to pay for

same, and set up the failure of consideration as a defense." The judge charged that the request was true, as a legal proposition, but whether it is applicable to a particular case, or not, depends upon the circumstances. "There could be no doubt if Mr. Blalock, accustomed to the use of fertilizers, was informed that a fertilizer, with certain ingredients, was offered him, and that plaintiffs guarantied that it should contain these ingredients, and nothing more,—no other guaranty being made than that it contained these certain ingredients, and nothing more,—then Mr. Blalock took his fertilizer at his own risk; and if it proved to be of no value whatever, if it contained the ingredients that it was warranted to contain, manipulated in the way that it had been warranted to be manipulated, he would be bound for it, although the circumstances under which he used it was [made it] of no value whatever to him. I suppose that your common sense would teach you that, to make the seller of fertilizers responsible for the benefit to be derived by the purchaser from it, it must have been used under circumstances which would produce a proper result. If there was a season without rain, for instance, entirely, of course no amount of fertilization would make the cotton sprout in the hill and grow, or if, as soon as the cotton was up, there should be no more rain, of course the plant would wither away and die. So that all, under any circumstances, a seller of the fertilizer could be held to do, would be that, under suitable circumstances, it would produce a given result. But when he undertakes to guaranty that it contains certain elements, and don't guaranty anything else, then I charge you that he is not responsible for the results, unless he makes some further representation as to results, as was done by Mr. Robson in the case that I have just called to your attention, against Dr. Miller," etc. Was this error? The contract was in writing, and it was the duty of the judge to give it construction. It was short and plain,—so many tons of the Farmers' Standard Phosphate for so many dollars. Calling the article by its commercial name could not create any difficulty. The article was known to be a fertilizer compounded of certain ingredients, and the contract would have been no more clear and explicit if it had expressly mentioned all the ingredients known to be contained in its composition. The judge charged that the contract was, in effect, an express warranty that the article contained all the elements known to constitute what was called the "Farmers' Standard Phosphate," compounded by the formula of G. Ober & Sons Company, and no more; that it was silent as to anticipated results from its use. This was certainly the proper construction of the writ-

ten contract. If so, the question arises whether, in addition to the express contract, the law will imply another, insuring good results from the application of the article. As we understand, it is only in cases where there is no express warranty that the law will imply one, or set up what is sometimes erroneously called the "equitable condition of the sale." The general rule, very clearly, is that, where the contract is reduced to writing, parol evidence is inadmissible to show that anything else was intended than what was expressed. The presumption always is, in the absence of proof, that the parties to any written agreement between them have, upon the subject-matter, expressed their whole agreement. Besides, there would seem to be an inherent difficulty, from the uncertainty incident to the subject, in attempting to estimate the fruits of the application of a fertilizer, for the results must always depend largely upon the manner of its application, the character of the soil, the seasons, climate, culture, etc. It is insisted, however, that the rule is not always applicable, and it does seem that there is an exception in the case where the express warranty goes only to the title, as in *Wells v. Speer*, 1 McCord, 421. But this case was restricted by that of *McLaughlin v. Horton*, 1 Hill, (S. C.) 383, as applicable "only to a case where the express warranty is silent, for, if there is any stipulation in the written contract in relation to the quality of the thing sold, the law will imply nothing." *Heyward v. Wallace*, 4 Stob. 181. There certainly were, in the contract here, "express stipulations" as to the quality of the article,—indeed a warranty of the ingredients necessary to make the article sold,—and we therefore concur with the judge, and think he committed no error. The result might have been different if the plaintiff here had warranted results, as was done by the plaintiffs in the case cited by the circuit judge, of *Robson v. Miller*, 12 S. C. 586. The learned counsel for the defendant cites some cases from our sister state of Georgia which seem to favor the view so strongly urged by them,—particularly, the case of *Wilcox v. Owens*, 64 Ga. 601. But these cases were decided under the Code of that state, which, as we understand it, materially changed the general law upon the subject. It is stated in one of the cases that section 2651 of their Code provides as follows: "The seller, however, in all cases (unless expressly or from the nature of the transaction excepted,) warrants: (1) that he has a valid title and the right to sell; (2) that the article sold is marketable and reasonably suited to the use intended," etc. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

SULLIVAN v. SUSONG et al.

(Supreme Court of South Carolina. Nov. 28, 1893.)

ATTORNEY — AUTHORITY TO ACCEPT SERVICE OF SUMMONS — ACTION AGAINST PARTNERSHIP — DEATH OF PARTNER BEFORE JUDGMENT — EFFECT.

1. Authority of an attorney to accept service of summons for a partnership, of which the members are nonresidents, is sufficiently shown by the signing of a bond prepared by the attorney by each of the partners, a statement in an affidavit by one partner of their knowledge that the attorney appeared and was acting for them, the attendance of two of the partners at the beginning of the trial, and the upholding of the attorney by the partners during five years of litigation.

2. The acceptance by an attorney of service of summons for a partnership need not be in the firm name, or in that of each member thereof "per" the attorney.

3. A written admission of service of summons by the duly-authorized attorney for defendant is binding on defendant.

4. Where a partner dies pending an action against the partnership, and his death is not suggested on the record, nor his personal representative substituted, before the rendition of a judgment for plaintiff, the judgment is a lien on the partnership assets, and binding on the surviving partners personally; and plaintiff may, by order of court, make the personal representative of the deceased partner a party to the action, and such representative may then show any reason why the judgment should not bind the estate of the deceased partner.

Appeal from common pleas circuit court of Aiken county; J. H. Hudson, Judge.

Action by W. E. Sullivan against G. W. Susong, W. A. Susong, A. E. Susong, D. L. Boyd, and James H. Rumbough, as partners under the firm name of Susong & Co. Judgment for plaintiff. From an order denying a motion to vacate the judgment and attachments issued shortly after service of summons, W. A. Susong, A. E. Susong, D. L. Boyd, and A. J. Mosely, as administrator of G. W. Susong, deceased, appeal. Modified and affirmed.

Haynsworth & Parker, for appellants. Henderson Bros., for respondent.

POPE, J. An action was commenced by the plaintiff against the defendants, G. W. Susong, W. A. Susong, A. E. Susong, D. L. Boyd, and James H. Rumbough, as composing the firm of Susong & Co., on the 17th June, 1887, in the court of common pleas for Aiken county, in this state. Service was made upon the defendants by an acceptance of their attorney at law, W. C. Benet, Esq., on the 1st day of July, 1887, in writing. The object of the action was to recover by the plaintiff of the firm of Susong & Co. the sum of \$10,518.28 for services rendered such firm, under a contract in writing, in the construction of the Atlantic, Greenville & Western Railway Company. An answer was duly filed to such complaint on behalf of the defendants by their said attorney at law. Before the answer was filed, a writ in attachment had been issued to the counties of

Aiken, Edgefield, Abbeville, Laurens, and Greenville, in this state, under an affidavit that defendants were nonresidents, but had property in this state; and before the attachments were released by the plaintiff, and as a condition precedent thereto, a bond in the penal sum of \$21,050 was made and signed by each defendant, with Alexander Stuart and James T. Williams as sureties, wherein it was recited that the defendants before named constituted the firm of Susong & Co., and that each of them was a nonresident of South Carolina, but that their sureties, Stuart and Williams, were residents in this state, to wit, in the city of Greenville, state of South Carolina, and each one of the parties before named was bound in the sum as aforesaid unto the plaintiff, who was a creditor suing the said Susong & Co. for the sum of \$10,518.28, with interest and costs, and which plaintiff had attached the property of the said Susong & Co., besides the property of certain of the members of said firm, in this state, conditioned to pay "the amount of the judgment that may be recovered against the said Susong & Co., defendants' debtors, in the action brought by the said W. E. Sullivan against said Susong & Co." in the court of common pleas for Aiken county for \$10,518.28. This bond was dated the 27th July, A. D. 1887. A very stubbornly contested litigation was conducted, extending through a period of nearly five years, in which three appeals were carried to the supreme court of this state, (9 S. E. 156; 15 S. E. 377,) but ultimately the plaintiff recovered a judgment for \$11,375.62 and costs, which was affirmed by the supreme court on the 9th day of May, 1892. 15 S. E. 377.

On September 24, 1892, A. J. Mosely, as administrator of the estate of George W. Susong, deceased, served a notice upon the plaintiff that he would move the court of common pleas for Aiken county, at its term next ensuing after date of notice: (1) For an order vacating the judgment in this case "upon the ground that the said George W. Susong departed this life before the hearing and rendering of judgment herein, and no order was made allowing the action to proceed against his representative or successor in interest, nor was his death suggested upon the records." (2) For an order vacating and discharging the attachments issued herein (a) upon the ground that said attachments are void, in that they were issued at or about the time of issuing the summons in this action, and before service of the same, and said summons was not served personally upon this defendant, or, indeed, upon any of the persons named as defendants, within 30 days after issuing said attachments, and no publication thereof was commenced in said time; (b) upon the ground that the attachments were irregular, in that the attachment bond given by the plaintiff was not proved or acknowledged as requir-

ed by law, and also in other respects apparent upon said papers.

At the same time (24th September, 1892) the defendants W. A. Susong, A. E. Susong, and D. L. Boyd served a notice upon the plaintiff that at the time noticed by A. J. Mosely, as administrator of the estate of G. W. Susong, they would move: (1) For an order vacating the judgment, as to them, upon the ground that the summons herein has never been served upon them, either personally or by publication, and that the court did not have jurisdiction to render said judgment, and upon the ground that G. W. Susong, the only defendant herein who submitted himself to the jurisdiction of the court, died before the hearing of this case, and judgment was rendered without the making of an order allowing the action to proceed against his representative or successor in interest. (2) To vacate the acceptance of service of the summons and complaint, and the answer filed herein, in so far as they purport to bind them, upon the ground that said acceptance and answer were unauthorized. (3) For an order vacating the attachments issued herein (a, b) upon the same grounds set forth in the notice of A. J. Mosely as administrator; (c) upon the ground that the said attachments were improvidently issued as to these defendants, in that they were not indebted to plaintiff in any amount.

The issues thus tendered came on to be heard before his honor, Judge Hudson, upon quite an array of affidavits for and against the said issues of fact, and on the 4th day of November, 1892, the circuit judge made and filed his decision as follows:

"This matter was submitted to me in open court at Aiken upon the call of the calendar, and argued before me, by consent of counsel, at Waltherborough. The defendants W. A. Susong, A. E. Susong, D. L. Boyd, and James H. Rumbough gave notice of a motion to vacate and set aside a judgment against Susong & Co. in favor of this plaintiff in the aforesaid action for \$11,375.82 on the 14th July, 1890, by the clerk of the court of Aiken county, in pursuance of a decree of Judge Fraser, which has since been affirmed by the supreme court; also, a motion to vacate the attachment which was issued at the commencement of this action, as against the defendants, as nonresidents, and levied on their property in this state. A. J. Mosely, clerk of the court at Greenville, as administrator of G. W. Susong, (who, it seems, died before Judge Fraser's decree,) joins in said motion. At the hearing the motions were withdrawn as to the defendant James H. Rumbough. The grounds on which it is insisted that the judgment must be vacated are that the defendants were nonresidents, and were not served personally or by publication, and that W. C. Benet, Esq., who accepted service for them, was not authorized so to do. The summons and attachment were issued on the 17th

June, 1887. The attachment was levied on property of the defendants in several counties in this state. An order for publication of the summons was granted on the 20th June, 1887. On July 1, 1887, within 30 days from the issuance of the summons and the granting of the attachment, W. C. Benet, Esq., a reputable attorney at the bar, accepted due service of the summons for all the defendants. If he were authorized so to do, then this was equivalent to personal service on the defendants. One mode of proof of personal service, as laid down in our Code, (section 159, subd. 4.) is 'the written admission of the defendants,' and written admission by a duly-authorized attorney is admission by the principal of said attorney. *Reed v. Reed*, 19 S. C. 551. That Mr. Benet had the authority to do what he did, is presumed; and, as a matter of fact, I find, after a careful examination of all the testimony and the argument, that he was fully authorized and empowered by each of the defendants to accept service of the summons in this action for them, which he did in due form within the 30 days from the issuance of the summons. Plaintiff's attorney applied to him, asking if he had authority and would accept service for said defendants. He said he would write to them for instructions, and afterwards, in pursuance of such instructions, he accepted service. Besides this, if this authorized acceptance and appearance needed ratification, there is abundant proof of such ratification by all the defendants. An answer was filed for them. A hot litigation ensued, promoted and counseled by them, which lasted five years, in various tribunals, in which some of them personally appeared, aiding their counsel, Mr. Benet, and of which all of them had knowledge. On the 27th July, 1887, a formal bond, prepared by Mr. Benet, for the release of the attachment, was executed, as the preponderance of the testimony shows, by all the defendants, and the property attached in Greenville released, the benefit of which was reaped by the defendants. These matters, and others in the case, clearly amount to an estoppel against the defendants from questioning Mr. Benet's alleged want of authority to accept service for them, and he is estopped by his own act.

"Mosely, as administrator of George W. Susong, joins in the motion to vacate the judgment on the further ground (and the other defendants claim the benefit of his motion) that his intestate died prior to the rendition of the judgment, and that such judgment should be vacated as to him, and for said reasons as to all, no person having been substituted on the record in his place. This position is not tenable. The action was against the defendants as partners. When G. W. Susong died, his other partners, as survivors of the firm, owned the partnership assets subject to the claims of creditors, and to the right of the administrators of a deceased partner to call them to an account.

But no revival of the said suit was necessary. It could proceed as against the concern. Besides this, the judgment is against the partnership. The defendants were joint debtors, and no effort is now being made to enforce the judgment against the separate property of G. W. Susong. As to the contention that A. E. Susong and W. E. Susong were not members of the firm, that matter is settled against them by the testimony, and especially by their powers of attorney to G. W. Susong, which show they were partners.

"The motions to vacate the judgments must be denied as to all the defendants, and also as to Mosely, the administrator of G. W. Susong, and so must be the motions to vacate attachment. Even if said motion could be entertained after the rendition of the judgment, still, as it appears by my aforesaid finding of fact that when Mr. Benet, on the 1st of July, 1887, within 30 days from the issuance of the attachment, was fully authorized to perform said act, then it follows that such written acceptance, being so authorized, bound the defendants, and each of them, and stands in lieu of personal service upon them, and is such personal service. All questions as to the formal execution of the attachment bond, and its acceptance by and acknowledgment before the clerk, were abandoned at the hearing. Wherefore, it is ordered that the motions herein made to vacate the judgment and attachment herein be, and the same are hereby, denied, with costs."

From this decretal order of Judge Hudson, the appellants urge the following exceptions: "(1) It is submitted that the circuit judge erred in holding that each of the defendants, within thirty days from the issuance of the summons, authorized and empowered W. C. Benet, Esq., to accept service of the summons for them, and in not holding that none of them had given such authority. (2) He erred in holding that the acceptance of service by Mr. Benet was personal service upon the defendants, within the meaning of section 248 of the Code. (3) Because he erred in not holding that the summons in this action had not been personally served upon the defendants, or publication commenced within thirty days after the issuance of the warrant of attachment, as required by law, and in not adjudging, therefore, that the said attachment was void. (4) He erred in holding that the acceptance of service by Mr. Benet was satisfied by all the defendants, and that they were estopped from disputing that he had originally authority; it being submitted that there is no evidence to show that they ever knew that he had accepted service of the summons, and that they had done no act of ratification. (5) Because, though assuming that the acts of the defendants were a sufficient ratification of the acceptance by Mr. Benet to validate the judgment, yet it is submitted that these

acts did not occur within thirty days after the issuance of the attachment, and therefore could not, and did not, operate to validate said attachment, and his honor erred in not so holding. (6) Because he erred in holding that after the death of G. W. Susong the action could proceed against the defendants as though the said G. W. Susong were still living. (7) Because he erred in not holding that said action could not proceed after the death of G. W. Susong until his death was suggested on the record, or his administrator substituted, or, after one year, on supplemental complaint. (8) Because he erred in not setting aside the said judgment; it appearing that the said Geo. W. Susong had died before rendition of the judgment, that his death had not been suggested on the record, that his administrator had not been made a party to the suit, and that no supplemental complaint had been filed. (9) Because he erred in holding that the judgment, as it now stands, is a judgment against the partnership only, and that no effort is now being made to enforce the judgment against the property of Geo. W. Susong, it being submitted that the judgment, as it now stands, not only affects the property of the partnership, but of each partner and of Geo. W. Susong, including his real estate in the city of Greenville, and should have been set aside as to him and the other appellants."

The appellants have followed the practice recognized and enforced by this court in the cases of Crocker v. Allen, 34 S. C. 452, 13 S. E. 650, and Gillam v. Arnold, 35 S. C. 612, 14 S. E. 938. As the court said in the latter case, "when the relief sought consists in setting aside a judgment for some alleged defect in the proceedings by which it was recovered, it would seem to be eminently fit and proper that the question should be determined by the court, and in the case in which the judgment was recovered." It remains now for us to consider the grounds of exception to the order of the circuit judge, which denied them the relief they sought:

It is claimed by the appellants in their first five exceptions that there was error in holding that Mr. Benet, within the 30 days immediately ensuing the issuance of the summons, accepted service for the defendants of the summons in the case at bar. Wherever these exceptions relate to questions of fact, this court has repeatedly decided that such findings of the circuit judge will not be interfered with, unless without any testimony to support them, or where such findings are manifestly against the weight of the testimony. We have examined the case with care, and find that there was testimony to support this finding of fact by the judge. To begin with, there is, in writing, indorsed upon the summons itself, an admission by Mr. Benet that he accepts such service of the summons and complaint for Susong & Co., defendants, on the 1st of July, 1887. Then

on the 27th day of July, 1887, we find that Mr. Benet prepared the bond in the attachment proceedings for his clients, Susong & Co., to sign, and that each one of them did sign such bond so prepared. Then we find, upon an examination of the bond itself, a direct and palpable admission by each member of this firm of Susong & Co. that the action of plaintiff against them as defendants had been begun in the court at Aiken for the exact sum sued for. Then we find in the affidavit of James H. Rumbough, one of that firm of Susong & Co., "that whilst it is true that he did not specifically, *for himself*, [italics ours,] authorize W. C. Benet to appear for him in said case of Sullivan v. Susong & Co., yet he knew that said Benet had appeared for the firm of Susong & Co. in said case, and answered for them, and *said fact was well known to all the firm*, [italics ours.] *Said case was vigorously fought by the firm, and it was known that Mr. Benet was acting for us*, [italics ours.]" Besides, two of the firm—George W. Susong and David L. Boyd—attended the trial of the cause, at its beginning, upholding while there, with might and main, the hands of their active and able attorney, Mr. Benet. It is idle, at this late day, with these facts in testimony at the hearing before the circuit judge on the motions made by appellants herein, to say there was no testimony to support this finding of the circuit judge. Was such finding against the manifest weight of the testimony? We cannot so find, in view of the facts testified to.

But appellants say the form in which the acceptance was made by Mr. Benet is utterly unavailing, because, as they say, it should have been signed by Susong & Co. or rather each individual member of such firm per Mr. Benet, and in support of such proposition they cite as authority Pryor v. Coulter, 1 Bailey, 517; Welsh v. Parish, 1 Hill, (S. C.) 154; Fash v. Ross, 2 Hill, (S. C.) 294; Taylor v. McLean, 1 McMul. 352; Moore v. Cooper, 1 Speer, 87; Webster v. Brown, 2 S. C. 431; De Walt v. Kinard, 19 S. C. 292; Johnson v. Johnson, 27 S. C. 316, 3 S. E. 606. We have examined these cases, and such examination shows that Pryor v. Coulter, supra; Welsh v. Parish, supra; Webster v. Brown, supra; De Walt v. Kinard, supra; and Johnson v. Johnson, supra,—were instances where deeds, either of conveyance or by way of mortgage, were in question, and in each of these the court held that, in order to make the deed executed by an agent for a principal effectual as the principal's deed, it must be signed and sealed in the name of the principal by the agent. But the cases of Fash v. Ross, supra; Taylor v. McLean, supra; and Moore v. Cooper, supra,—being instances where the agent signed notes, instead of the principal, have each been overruled by the court of errors of this state in the case of Robertson v. Pope, 1 Rich. Law, 501. In the case last cited the court said:

"But there is a wide distinction between the technical, formal execution of a deed, and the making of a parol contract. The one rests upon the technical, artificial rule that it must appear from the deed that the sealing and delivery was in the name of the principal. In a parol contract, it is sufficient if it appear that it was intended to be made for the principal." Thus it appears that this position of appellants is unfounded. The appellants, in their argument, very aptly distinguish between the power, in law, of an attorney under his general authority, and that derived by him under a special power, and very properly announce the rule to be that an attorney can only accept service for parties of a summons—the original process in a cause whereby jurisdiction of the person of a defendant is acquired by a court in a cause therein pending—under a special authority from such proposed defendant. All this is admitted by the circuit judge; and we understand him to hold, in the case at bar, that Mr. Benet was clothed by these defendants with this special power to accept service for them. It would, it seems to us, be a strange conclusion, in view of the testimony here, to allow these defendants, after an acceptance by their attorney of service of this original process, and putting in an answer with their knowledge and consent, and conducting a litigation for five years, nearly, and then, after a decision against them is reached, that, upon their present showing, they should now be allowed to repudiate such agency by their attorney. This court has had occasion more than once, recently, to declare the law to be that, where nonresidents appear and answer an action, they are forever afterwards precluded from a denial of the service of a summons. Chafee v. Telegraph Co., 35 S. C. 378, 14 S. E. 764; Meinhard v. Youngblood, 37 S. C. 235, 236, 15 S. E. 950. But it is suggested by appellants that, although this may be, yet the time at which this ratification may be had, if beyond the 30 days in which, by a statute of this state, such a harsh remedy as an attachment may be obtained, is of prime importance. In other words, appellants insist that an attachment cannot be supported if the summons is not served personally, or its equivalent, within 30 days after it is issued. This is true, but in the case at bar the summons was issued on the 17th June, 1887, and actually served. If Mr. Benet's acceptance is a service, on the 1st day of July, 1887, which was within the 30 days fixed by the statute as imperatively necessary in case of an attachment. This is no promise to accept, that Mr. Benet has made. This is no request in writing to delay the service. On the contrary, it is an actual, hard, admitted fact of this attorney's acceptance in writing on the summons itself, within the period fixed by the statute. Did Mr. Benet have the power, under the law, to accept this service? In the case of Reed v. Reed, 19 S. C. 551, the present chief jus-

tice stated: "The question, therefore, is narrowed down to the inquiry whether the admission of service by the attorneys of defendant amounts to the same thing as a written admission of service by himself in propria persona, for while the Code does not, in terms, provide that the written admission of service by the defendant may be by one duly authorized so to do by the defendant, yet we suppose that, upon well-settled principles, an admission so made would be binding upon the defendant." We are perfectly satisfied, still, with this enunciation of the law on this subject. It follows, therefore, that it was in the power of Mr. Benet, as the attorney for the defendants Susong & Co., if he had special authority so to do, to accept legal service for these, his clients. Having already determined that he was clothed by the defendants with such special authority, his acceptance of service of the summons was complete. This conclusion renders it unnecessary to add anything more on this point. These exceptions, therefore, are overruled.

The next three exceptions are more serious, and have caused us much reflection. While it is true that a partnership is an entity somewhat distinct from the entity of each member of it, yet for some purposes, and in some particulars, each member is a part—an essential part—of a firm. It is because of this character affixed by the law to partnerships that business enterprises made up by several persons are made corporate bodies by the authority of the state. Here these five gentlemen—the three Susongs, D. L. Boyd, and James H. Rumbough—entered into a partnership, and this partnership entered into this contract with the plaintiff. The action at bar was properly begun by the service of a summons upon each partner. At one time they were all in court in this action. Up to this point we have hereinbefore agreed with the plaintiff. But George W. Susong departed this life in 1888 or 1889, before any judgment had been rendered in the action. Could this action be continued thereafter without the presence of George W. Susong, or his personal representative? There would be no difficulty if the judgment rendered against this firm only bound the partnership assets, for we cannot see that the surviving partners, being already parties to the action, would not support such judgment against the firm. The mere absence of an entry upon the process suggesting the death of one partner would scarcely be regarded as a fatal vice in the judgment. That suggestion is proper in all such cases, and should have been entered on the record, but it is not incurable, for the court could order it done *nunc pro tunc*. The true difficulty consists in the dual character of a judgment against a firm. It binds,—that is, a lien upon,—on the one hand, the partnership property, and, on the other hand, is a lien upon the property of

each individual partner. At this point we may refer to the decision of the court of appeals in this state, (*Kuhne v. Law*, 14 Rich. Law, 27,) where Judge Wardlaw, as the organ of the court, among other things, said: "At law, the firm, and every partner in it, is bound for a partnership debt. The liability is said to be joint and several, but the contract is joint only. Suits against partners severally could not be sustained. Each of them is the agent of the others, and the law makes no distinction between an execution against them as partners, and one against them as joint contractors acting each for himself. See cases cited, *Bank v. Hodges*, 11 Rich. Law, 730. Either execution has a lien upon the goods of every one of them, and satisfaction of either execution may be executed from any one of them, leaving him to compel contribution from the others." This case just cited was one from a law court, as distinguished from a court of equity. The case, from its importance, was heard by the court of errors; and while no decision was announced by the court of errors, but the judgment was from the court of appeals, we are informed in the decision itself: "The court of errors attained no satisfactory conclusion respecting the rule which should prevail in equity on the distribution of separate effects between separate and partnership creditors; but the judges were nearly, if not entirely, unanimous in the opinion that at law the supposed preference given to a separate creditor should not be allowed to prevail against a prior lien acquired by a partnership creditor." The court of appeals overruled *Roberts v. Roberts*, 8 Rich. Law, 15, wherein a different rule had been recognized.

In the case at bar, it is quite true that no separate creditor raises any question as to the judgment now in question; but the administrator, by law, represents all the creditors, and we conceive it to be in the line of his duty to such creditors to intervene, so that justice may be subverted, and the principles of law upheld. Such administrator has been quite tardy in making his appearance in this action, and he has given no reason or excuse for this tardiness. Still, he now complains, and we are not called upon to decide the effect of his slowness in putting in his appearance. While, at law, he is not a necessary party to a judgment against a firm of which his intestate was a party, if such judgment could be restricted to a lien on the partnership assets, still, in equity, where it is hoped that an end may be reached in its judgment, which will include the liability of the partnership to its creditors as well as that of the individual members composing the firm, he would be a necessary party. To follow this view to its full logical result, and thereby upset this judgment, so that its finality as to the four surviving members of the firm of Susong & Co. should be destroyed, would be a very

harsh conclusion. Courts are not children's play houses. A law suit is a solemn thing. It is pre-eminent a practical thing. When this, the court of last resort in this state, is called upon to declare the freedom of the survivors of a partnership from a judgment to which they were parties, simply because another, who was a party, has died since the suit began, it is asking too much. Such a step would be monstrous. The words of the dean of the New York University Law School,—Austin Abbott,—in a recent article entitled "Lawlessness and the Reason of the Law," where he says, "The time is ripe for a systematic effort to bring disputed questions and conflicts of legal authorities directly to the test afforded by the bearing of the law on public welfare, * * *" are pregnant with meaning. In the light of our duty, we are inclined to adopt the course here that will hold these survivors—A. E. Susong, W. A. Susong, D. L. Boyd, and James H. Rumbough—bound by this judgment and the attachment, and to remand the case to the circuit court, with directions that plaintiff, by a simple order of the court served upon A. J. Mosely as administrator of the estate of George W. Susong, deceased, make him a party to this action, in which he shall be allowed to show, if he can, any reason why the judgment should not include the estate of George W. Susong, deceased,—the lien of the attachment still being preserved,—but this litigation between the plaintiff and such administrator not to affect in any manner the judgment already obtained against the said four survivors of Susong & Co., either as to its lien on the partnership assets, or as to their personal liability thereunder, or as to the lien of the attached property. The judgment of this court is that the order appealed from be modified in accordance with the directions herein contained, but in all other respects it is affirmed.

MOIVER, G. J., and MCGOWAN, J., concur.

WELSH v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Nov. 23, 1893.)

CRIMINAL LAW—CONTINUANCE.

Defendant, a few days before trial, issued a summons for a witness, who resided in the same town, to be delivered to the sheriff. The summons was returned "Not found." Defendant made affidavit to the materiality of the witness, and the necessity for his presence at the trial. The court overruled the motion for continuance upon the sole ground that the statements of the prisoner under oath were not to be credited. *Held*, error.

Error to corporation court of Norfolk.

John Welsh was indicted and tried for larceny against his exception, he making a motion for a continuance, which was overruled.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

He was convicted, and brings error from the judgment. Reversed.

John Neely, for plaintiff in error. ' R. Taylor Scott, Atty. Gen., for the Commonwealth.

LACY, J. This is a writ of error to a judgment of the corporation court of Norfolk city. The plaintiff in error was indicted in the corporation court of Norfolk city for grand larceny on the 7th day of March, 1893, and on the 24th day of the same month he was tried by a jury, and convicted, and his term of imprisonment fixed at seven years in the penitentiary. The accused moved the court to set aside the said verdict, and grant to him a new trial; but the court overruled the motion, and rendered judgment in accordance with the verdict, and the prisoner excepted. The prisoner thereupon brought the case here by writ of error. There were two exceptions taken by the plaintiff in error to the rulings of the court, which are assigned as error here. The first is that on the calling of the case the defendant moved the court to continue the case on the ground of the absence of a witness wanted in his defense, and in support of the motion filed the following affidavit: "John Welsh, the defendant, being first duly sworn, says that upon the trial of the above-mentioned indictment he desires to introduce Sidney Hoffheimer as a witness in his behalf; that said Hoffheimer was present in the city of Norfolk at the time of the occurrences which constitute the subject of said indictment; that he is a material witness for the defendant, and can prove facts not within the knowledge of any other witness procurable by the defendant; that this defendant has caused to be issued subpoenas for the attendance of this witness, returnable to the first day of this term and to this day, directed to the sergeant of the city of Norfolk, which subpoenas have been returned 'Not found;' that said witness has not been kept from attendance by the solicitation or procurement of this defendant, or by any connivance of his, and that he has used every effort in his power, in addition to the issuing of process as aforesaid, to secure his attendance." Subscribed and sworn to the same day. The court overruled this motion, and ordered the trial to proceed, and the defendant was found guilty by the jury, as stated above.

In support of his motion to set aside the verdict and grant him a new trial the defendant filed another affidavit, as follows: "John Welsh, the defendant, being first duly sworn, says that Sidney Hoffheimer, the witness mentioned by him in a previous affidavit, filed upon his motion for a continuance of this case, is a resident of the city of Norfolk, and, as this defendant believes, is only temporarily out of the said city. This defendant believes that the attendance of the said Hoffheimer can be procured at the May

term next of this court. He says that the said Hoffheimer was present at the time when and place where the larceny charged in the indictment is alleged to have been committed by this defendant, and this defendant verily believes from statements subsequently made by said Hoffheimer to him that he will swear that this defendant did not commit the same." Subscribed and sworn to the 31st day of March, 1893. But the court refused to allow the said affidavit to be filed, or to consider the same in connection with said motion for a new trial, to which action and ruling of the court the prisoner again excepted, and filed his bill of exceptions. The defendant filed a third bill of exceptions to the action of the court in overruling his motion to set aside the verdict and grant to him a new trial. This is the whole case, as it appears here; and the main question is whether the court below erred in refusing to continue the case on the motion of the defendant on account of the absence of a material witness.

The rule upon which the court proceeds in considering a motion for a continuance is well settled, and has often been the subject of decision in this court. In *Hewitt's Case*, 17 Grat. 629, Judge Moncure said on this subject: "A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. As a general rule, when a witness for a party fails to appear at the time appointed for a trial, if such party show that a subpoena for a witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides a reasonable time before the time for the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted. The party thus shows *prima facie* that he is not ready for trial, though he has used due diligence to be so; and, in the absence of anything to show the contrary, the court ought to give him credit for honesty of intention, and continue the case, if there be reasonable ground to believe that the attendance of the witness at the next term of the court can be secured; especially if the case has not been before continued for the same cause. But circumstances may satisfy the court that the real purpose of the party in moving for a continuance is to delay or evade the trial, and not to prepare for it; and in such case, of course, the motion ought to be overruled." See 3 Rob. Pr. (Old.) pp. 140, 141; *Savage, C. J.*, in *People v. Vermilyea*, 7 Cow. 383; *State v. Lewis*, 1 Bay, 1; *Com. v. Knapp*, 9 Pick. 515; *Russell's Case*, 28 Grat. 936; opinion of Burks, J., citing and approving

Judge Moncure's opinion in *Hewitt's Case*, supra; *Gwatkin v. Com.*, 10 Leigh, 687; *Walton's Case*, 32 Grat. 863, opinion of Judge Moncure,—a case very similar to this case; *Hook v. Nanny*, 4 Hen. & M. 157, note; *Higginbotham v. Chamberlayne*, 4 Munf. 547; *Deford v. Hayes*, 6 Munf. 390; *Harris v. Harris*, 2 Leigh, 584; *Harman v. Howe*, 27 Grat. 676; *Bland & Giles County Judge Case*, 33 Grat. 447. The authorities on this subject are collated in an admirable article in 3 *Amer. & Eng. Enc. Law*, pp. 804, 821.

In this case only a few days had elapsed between the indictment and the trial. A summons for the witness had been placed in the hands of the sheriff for the witness, who resided in the same town. It was returned "Not found," and the witness was not present. No lack of diligence appears or is hinted at on the part of the prisoner. He made affidavit in due form to the materiality of the witness, and the necessity for his presence at the trial to prevent a miscarriage of justice. The court overruled the motion for a continuance upon the sole ground, as appears from these circumstances, that the statements of the prisoner under oath and uncontradicted were not credited by the court; because, if the statements had been credited by the court, it is not reasonable to consider that the motion would have been overruled by the court. We think the court erred in refusing to continue the case under these circumstances. The court should have given the prisoner credit for honesty of intention, as is said in all the cases, and ought to have continued the case. For this error of the said court the said judgment must be reversed and annulled, and the case remanded for a new trial to be had therein.

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RICHMOND & D. R. CO. v. DUDLEY.¹
 (Supreme Court of Appeals of Virginia. Nov. 16, 1893.)

INJURY TO RAILROAD EMPLOYEE — CONTRIBUTORY NEGLIGENCE—DISOBEDIENCE OF ORDERS.

1. The conductor of a freight train, contrary to the rules of the company, allowed certain cars to be shifted and run down grade without an engine attached. Subsequently, while the conductor was between said cars, a brakeman, without objection from the conductor, caused another car to run down in the same way, which, by reason of defective brakes, could not be controlled, and struck the first cars with such violence that the conductor was injured. *Held*, that there was no cause of action against the company.

2. Railroad companies have a right to presume that cars delivered to them by connecting lines are in proper condition.

3. Conductors of freight trains, who are required by the rules of the company to inspect all cars which they pick up in transit, cannot maintain actions for injuries caused by their failure to do so.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Error from circuit court, Culpeper county.

Action by David Dudley against the Richmond & Danville Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Wm. H. Payne and J. C. Gibson, for plaintiff in error. F. L. Smith and Edmund Burke, for defendant in error.

FAUNTLEROY, J. The petition of the Richmond & Danville Railroad Company represents that it is aggrieved by the verdict of the jury, and the judgment of the circuit court of Culpeper county thereon, rendered on the 25th of March, 1892, in a suit pending in that court, in which one David Dudley is plaintiff and the petitioner is defendant. A transcript of the record, including a certificate of all the evidence adduced before the jury at the trial, is exhibited. After the evidence was all in, a multitude of instructions were presented upon both sides, some of which were granted to plaintiff and defendant. The jury rendered a verdict for the sum of \$9,000 damages against the defendant, which verdict the defendant moved the court to set aside, because the verdict was contrary to the law and evidence, because of misdirection by the court, because the verdict was excessive, and because of misconduct on the part of the jury; which said motions the court overruled, and entered judgment upon the verdict. A demurrer to the declaration the court had likewise overruled. It appears from the record that on the 12th of December, 1889, the plaintiff below, (defendant in error here,) a freight conductor in the employ of the defendant company, was conducting a freight train from Charlottesville to Alexandria. At Culpeper, an intermediate station, he received a telegraphic order to shift certain stock cars then in and upon a side track of the defendant's road, north of its station at Culpeper, to another side track of the defendant, south of its station at Culpeper, and also to take into his train a certain car, loaded with spokes, which was in and upon the side track north of Culpeper. The conductor (Dudley) who received this order directed his men, including a brakeman named Munday, to go and shift the cars; and he addressed himself to the undertaking of the removal of a car which obstructed a street in the town of Culpeper. The men whom he had ordered and sent to shift the cars attempted to effect the shifting by dropping them down the track without the grasp or control of the engine, and his attention was called to the fact that two of the cars so dropped down the track were running down the grade without any one upon them,—running "wild," in railroad parlance. The conductor, Dudley, pursued, overtook, and stopped these cars, and was in between them, endeavoring to get a coupling pin out of the drawhead of one of them, when Munday, whom he had sent to do the shifting, removed the wooden chock from

under the car loaded with spokes as it stood at the head of the grade, where it had been left when pushed out of the siding, and put his shoulder to start it, when it went down the grade, gathering momentum so rapidly that it got beyond the control of the brake, and ran with great velocity and violence against the cars which Dudley had stopped, and caught and mashed and severely hurt him between the cars, where he had placed himself in the endeavor to extricate the coupling pin, as aforesaid; whereupon he exclaimed: "My God, Munday, you have killed me! How often have I told you about this before." Dudley was an old conductor, with 22 years' experience in railroad service. He was engaged at the time of his injury in his regular and appointed work, which he was paid to perform. By the rules of the company, which were placed in his hands in the form of a regular book, and by special orders, constantly repeated, he was instructed generally and particularly as to his duties. He represented the company, commanded the crew and the train, and was responsible for the protection of the company's property. By the rules of the company, as well as ex necessitate, a train once launched upon its career must be under the absolute control of one person, whom all connected with the conduct of the train are in duty bound to obey. The law requires and approves this order and discipline. See *Moon v. Railroad Co.*, 78 Va. 745-750; *Johnson's Adm'r v. Railroad Co.*, 84 Va. 713, 5 S. E. 707; *Ayers' Adm'r v. Railroad Co.*, 84 Va. 679, 5 S. E. 582; *Railroad Co. v. Rudd*, 88 Va. 648, 14 S. E. 361. Proper rules must be made, and the conductor must obey and enforce them. *Railroad Co. v. Donnelly*, 88 Va. 858, 14 S. E. 692. Dudley was injured 60 miles from a terminal point, while his train was out upon its run, and while he was in absolute command. The order which set the cars in motion down grade, without the control and grasp of an engine, in gross violation of the express and especial rules of the company, and which injured him, was given by him to Munday, whom he knew and declared to be an open, reckless, and frequent violator of that particular rule Z, which explicitly forbids the attempt to shift cars without the connection and control of an engine, yet whose disobedience and reckless violation of the rules of the company he never reported. He turns his train and his own special duty over to his reckless subordinate, absents himself from the operation and direction of the shifting, and observes the car flying wildly down the grade of the track, and hears the shout: "Look out! There goes a car down the main track without brakes on it." He pursues this car, leaps upon it, and rides it down to its destination. He knew that it was moving in gross violation of the general orders and express rule of the company, yet with this disobedience of orders by his subordinates under his eyes, with the general

and special rules of the company in his pocket, he did not give even a hint of disapproval of any sort of the dangerous disobedience and misconduct of his subordinates until he is injured by it, between the cars, where he had placed himself, in violation of the rules of the company made to protect him and the property of the company from injury, and which common experience and prudence advised him was a most perilous position. While in this perilous position, his disobedient subordinates, encouraged by the approval of his silence, launched car after car—four in all—down grade, in defiance of rule Z, without even a forbidding word or wave of the hand from him, until one heavily loaded goes wildly down the descending grade, acquiring too much momentum to be controlled by its brake, which Munday applied to it, and plunges against the cars which he had stopped, and between which he had placed himself; when he instinctively recognized the cause of his injury by the exclamation: "My God, Munday, you have killed me! How often have I told or warned you of this before." It is clear that if Dudley had been at his proper post of duty, and enforcing obedience to the express and imperative rule of the company as to the only allowable and safe mode of shifting cars, he would not have been hurt. It is clear that if rule Z, so often, so imperatively, and so constantly repeated, had been observed, he would not have been injured. If he had even used reasonable prudence in keeping from between the wild-cat cars, or had simply signaled a forbidding disapproval of what was going on in violation of rules, which it was his special, peculiar, and paramount duty to enforce, he would not have been injured. The company had ordered this conductor into no perilous duty. There was absolutely no danger in shifting cars if rule Z had been observed; and the company had taken every precaution to impress rule Z upon the men, and it was present only in the person of the conductor, who defied and disobeyed its rule, and who had promised to prevent the very disaster which was caused primarily and proximately by his disobedience and gross negligence.

It is claimed that the brake upon the car loaded with spokes was defective, and that this caused the injury; but the answer to this is that the rules of the company made it the express duty of the conductor to see to the careful inspection of all cars which he should put into his train in the transit, and that this duty he did not perform. It was put into his train without inspection, report, or information of any defect whatever. It was carried to Manassas, and thence to its destination. It was a Pennsylvania car, which had brought freight to and carried freight from Culpeper without any discovered or known defect. The railroad companies, in hauling the vast mass of commerce which burdens their roads, have a right to

presume that cars delivered to them by connecting lines of great railways are in proper condition. McKinney, Fel. Serv. § 28; Patt. Ry. Law, § 241; 21 Amer. & Eng. Enc. Law, 501, 504; 15 Amer. & Eng. Enc. Law, 196. It is not required that railroad companies shall have inspection shops and special inspectors all along the line of their roads. It is apparent that they are largely dependent upon their conductors, into whose hands their trains are committed, whose duty it is to inspect any cars which they pick up and incorporate into their trains in the transit. This, it does appear, was not done by Dudley or his subordinates en route. But Dudley himself not only did not know anything about the defective brake, but he is quite clear and certain, that in spite of the numerous warnings that he had given to Munday "about this thing before," but which he had practically concealed from his employers. Munday caused the accident, and not a defective brake. Munday himself, who used the brake, knew nothing of any defect; nor did Deland, the engineer. Thornbury, an exceedingly swift and self-contradicted witness, testified that he shouted to Munday "not to start that car; it has no brake on it." In the next sentence he says, "Munday left off the brake," which he had just sworn was not there, and after the car had got far down the hill, and was running rapidly, he says he called to Munday, "not to let it get the start of him. The brake is not in order." When examined as to how he knew about the brake, he said he examined it after the accident, and "had no opportunity to examine it before." And, when confronted with his testimony at a former trial, as to the brake, he admits that "he does not know what was the matter with it." But, even if it were conclusively proved that the brake was defective, the conductor, who was injured by its being set in motion by his own negligence and disobedience of the rules of the company, cannot recover. The promoting and the dominating cause of the injury in this case, which controlled every subsequent event, was the turning of the cars loose upon the track, and ordering the shifting to be done without an engine, in violation of rule Z of the company, and the failure to inspect before incorporating the car in the train. See McKinney, Fel. Serv. § 31; George's Case, 88 Va. 223, 13 S. E. 429.

The foregoing review of the evidence, bringing us to the conclusion that the appellee, Dudley, was the victim of his own gross negligence, and disobedience of the rules of the company, and cannot recover damages for his own wrong, renders it wholly unnecessary to advert to the errors assigned as to the instructions given and refused by the court. We are of opinion that the verdict of the jury and the judgment of the circuit court of Culpeper county are wholly erroneous, and our judgment is to reverse and annul them.

CHASE v. MILLER.¹

(Supreme Court of Appeals of Virginia. Nov. 16, 1893.)

RESCISSION OF CONTRACT—FRAUD—EVIDENCE.

Upon a bill to rescind a sale of land on the ground of misrepresentations by the vendee as to his ability to pay, it appeared that the purchaser expected certain money, as the seller was informed; that, after the contract was executed, but before the purchaser was put in possession, he informed the seller of his being disappointed in his anticipated receipts of money; that the cash payment required was made, but subsequent payments were not, a draft given by the purchaser being protested; and that the seller, though knowing of the other's failure to realize his expectations, sought to enforce the contract. *Held*, that there was no evidence of fraudulent representations, although present insolvency was proved; and that the seller's remedy was to ask for specific performance and sale of the property. *Fauntleroy and Hinton, JJ., dissenting.*

Appeal from circuit court, Frederick county.

Bill by J. M. Miller against W. C. Chase to rescind a contract for sale of real estate upon the ground of fraudulent representations as to the latter's ability to pay for the same. From a decree for complainant, defendant appeals. Reversed.

Holmes Conrad, for appellant. John J. Williams, for appellee.

LACY, J. This is an appeal from a decree of the circuit court of Frederick county, rendered in July, 1892. The bill was filed in this cause by the appellee, J. M. Miller, seeking a rescission of a contract between him and the appellant, W. C. Chase, for the sale by Miller to Chase of a tract of land called "Vanduse," situated in the said county, executed April 18, 1892, under which Miller had put Chase in possession; and to reinvest Miller with the title, legal and equitable, and to restore Miller to the possession; to have an account of the payments made by Chase, and for the appointment of a receiver to take charge of the land in question; and for an account of the rents, profits, and proceeds of the land; and praying an injunction to enjoin and restrain the defendant and his agents from disposing of any proceeds of the land, leasing or renting or selling the same, or any part thereof, and from cutting wood from the land. The ground upon which the rescission is asked is that the defendant fraudulently deceived the plaintiff as to his means of paying for the land, falsely stating that he had made sales of valuable property, by the proceeds of which he could pay for the land. The defendant demurred and answered. In his answer he denied that he had ever made any false or fraudulent representations as an inducement to the sale; that at the time of the purchase he had, in his opinion, ample means to pay for the land; that he had made some payments, and had

used his best ability to make sale of enough of his property to meet this indebtedness, but had been disappointed. The depositions are taken, which show that the seller was anxious to sell and the buyer equally anxious to buy at the price demanded. The dispute between them was not as to the price of the property, but as to the terms of payment. The seller demanded \$15,000 for the land, and the buyer agreed to pay that sum for it. But the seller demanded a down payment of \$5,000; but the buyer did not agree to this, because, as he stated, it was out of his power to pay so much cash. Finally, at the railway station, when they were awaiting the train upon which the proposed buyer was to depart, the seller suggested that something be put in writing, it appearing that they were agreed as to the amount of the purchase price. The defendant then, in April, 1890, wrote and delivered a contract in writing, which was signed by both, by which the sale was agreed to, but the time of making the cash payment was left to future agreement, and it was provided as to this as follows: "Said sale is made under following conditions, to wit: Said Chase is to pay unto said Miller, on or before the 1st day of July, 1890, the sum of five hundred dollars, being the first payment of the purchase money for the said tract or farm, and to pay the balance, (\$14,500,) fourteen thousand five hundred dollars, in payments hereinafter to be determined upon by and between said Miller and Chase: provided, such payments shall not be less than \$5,000 five thousand dollars per year, with six per cent. interest from 1st of January, 1891 and said payments to be paid in not less than ——— months from date hereof, and other or residue payments to be paid in full on or before 1st of January, 1893, until the purchase price of \$15,000 shall be fully paid as herein mentioned." It was provided also that Chase was not to disturb the tenant then on the farm before the expiration of the crop year, and that Chase was not to have any of the crops of that year unless he paid the \$5,000 by the 1st day of November following, and not to pay the taxes unless he got the crops, and that Miller was to have the use of a spring on the farm for life. Miller hesitated, he says, but signed and delivered the contract. Chase departed in a few minutes on the train, but came back before the 1st of June, and was put in possession of the farm, and paid the \$500 in a manner satisfactory to Miller by getting the agent of Miller, in selling the land, his son-in-law and nephew Long, to receipt to Miller for \$500, and take him on the claim. He gave Miller a draft for \$2,000, which was protested, and, except small sums, (\$500 in sheep, \$150 in a carriage, and \$250,—this said to be for crops.) has paid nothing. Chase not complying with his contract, in April, 1891, Miller repudiated it on his part, and brought an action of unlawful detainer in the coun-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

ty court to recover the possession of the land, when and in which action there was verdict and judgment for Miller, which, on Chase's appeal, was affirmed in the circuit court of Frederick county. From this judgment Chase obtained a writ of error to this court, where that controversy is still pending and undetermined; when, in April, 1892, Miller brought this suit to set aside the contract for fraud, as stated above.

The contract having been mutually agreed to in writing, and the terms of it as to payments of the purchase money having been broken by Chase, who, as we have seen, was to pay \$5,000 by the 1st of January, 1891, and Chase having been put in possession by Miller, and part of the purchase money having been paid, and a large part due and unpaid, we are not informed why Miller did not seek to have the contract enforced, and the land sold to satisfy the purchase money due and unpaid. It must be borne in mind that Miller is the vendor, and the fraud alleged is as to false representations made by Chase as to his means of making payment; and there is no allegation of insolvency on the part of Chase at the time of making the contract, but present insolvency is charged in the bill, and may be said to be proved, outside of the land, of which, in equity, Chase is regarded as the owner, and Miller as the owner of the purchase money. The contract not having been complied with by Chase, Miller has the right to go into equity, and have it enforced against Chase, and the land subjected to the satisfaction of his debt, for which it stands as security. There is a failure to pay on the part of Chase, and he is, under his contract, liable to pay the debt. But the evidence shows that at the time of entering into the contract Chase had an expectation in South Carolina of a vineyard, as he says; and, as Miller alleges, the ownership of the vineyard was asserted to him. But the evidence shows that before he was put in possession of the tract of land Chase informed Miller that he had been disappointed as to this vineyard, and could not get any money from this source. It seems that Chase had information of a sale of stock, for which he was to get \$3,666.66, and on which he drafted in Miller's favor for \$2,000 towards the cash payment. But here the sale failed, and Chase failed to realize according to his expectations. What Chase's other expectations were we do not know. He now appears to be insolvent. But the evidence does not sustain the allegations of fraud or of false representations made in the bill. Chase informed Miller before the contract was written of his inability to make any cash payment, and the parties had left Miller's house, where the negotiations were going on; and Chase so stated on his way homeward, when Miller asked for and obtained a written contract with Chase for the sale, time of payment to be thereafter agreed

on; and Chase was subsequently put in possession by Miller, after Miller had been informed that the vineyard sale had been a failure. Miller held on to the contract, and sought to obtain a compliance from Chase after he knew all. This suit, therefore, appears to be an effort to claim against a contract, under which, with full knowledge, he asserted his rights. His remedy is for specific enforcement of the contract between himself and his vendee and his debtor. Upon the allegations of the bill there was no insolvency of the purchaser, and subsequent insolvency does not constitute a ground for a rescission of the contract. The action of the circuit court in rescinding the contract and decreeing an account of the partial payments—of the profits of the land—to be offset against them is erroneous, and must be reversed and annulled, and the cause remanded to the circuit court, where the plaintiff may amend his bill as he may be advised.

FAUNTLEROY and HINTON, JJ., dissenting.

DANVILLE & W. R. CO. v. BROWN.¹

(Supreme Court of Appeals of Virginia. Nov. 16, 1893.)

ALIAS SUMMONS—SERVICE ON DIRECTOR OF CORPORATIONS—CONTINUANCE—NEGLIGENCE OF RAILROAD COMPANY—DAMAGES.

1. Plaintiff, on May 9, 1891, sued out a summons returnable to third Monday in May, when declaration was filed, and case continued for process. July 6, 1891, an alias summons was issued, on which no rules were taken. August 27, 1891, plaintiff sued out alias summons returnable to the third Monday in September, 1891, which was served, and on this last summons rules were taken, on 2d September rules and 1st October rules, and the cause placed on docket at October term. *Held*, that a motion to quash the process, and remand the cause to rules, was correctly overruled, as, where previous writs have failed for irregularities, plaintiff is entitled to an alias writ.

2. When a person is notified of his appointment as a director of a company, and subsequently receives a summons intended for the company, without remonstrance, he must be presumed to have accepted, unless he expressly declined.

3. Where a summons against a corporation is served on a director, it is no defense that he did not deliver the summons, especially when defendant appears and defends the action.

4. It is no cause for continuance, in an action for negligence, that plaintiff is allowed to amend at bar by inserting a charge that defendant had notice of certain defects in its station platform.

5. The plaintiff received notice from the defendant company that certain goods for him were at its depot. While walking along the passage to the freight room, several boxes of iron, which had been carelessly piled, fell on him. *Held*, that the plaintiff was a licensee, and defendant company was liable for failure to exercise ordinary care.

6. \$7,500 is not an unreasonable verdict against a company, which, by its negligence,

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

causes plaintiff's thigh to be crushed, and his leg shortened.

Fauntleroy, J., dissenting.

Error to circuit court, Henry county.

Action by one Brown against the Danville & Western Railroad Company for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

Green & Miller, for plaintiff in error. S. A. Anderson and W. R. Staples, for defendant in error.

HINTON, J. This was an action of tort, brought to recover damages for injuries sustained by the plaintiff at the depot of the defendant company at Martinsville, Va., where he had gone for the purpose of looking for some freight, for which he had received a bill of lading from New York. At the trial the jury returned a verdict in favor of the plaintiff for the sum of \$7,500, and the company applied for and obtained a writ of error from one of the judges of this court.

The first and chief cause of complaint is that the circuit court refused to quash all the processes, and to remand the case to rules. It appears from the record that the plaintiff, on the 9th day of May, 1891, sued out a summons from the circuit court of Henry county, returnable to the third Monday in May, 1891, when he filed his declaration in the clerk's office, and the case was continued for process. On the 6th day of July, 1891, an alias summons was issued, directed to the sergeant of Danville, on which no rules were taken. On the 27th day of August, 1891, the plaintiff sued out an alias summons returnable to the third Monday in September, 1891, directed to the sheriff of Henry county, which summons was returned as executed by delivering a copy to H. C. Lester, a director of the defendant company, on the 29th of August, 1891; and on this last summons the rules were taken at the 2d September rules and 1st October rules, and the case was placed on the docket for trial at the October term, 1891. When the case was called for trial the defendant company moved the court to quash the process, and remand the cause to rules, and in support of this motion proved the above irregularities. But the court overruled this motion, and this action of the court is made the chief assignment of error in this court. Without going, however, into a lengthy discussion of this point, we think it sufficient to say that this motion was properly overruled, for the reason stated in the brief of counsel for the defendant in error, namely, it was too broad in its scope. If this motion had prevailed, as the counsel very properly say, and the court had quashed all the processes which had been issued, there would have been no case, and nothing to remand to the rules. But, apart from this reason, we think that the process of August 27, 1891,

by whatever name it may be called, is good and valid as an original process. The simple circumstance that it is characterized as an "alias writ," and that it runs, "We command you, as we have before," or "at another time commanded you," etc., cannot possibly affect or change its essential character, or render it less effectual as a process for bringing the defendant before the court, and this is all that any original summons does. The only limitation in law upon the power of the plaintiff in a suit to have issued as many writs as he may deem proper is that he is not permitted to harass or vex the defendant with unnecessary costs. But if, as in a case like the present, previous writs, by reason of any irregularity in the service merely, have failed to bring the defendant into court, there seems to be no good reason why he may not issue an alias without being amenable to the charge of unduly vexing the defendant with costs.

The next objection is that H. O. Lester was not a director of the company at the time of serving process on him, and did not inform the company of the fact. But the first of these allegations is not sustained by the record, for he is shown to have received a letter from Mr. Wilcox Brown notifying him of his election on the 3d of August, 1891, whereupon he says he determined to accept at once; and he subsequently evidenced his acceptance by receiving the summons without remonstrance or disclaimer, and by other official acts since. Independently of these acts, he must be presumed to have accepted when notified of his appointment, unless he expressly declined it. Wood, Ry. Law, § 149; Lockwood v. Bank, 9 R. I. 308. And, as to his not having delivered the summons to the company, we cannot perceive how this circumstance, in absence of fraud or collusion,—neither of which are shown,—could possibly affect the right of the plaintiff. He did all that he was required to do. In point of fact, however, this failure of Lester to inform the company does not appear to have worked any harm to the company, for when the case was called the defendant was in court, with its counsel and witnesses, ready for trial; so that it must have been notified of the suit in ample time for necessary preparations for the trial.

The next objection is the refusal of the court to continue the case for the defendant. This motion seems to have been based solely upon the ground that the court permitted the plaintiff to amend his declaration at the bar of the court by inserting the following words: "Of which fact the defendant company had notice, or by the use of reasonable diligence might have had notice,"—an amendment which we consider unnecessary. An averment of notice on the part of the defendant is never required, where the fact lies as much within the knowledge of the defendant as of the plaintiff. 1 Saunderson, Pl. & Ev. 214, 215. And in this case it fully



appears that the company's agent had notice that the platform where the accident occurred was used as a passway to the freight room. There was no necessity for averring it, as the knowledge of the agent is the knowledge of the principal.

Upon the facts, there can be no doubt of the correctness of the verdict. The plaintiff, as was customary, was walking, in company with two other persons, along a platform which was used as a passway to the freight room for the purpose of seeing as to some freight which he was expecting, when several boxes of sheet iron, weighing about 800 pounds, which had been carelessly placed on edge, fell over on the plaintiff, breaking his thigh, and occasioning a consequent shortening of the leg. This brings the case directly within the principles announced in *Railroad Co. v. White*, 84 Va. 505, 5 S. E. 573. The plaintiff was a licensee, and was entitled to have the defendant company exercise ordinary care and prudence towards him. The company plainly failed to discharge its duty in this respect, and is therefore liable.

Finally, there is nothing in the amount of the verdict in this case that discloses either passion or prejudice on the part of the jury, and the judgment of the circuit court must therefore be affirmed.

FAUNTLEROY, J., dissenting.

WESTERN UNION TEL. CO. v. TYLER.¹
(Supreme Court of Appeals of Virginia. Nov. 16, 1893.)

TELEGRAPH COMPANIES — FAILURE TO DELIVER TELEGRAM — PENALTIES — INTERSTATE COMMERCE.

Code, § 1292, provides that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver a dispatch as promptly as practicable the company shall forfeit \$100 to the person sending the dispatch or to the person to whom it was addressed. *Held*, (1) that a suit to enforce such forfeiture need not be brought in the name of the commonwealth; (2) said statute is not repugnant to the interstate commerce clause of the constitution of the United States.

Error to circuit court, Alleghany county.

Action by J. O. Tyler, plaintiff, against the Western Union Telegraph Company, defendant, to recover \$100 forfeiture imposed by statute for failure to deliver a telegraph message promptly. Verdict and judgment for plaintiff, and defendant brings error. Affirmed.

Stiles & Holladay, for plaintiff in error.
Benj. Haden, for defendant in error.

LEWIS, P. This was an action against the Western Union Telegraph Company to recover a statutory penalty of \$100 for the

failure of the company to deliver as promptly as practicable a certain dispatch sent from Asheville, in the state of North Carolina, to the plaintiff, at Clifton Forge, in this state. Section 1292 of the Code, under which the action was brought, is as follows: "It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed, where the same is to be forwarded. For every failure to deliver or forward a dispatch as promptly as practicable the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed." It is admitted that the dispatch in question was not delivered as promptly as practicable, but the company, nevertheless, denies the plaintiff's right to recover, on two grounds, viz.: (1) Because the action, if maintainable at all, ought to have been in the name of the commonwealth; and (2) because section 1292 of the Code is repugnant to that clause of the constitution of the United States which gives to congress the power to regulate commerce among the several states.

As to the first point, little need be said. Section 712 of the Code provides that "where any statute imposes a fine, unless it be otherwise expressly provided, or would be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth," etc.; and by section 745 it is provided that "wherever the word 'fine' is used in this chapter it shall be construed to include a pecuniary forfeiture, penalty, and amercement." But these sections upon which the company relies have no application to a case like the present. Section 1292, which gives a right of action in a case of this sort, expressly provides that the forfeiture shall be "to the person sending the dispatch, or to the person to whom it was addressed;" and it would therefore be manifestly inconsistent with the intention of the legislature to hold that the commonwealth has any interest in the penalty sought to be recovered in the present case, or that the action is not properly in the name of the plaintiff.

The next question, then, is whether section 1292, so far as it relates to a case like the present, is unconstitutional. That the power of congress to regulate commerce among the states is unqualified and unlimited, is not disputed. It was so decided in the great case of *Gibbons v. Ogden*, 9 Wheat. 1, and the subsequent decisions to the same effect are very numerous. It must also be conceded that telegraphic communication, like the transportation of passengers and merchandise, is commerce, and that such communication, when had between different states, is interstate commerce. In *Telegraph Co. v.*

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Texas, 105 U. S. 460, it was distinctly decided that a telephone company occupies the same relation to commerce, as a carrier of messages, that a railroad company does as a carrier of goods; that both companies are instruments of commerce; and that their business is commerce itself. See, also, *Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380. Nor is it denied that those subjects of commerce which are national in their nature, admitting of only one uniform system or plan of regulation, such as the transportation of commodities or the transmission of messages between different states, are subject to the exclusive control of congress, and consequently that any regulation thereof by state legislation, whether congress has legislated on the subject or not, is void. *Cooley v. Wardens of Port of Philadelphia*, 12 How. 299; *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor, etc.*, 92 U. S. 259; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681; *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806; *Telegraph Co. v. Texas*, 105 U. S. 460; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380.

These principles were acted on by this court in *Norfolk & W. R. Co. v. Com.*, 88 Va. 85, 13 S. E. 340, and we do not understand them to be controverted in the present case. But does the statute, the validity of which is here drawn in question, amount to a regulation of commerce? In *Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, a statute of Indiana was held to be repugnant to the commerce clause of the constitution, so far as it attempted to regulate the delivery of dispatches sent from that state into other states, because, as the court said, conflicting legislation would inevitably follow with reference to telegraphic communications between different states, if each state was vested with power to control them beyond its own limits. But that is not the question arising in the present case, nor does the reasoning in that case apply to this. This is an action for the failure to deliver in this state a dispatch sent from another state and deliverable here, under a statute of this state. There is no question as to the extraterritorial operation of the statute, and it will be time enough to decide that question when it arises.

It has been argued with much earnestness that the statute amounts to a regulation of interstate commerce, but we are unable to come to that conclusion. If it can be said to affect commerce at all, it does so only remotely or incidentally. It prescribes no new rule, and imposes no additional duty, and, so far as the delivery of telegrams is concerned, it simply prescribes a penalty for a failure to deliver where the regulations of the company itself require such delivery.

That it would be competent, moreover, for the state to afford redress through her courts, according to the common law, for the negligent failure of a telegraph company to deliver a dispatch sent from another state, is unquestionable; and, if this may be done, it is equally competent for the state to seek by legislation, in advance, to prevent such violation of duty. We think the case is within the principle decided in *Sherlock v. Alling*, 93 U. S. 99, namely, that "the legislation of a state, not directed against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." This principle was applied and amplified in *Smith v. Alabama*, 124 U. S. 405, 8 Sup. Ct. 564, and again in *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28. In the *Smith Case*, the question was whether a statute of Alabama making it unlawful for any locomotive engineer to drive or operate any train of cars without having been first examined and licensed was in contravention of the commercial power of congress, so far as it applied to engineers employed on interstate trains, and it was held that it was not. After a full consideration of the case, the conclusion announced was (1) that the statute was not, in its nature, a regulation of commerce; (2) that it was properly an act of legislation within the reserved power of the state to regulate the relative rights and duties of persons within the state so as to secure safety of person and property; and (3) that, so far as it affected interstate commerce, it did so only indirectly, and not so as to burden or impede such commerce. In the course of the opinion, it was said, by way of illustration, that a common carrier, although engaged in interstate commerce, is liable according to the local laws of the particular state in which he may be guilty of any nonfeasance or misfeasance, as, for example, for his failure to deliver goods at the proper time and place, or for injuries to passengers, caused by his negligence, and that in neither case would it be a defense that the law giving the right of redress was void as being an unconstitutional regulation of commerce by the state. These views were repeated in the case in 128 U. S., 9 Sup. Ct., above cited, where a statute of Alabama requiring the examination of certain railway employes with respect to their powers of vision was sustained, and held not to be a regulation of commerce. The provisions of the statute, like those of the statute upheld in the *Smith Case*, were held to be but parts of that local law which governs the relation between carriers of passengers and merchandise, and the public who employ them, which, as respects

interstate commerce, are not displaced until they come in conflict with an express enactment of congress; and, after quoting from the opinion in the *Smith Case*, it was added that what the state may punish or afford redress for, when done, it may seek, by proper precautions in advance, to prevent. In *Sherlock v. Alling*, supra, the main point was whether a state statute giving a right of action to the personal representative of the deceased, whose death was caused by the wrongful act or omission of another, could be constitutionally applied to the case of a loss of life by a collision between steamboats navigating the Ohio river, engaged in interstate commerce. The defendant's contention was that the statute enlarged the liabilities of parties for such torts, and, if applied to marine torts, would constitute a new burden on commerce. But this view was rejected, and the statute was held a valid addition to and amendment of the general law of the state, which did not, within the meaning of the constitution, place a burden on commerce, or amount to a regulation thereof; and, referring to previous decisions relied on by the defendant, it was said that the legislation adjudged invalid in those cases "created, in the way of tax, license, or condition, a direct burden on commerce, or in some way directly interfered with its freedom."

Tested by these principles, we are of opinion that section 1292 of the Code is not open to the objection that has been urged against it. It is not, in a legal sense, a burden upon, or a regulation of, commerce, nor does it conflict with any act of congress. It is simply, as was the legislation involved in the cases just mentioned, an amendment or enlargement of the local law, which is subject to modification by the legislature, and which regulates the relative rights and duties of telegraph companies, and persons doing business with them, in this state. It is, of course, competent for congress, in the exercise of its plenary power in the matter, to prescribe specific regulations touching foreign or interstate commerce, which regulations would supersede all conflicting local laws which, even indirectly, affect such commerce; but, until some such action is taken by congress, we are obliged to hold that section 1292 is a valid enactment. The following extract from the opinion in *Smith v. Alabama* is, mutatis mutandis, no less applicable to this case than to that. There it was said: "But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether ex contractu or ex delicto, to those who employ him; or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by congress, or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to

grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is, and can be, no law that does, until congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject." The result of these views is that the judgment complained of must be affirmed.

BENTON v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Nov. 23, 1893.)

CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—CONTINUANCE.

Defendant had been imprisoned since September, 1892, during which time he was ready and anxious for a trial, and his case was set for trial on February 15, 1893. The case was called, and he demanded a trial, but the commonwealth's attorney announced that he had made no preparation for trial at that term; that he had recalled processes issued for witnesses; that he could offer no evidence at that term,—though defendant offered to admit evidence taken at former trials, except that of one B., who, being in prison for felony, was incompetent to testify; and that, if ruled to trial, a nolle prosequi would be entered. The court then continued the case to March 16th, the day on which B.'s sentence would expire. Held, that the court erred in such continuance, as there was no good ground therefor, and under Const. art. 1, § 10, and Code, § 4016, the prisoner was entitled to a speedy trial.

Lewis, P., and Lacy, J., dissenting.

Error to county court, Loudoun county.

D. W. Benton was under indictment for larceny, and confined in jail. He demanded a trial, which the court refused, and continued the case to the next term, against prisoner's objection. At the next term, he was tried and convicted. Upon a motion to set the verdict aside, the court ruled against the prisoner, to which ruling he excepted, and brings this appeal. Reversed.

Garrett & Garrett, for plaintiff in error.
R. Taylor Scott, Atty. Gen., for the Commonwealth.

FAUNTLEROY, J. This is a writ of error to a judgment of the county court of Loudoun county, awarded by one of the judges of this court on the 15th of April, 1893, upon the petition of D. W. Benton, plaintiff in error, which was refused by the judge of the circuit court of Loudoun county April 13, 1893.

D. W. Benton, the plaintiff in error, was

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

indicted in the county court of Loudoun county, on the 8th day of August, 1892, for a felony, for which he was tried at the September term, 1892, and convicted, and sentenced to be imprisoned in the penitentiary for a term of two years and six months. Upon a writ of error to this proceeding, the circuit court of Loudoun county set aside this verdict and judgment, and ordered a new trial, which was had at the November, 1892, term of the county court of Loudoun county, wherein he was again convicted and sentenced. He obtained from this court a writ of error and supersedeas to this second conviction and judgment, which, upon the hearing, were reversed and set aside, and a new trial was ordered by this court, which judgment of this court was certified back to, and was received by, the clerk of the said trial court,—the county court of Loudoun county,—at 11:30 A. M. on the 2d day of February, 1893, more than 11 days before the commencement of the February, 1893, term of the said county court of Loudoun county. At an interview on the said 2d day of February, 1893, between the prisoner's counsel and the judge of the said court, at which the attorney for the commonwealth was present and conferring, the case of the prisoner was set for trial to be had on the first day of the then coming February term, 1893, according to the requirement of the statute; and the clerk of the said court, in preparation for the said trial, issued the summonses for the witnesses for the commonwealth, accordingly, for their attendance at the said trial of the prisoner, so set for the first day of the said February term, 1893, by the order of the judge of the said county court of Loudoun county as aforesaid. On that same day, to wit, on the 2d day of February, 1893, the commonwealth's attorney for the county of Loudoun addressed a card to the clerk of the said county court, saying that, when he wanted the witnesses for the commonwealth summoned, he would present the clerk with a list, and the summonses that he (the clerk) had issued he would recall for the present. This the clerk did on the morning of the 3d, and none of the commonwealth's witnesses were summoned. On the 2d day of February, 1893, the commonwealth's attorney stated to the judge of the county court, and to the counsel for the prisoner, that he would not be ready at the next term for trial, and then said that the main reason and the chief reason for a continuance was that R. Welby Barton's time in jail would not expire until the 16th day of March, 1893, (which is an admitted fact,) at which time he would be a competent witness. The said R. Welby Barton was then serving a term of imprisonment for a felony, of which he had been tried and convicted and sentenced in the county court of Loudoun county.

The case was called upon the 13th day of February, 1893, the first day of the term,

and the prisoner, who has been in jail since the — day of September, 1892, was set to the bar in the custody of the jailer of the county court of Loudoun county, whereupon the commonwealth's attorney stated he had made no preparation to try the case at this term, and asked for a continuance of the same, to which the prisoner objected, and demanded a trial, offering to admit as true for the trial of the motion and the case, if had today, all the evidence the commonwealth had heretofore offered against him, except that of R. W. Barton and Herbert Wilson, who have been disqualified to testify in any case by the law of Virginia, and are not now competent or admissible witnesses. The commonwealth's attorney stated that he had no evidence to offer to remove the disability of the witness Barton at this time, and acknowledged that if forced to trial, or without the evidence of Barton, at this time, he would enter a nolle prosequi. The demand of the prisoner to be tried was denied by the court, and the continuance, on the motion of the commonwealth's attorney, was granted to the March term, 1893,—the 16th of that month,—to which said action of the county court the prisoner objected and duly excepted, as set forth in his first bill of exceptions. On the 16th day of March, 1893, the case was called for trial, whereupon the prisoner moved the court to dismiss the prosecution, and discharge him, because he had not been tried at the last (February) term of the court, at which time he (the prisoner) was ready for trial, and demanded to be tried, and in support of this motion offered the bill of exceptions taken at the February term to the continuance, which motion the court overruled, and the prisoner duly excepted, as set forth in his first bill of exceptions. The prisoner was then put upon trial, and the jury found him guilty of grand larceny, as charged in the indictment, and fixed his punishment at two years' confinement in the penitentiary. Thereupon, the prisoner moved to set the verdict aside because it was contrary to the law and the evidence, and moved in arrest of judgment and for a new trial, which several motions the court denied, and pronounced judgment upon the verdict.

A motion for a continuance is always within the sound discretion of the court, to be exercised, not arbitrarily, but with due regard to all the circumstances of the case, fairly, and with conformity to the law of the land, enacted in pursuance of the provisions of the constitution of Virginia, (article 1, § 10,) which declares that "In all criminal prosecutions a man hath a right to a speedy trial." In pursuance of this provision of the constitution, the statute (Code 1887, § 4016) enacts: "When an indictment is found against a person for a felony in a court wherein he may be tried, the accused, if in custody * * * shall unless good cause be shown for a continuance be arraigned and

tried at the same term" at which an indictment is found. The "speedy trial," and the policy of the law to expedite the trial of criminal cases, forbid that the person accused of crime shall be detained in prison beyond any term of the court at which he may be lawfully tried, unless good cause be shown for a continuance; and Acts 1889-90, p. 79, require the judges of the county courts to set the criminal cases for trial 10 days before the first day of the terms of their courts, the object of which requirement is, as interpreted by this court in the case of *Hall v. Com.*, 15 S. E. 517, to insure a speedy trial, for the benefit of the accused no less than for the commonwealth. When the accused is ready for, and demands, trial by a court wherein he stands indicted, and may be lawfully tried, he is entitled to trial without delay, unless the prosecution shall show good cause for a continuance.

The prisoner, a thrifty young farmer of the county of Loudoun, had been incarcerated in the county jail, and denied the privileges of bail, since September, 1892, upon a felonious charge, for which he was always ready and anxious to be tried, and his case was set for trial on the 15th day of February, 1893,—the first day of the regular term of the county court of Loudoun county, in which he stood indicted,—by the judge of that court, 11 days before the beginning of the term. His case was regularly called, and he, being set to the bar of that court, in the custody of the jailer, demanded to be then and there put upon trial. The commonwealth's attorney announced that he had made no preparation for the trial at that term; that he had peremptorily recalled the processes issued by the clerk ten days before for the summoning of the witnesses for the commonwealth, and that he could not offer any testimony to convict the prisoner at that term of the court, even though the prisoner offered to admit as true the statements of all the commonwealth's witnesses who had not been summoned, except that of R. Welby Barton, who was then a convicted felon, serving out his term of imprisonment, and incompetent to testify in a court of justice; that, if ruled to trial at that term of the court, he would enter a nolle prosequi. Upon this statement the court granted the motion of the commonwealth's attorney, and continued the case until the March term of that court, and denied the prisoner's demand for a trial at that term of the court. This arbitrary continuance was granted by the court solely upon the ground suggested by the commonwealth's attorney,—that he could not convict the prisoner without the testimony of one R. W. Barton, a convicted felon, whose term of imprisonment would expire on the 16th day of March, 1893, and who, by his own confession, was an accomplice in the crime charged against the prisoner, for which he had been given immunity from arrest or prosecution as an approver or state's evi-

dence. If the court could thus, by its own arbitrary action, deny to the prisoner the trial set for the 15th day of February, and then demanded by him, and remand him to jail until the 16th day of March, 1893, to await the expiration of the term of imprisonment of a convicted felon, where is the limit of the discretion and the line of demarcation which will restrain a judge from holding a prisoner bound and incarcerated indefinitely upon a charge of which the law presumes him innocent, to await the expiration of the longest term of any felon undergoing the penalty of his crime? The principle is the same, whether the time be for 30 days or for 30 months.

The county court of Loudoun county, at its February, 1893, term, without good cause or warrant of law, continued the prisoner's case till the 16th day of March, 1893, and thus denied to him the speedy trial guaranteed to him by the law and constitution of Virginia. No person can be arbitrarily held and imprisoned without trial. In the case of *U. S. v. Fox*, 3 Mont. 513, Fox was indicted at the November term, 1879, for forgery, etc. At that term, two juries failed to agree, and were, with the consent of the defendant, discharged. At the March term following, 1880, the United States was not ready for trial, because congress had failed to appropriate money with which the marshal could defray the expenses of summoning witnesses, and the witnesses were not summoned, and because of the absence of these witnesses the trial court continued the case. Fox applied by habeas corpus to be discharged, and his motion was overruled by the trial judge; but the supreme court reversed the trial judge, and discharged the prisoner. In the case of *Klock v. People*, 2 Parker, Crim. R. 676, the court held that it was not allowable, and was a denial of a "speedy trial," for a public prosecutor to arrest the trial of a prisoner, so as to enable him to try the accused at a subsequent term, solely because he finds himself unprepared with the evidence to convict, when his condition is not the result of improper practice on the part of the prisoner, or some one acting with or for him, and that it was a denial of a speedy trial if the prosecution had neglected or failed to procure the attendance of witnesses who had not been summoned, and that it is not material to inquire for what reason the prosecution so failed or neglected to prepare for trial; the fact of such failure or neglect is sufficient.

For the foregoing reasons, we are of opinion to reverse the judgment of the county court of Loudoun county, and this renders it unnecessary to state and analyze the evidence upon which the prisoner was convicted. It is sufficient to say that it was, in character and certainty, wholly insufficient to warrant the verdict of guilty, consisting mainly and essentially of the uncorroborated statements (vague and indefinite, as to the

value of the property alleged to have been stolen) of the witness R. W. Barton, a released felon, that day only out of jail, and a self-confessed accomplice in the crime which he had every motive to fasten upon D. W. Benton, as the consideration for his own immunity from prosecution and punishment for it by the commonwealth. The county court of Loudoun county erred in overruling the motion of the prisoner to set the verdict aside on the ground that it was contrary to the law and the evidence, and in overruling the motion in arrest of judgment. The verdict must be set aside, and the judgment reversed and annulled.

LEWIS, P., and LACY, J., dissenting.

OSBURN et al. v. THROCKMORTON.¹

(Supreme Court of Appeals of Virginia. Nov. 1893.)

MARRIED WOMAN—TRANSFER OF SEPARATE PROPERTY—VALIDITY.

1. Where a woman consents to the transfer of her separate estate to her husband, and its investment in a certain manner, she cannot avoid the transaction on the ground of ignorance of the law affecting the subject.

2. Under the married woman's act of April 4, 1877, a married woman may bestow her separate property upon her husband.

Fauntleroy, J., dissenting.

Appeal from circuit court, Loudoun county; James Keith, Judge.

Bill by James B. Throckmorton to enjoin one Osburn, trustee, and others from selling certain property under a deed of trust. From a decree for complainant, defendants appeal. Affirmed.

John M. Orr, for appellants. Ed. Nichols and Alexander & Tibbs, for appellee.

LACY, J. This is an appeal from two decrees of the circuit court of Loudoun county, rendered respectively at the January term, 1891, and the October term, 1891. The bill was filed in this case in December, 1890, to enjoin Osburn, trustee, from selling a tract of land in Loudoun county, conveyed to him as trustee by deed dated March 8, 1876, executed by James B. Throckmorton and Eliza J. Throckmorton, his wife, to secure the payment to Joseph Lodge of the debt therein mentioned of \$2,000, due by note executed by the said James B. Throckmorton, dated March 8, 1876. The ground stated in the bill upon which the injunction is sought is as follows: The said Joseph Lodge died in the year 1877, after having made his will, by which said Osburn, trustee, was appointed the executor of the same. That during the first year of said executor's administration of said estate the said \$2,000 was fully settled, and was charged in his executorial

account as settled and collected, and the account confirmed more than 10 years before, and the said bond evidencing said debt was surrendered to the debtor as paid. But the trust deed executed to secure the same by inadvertence was not released, though discharged in fact, and no trust remained to be executed by said trustee. That, nevertheless, the said Osburn, trustee, had advertised the said land for sale, as was shown by copy of advertisement exhibited with the bill, reciting in the said advertisement that the said debt secured by the said deed was now the property of the appellant Annie E. Throckmorton under the provisions of the said Lodge's will, of which he is the executor. The complainant averred that the will of Lodge contained no such provision, and that, being the executor of the Lodge will, Osburn, trustee, was disqualified from acting as trustee under the deed. The injunction was awarded by the judge of the Loudoun county circuit court in accordance with the prayer of the bill in December, 1890. At the January term, 1891, of the said court, the defendant Osburn, trustee, demurred to the bill for want of equity, and for want of Mrs. Annie E. Throckmorton as a party, she being a proper party, and answered: That he admitted that the debt was due by James B. Throckmorton, and note given and secured by trust deed, as stated in the bill, conveying the said tract of land to him as trustee. That Lodge died, and made his will, and appointed him executor thereof, etc., as charged in the bill; but denied that the said debt had been paid, and the bond delivered as settled to the debtor, stating that he, as trustee, had been required by Annie E. Throckmorton, the owner of the debt secured under the said deed, to execute the same by the sale of the said land. That it is true that the will of Lodge did not mention the said debt, and provide that it should be paid to Annie E. Throckmorton, but that it became her property under the said will, her mother, Mary A. Humphrey, being entitled to a portion of his estate under the will; and that she had died, and left three children, to wit, Abner Edward Humphrey, Virginia, wife of Volney Osburn, and said Annie, then the wife of Mason Throckmorton, son of said James B. Throckmorton, the complainant; and that said Annie E. was entitled to one-third of the said legacy to her mother, which, under the laws of Virginia, in July, 1877, was her separate property. That under the distribution of the estate this bond in question was allotted to the children of Mary C. Humphrey, and was then allotted to Annie E., and received by her husband, Mason Throckmorton, and taken into his possession, and his (Osburn's) connection with the said bond as executor ceased when he assented to this legacy, and he had no further concern with it, and was, therefore, not disqualified by reason of his being executor from acting as trustee to ex-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

ecute the said trust,—and moved the dissolution of the injunction awarded in the case. A decree in the said court, rendered on the 22d day of October, 1890, in a cause in the said court between Mason Throckmorton and his wife, whereby a divorce a vinculo matrimonii was granted the husband against the said Annie, his wife, was exhibited with the said answer; and at the January term, 1891, a decree was rendered in the said cause, whereby the demurrer to the bill was overruled, and on his motion leave was given the plaintiff, James B. Throckmorton, to amend his bill, making Annie E. Throckmorton a party defendant thereto, which was filed accordingly; and it was set forth by way of amendment that the whole of the said \$2,000 bond did not pass to said Annie as her share, but that \$827.05 was in excess of her share, and was due to the said Abner Edward, and he paid this to him by a new bond for that amount, with security, which was accepted by said Abner, and surrendered on his part. The residue belonged to Annie. The bill then states how, in detail, the debt was paid to Mason, about which Annie was consulted with reference to the payment of the said debt to her husband by a conveyance to him of property and land, and that the said settlement made December 25, 1878, was with her knowledge, and had her approval and consent, and he (the complainant) had never heard from her a word of dissent or disapproval until about the time the land was advertised for sale. That up to 1885 the relations of Mason and Annie to each other as husband and wife were such as are usual between husband and wife. That in 1878, Mason bought a tract of land worth \$1,600, and had the deed made to his said wife, without her knowledge until he informed her, which is still hers; and he gave her large sums, stated in the bill, exceeding, with the said land, the amount received in the said Lodge debt by her husband. In 1890, Mason and Annie were divorced, and Annie required to pay the costs. That there had been a complete settlement between him and Mason, with which Annie had remained satisfied until the disagreement between her and her husband. Annie answered, and made general denials of consent on her part to the delivery to her husband of her property in question, and emphasizes her ignorance of her rights under the act of 4th of April, 1877, known as the "Married Woman's Act," and that the said act made this property her separate estate. But in the evidence it is shown that she knew all about it, and was a party to its delivery to her husband, and to the purchase of the Throckmorton place, subject to liens on it, belonging to her husband's mother. And in her deposition she admits that she knew that it was handed to her husband, and on cross-examination that she gave her consent to its investment in the farm, and that she was present at

the division of the Lodge estate and delivery of the J. B. Throckmorton note to her husband. In the suit of Throckmorton v. Throckmorton, referred to above, and decided in this court April 10, 1890, which was a suit between the said Mason and Annie, his wife, for divorce a vinculo matrimonii, and reported in 86 Va. 768, 11 S. E. 289, the said Annie asserted her claims against her husband for large sums of money belonging to her, amounting to \$10,000, which he had received for her, and which sums included the debt in question here, as she says in her deposition in this case. In that suit her claim was decided against her, and her husband was divorced at her costs.

The first question we are to consider is the effect of this transfer of her rights by the married woman to her husband, and consenting to its investment in a particular manner, or to its use by him. Can the transaction be avoided upon the ground that she was ignorant of the law affecting the subject? If upon the mere ground of ignorance of the law men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proofs. *Lyon v. Richmond*, 2 Johns. Ch. 51, 60; *Shotwell v. Murray*, 1 Johns. Ch. 512; *Storrs v. Barker*, 6 Johns. Ch. 169, 170; *Story, Eq. Jur. § 111*. The presumption is, that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law, acting on his title. *Proctor v. Thrall*, 22 Vt. 262. Ignorance of the law does not affect agreements in courts of equity, nor excuse from the legal consequences of particular acts. 1 Fonbl. Eq. c. 2, § 7, note 2; 1 Madd. Ch. Pr. 60; *Hunt v. Rousmaniere*, 1 Pet. 1, 15, 16; 1 *Story, Eq. Jur. §§ 112, 113, 115, 116*. A married woman possessed of separate property, as to which she has a general right of disposal, may bestow it upon her husband as well as upon a stranger, and courts of equity will sanction such disposition when made by the wife. *Story, Eq. Jur. §§ 1395-1397*. And, as was said by this court in *Beecher v. Wilson*, 84 Va. 813, 6 S. E. 209, the married woman's act of April 4, 1877, does not prevent a wife from giving her property to her husband if she pleases; nor does it abrogate the presumption that under circumstances such as obtained in this case she has done so. (Opinion by Fauntleroy, J.)

It is further insisted by the appellee that the decree of the circuit court perpetually enjoining the sale is right for another reason. In the divorce suit of Throckmorton v. Throckmorton, supra, the question as to prop-

erty rights of the wife was raised, and by the decree in that cause they were disposed of by the decree of absolute divorce, without settling the property rights, and the rights of property were left where they were at the date of the decree. *Porter v. Porter*, 27 Grat. 599. These rights certainly might have been disposed of in the divorce suit, and so the matter is *res adjudicata*. *Campbell v. Campbell*, 22 Grat. 666; *Findlay v. Trigg*, 83 Va. 543, 3 S. E. 142. The debt in controversy having been fully paid and discharged, the appellee is entitled to hold the land free and released from the lien of the trust deed; and it was the duty of the creditor within 90 days to have entered upon the margin of the book where such deed is recorded a release thereof, under our statute, and for failure to do so he is liable to a fine of \$20. Code Va. § 2498. There was no error in the decree of the circuit court complained of, and appealed from here, and the same is affirmed.

FAUNTLEROY, J., dissenting.

JEEMS v. GUNN.

(Supreme Court of Georgia. July 28, 1893.)

APPEAL—TIME OF PERFECTING.

A fast bill of exceptions, complaining of the grant of an interlocutory injunction, having been served on the 11th day of January, and the transcript of the record not having been certified by the clerk and transmitted to this court until February 4th, the transmission was too late, section 3213 of the Code requiring such transmission to be made in 15 days after the date of service.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

Action by U. M. Gunn against Anthony Jeems for an injunction and other relief. From an order granting an interlocutory writ, defendant brought error. Dismissed.

Jones & Dasher, for plaintiff in error. L. D. Moore, for defendant in error.

PER CURIAM. Writ of error dismissed.

HOLLIS v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. July 24, 1893.)

TELEGRAPH COMPANIES—ERROR IN TRANSMISSION OF MESSAGE—DAMAGES—NONSUIT.

1. The measure of damages against a telegraph company for deviating from the terms of a message correctly reporting the state of the market for a particular article, which the receiver of the message is induced by it to send forward for sale, is the difference between the actual state of the market and the terms of the message, as erroneously transmitted, overstating it, provided the plaintiff's actual loss amounts to that much.

2. The plaintiff's correspondent, in reply to a message inquiring as to the state of the market for watermelons, furnished to the company a message in these terms: "No melons on the market. Will bring twelve to fifteen dollars

per hundred." As transmitted by the company, and delivered to the plaintiff, it read thus: "No melons on the market. Will bring twenty to twelve dollars per hundred." At the trial the evidence in behalf of the plaintiff (the sender of the message being the witness) was: "I sent a dispatch, and it did give the correct market price of melons at the time. I do not remember the exact words of it, but it quoted melons at fifteen to twenty cents." In fact the message did not so quote them. *Held*, that a jury could infer from this evidence that the market was, not as the witness remembered it, but as this message stated,—that is, from \$12 to \$15 per 100, an average of 13½ cents per melon,—and that, as the average per melon indicated by the erroneous message was 16 cents, the plaintiff's loss may have amounted to 2½ cents per melon. *Held*, further, that the plaintiff's misconduct or negligence in trying to sell the melons himself, instead of employing a proper agent to do so, would not affect his right to recover, inasmuch as he realized less than the actual market price, and nothing appears to suggest even a possibility that more than the market price could have been realized. He should be treated as having obtained the market price, no matter how much less he did obtain, or what caused him to do so.

3. In such case the state of the market at the point at which the watermelons were at the time the dispatch was received, and any actual sales which the plaintiff made, or could have made, at that point, had no relevancy on the question of measuring his damages, the state of the market from which the dispatch was sent being alone relevant.

4. The court erred in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Taylor county; J. H. Martin, Judge.

Action by James A. Hollis against the Western Union Telegraph Company to recover damages for transmitting a message erroneously. From a judgment of nonsuit, plaintiff brings error. Reversed.

W. S. Wallace, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

BLECKLEY, C. J. 1. By an error of the company, the price of watermelons was overstated in the message. As the message was acted upon by Hollis, he had a right to expect that the market in Atlanta was as the message which he received represented it. As it was not so in fact, his damage would be measured by the difference between the market he had a right to expect and the one which actually existed, provided his loss amounted to that much. If his loss amounted to less, of course the amount of his loss would be the amount of his recovery.

2. The message furnished to the company for transmission quoted melons at \$12 to \$15 per 100. As transmitted by the company and delivered to the plaintiff, it quoted them at \$20 to \$12 per 100. The sender of the message testified at the trial that his message gave the correct market price of melons at the time; that he did not remember the exact words of it, but "it quoted melons at fifteen to twenty cents." It did not so quote them, for the exact contents of the message were in evidence or agreed upon, and the equivalent of its terms was 12 to 15 cents.

The jury could well have inferred that the market price was as stated in the message, and not as the witness remembered it at the trial. The average of the terms of the message, correctly quoted, would be $13\frac{1}{2}$ cents per melon, and the average per melon indicated by the erroneous message which was delivered was 16 cents. There is no evidence of any change in the market from the time the dispatch was sent until the plaintiff's melons arrived in Atlanta and were put upon the market. His loss, therefore, may have amounted to $2\frac{1}{2}$ cents per melon. It was contended that he had barred himself from recovering anything by mismanaging the melons in Atlanta, endeavoring to sell them himself, instead of intrusting the sale to a competent person, and that his loss was the result of his own fault; but there is no pretense that he could have obtained, by any sort of management, more than the market price. Let him be treated, therefore, as having realized that price, and still he would be entitled to be compensated for the balance of his loss, which was the difference between that price and the one that could have been obtained, had the market been as the erroneous dispatch represented it. Very likely, the failure to find the market which he was entitled to expect was the cause why he undertook to manipulate the melons in person, and did not employ a competent agent to do so for him. Had the market been as represented, he might have felt himself able to afford to undergo the expense of employing an agent to sell, and probably would have done so. The loss which he sustained by not employing such an agent could not have been more than the actual market price, and we have already said that so much of his loss as was covered by that price he must bear, no matter what occasioned it. It is certain that the erroneous dispatch did not occasion it, and for that reason the telegraph company is not chargeable with any part of it. But the fair presumption is that, had the market price been as high as the erroneous dispatch quoted it, that price could and would have been realized on the plaintiff's shipment. In fixing upon the averages of the two readings of the message, and applying them to the case, we have assumed that the plaintiff's melons were average melons; there being nothing in the evidence to the contrary, or certainly nothing to show that they were below the average. If it appeared that they were melons of the lowest class, such as would have been worth, as a whole, only 12 cents apiece, then there would have been no loss at all, for the reason that it is the minimum mentioned in both readings of the dispatch. So, if it appeared that the melons were all of the highest class, it would, for a similar reason, be improper to apply to them the average of the prices, but the loss should be estimated with reference to the highest price named in the erroneous reading; that

is, 20 cents each. We only say that on the present state of the evidence, as we find it in the record, the jury could hold the company responsible for loss at the rate of $2\frac{1}{2}$ cents per melon. We will add that if the market had declined in the interval between the sending of the dispatch and the time the melons arrived and were put upon the market, this decline should be taken into the account, and proper allowance be made for it. What that allowance would or should be, we have not considered, because no evidence of a decline is before us.

3. At the time the erroneous message was received, the watermelons were already loaded in cars, and were standing on the side track of the railway at Butler, in Taylor county. On the day before, the plaintiff had sold a car load of melons at that place for \$68, (20 cents each,) and after he received the dispatch he was offered \$70 per car load for those on the side track; and the plaintiff testified that, but for the dispatch, he would not have shipped these melons to Atlanta, but would have sold them in Butler. We consider these facts wholly irrelevant on the question of measuring his damages. The basis of measurement which we have suggested gives him the full benefit of the market which the erroneous message indicated, and therefore of the one which he was entitled to expect. If he gets this, it matters not what opportunities he had to dispose of the melons at Butler, or what the price of them there was. By acting on the dispatch, he cut loose from all advantages which the Butler market afforded as to the melons shipped, and threw himself upon the Atlanta market. Let him realize the difference between what the Atlanta market was in fact, and what the company, by introducing an error into the message, represented it to be, and any possible injury which he could have sustained by the error will be repaired.

4. As there was evidence from which the jury could have arrived at a finding of some amount in favor of the plaintiff, the court erred in granting a nonsuit. Judgment reversed.

BELL v. STATE.

(Supreme Court of Georgia. Nov. 9, 1892.)

INTOXICATING LIQUORS — LOCAL OPTION — CONSTITUTIONALITY OF ACT — UNLAWFUL SALES — EVIDENCE.

1. The title of an act being "To prohibit the sale of alcoholic, spirituous or malt liquors, or intoxicating bitters," in a named county, and the enacting clause, which prescribes a penalty, corresponding therewith, the act is not rendered unconstitutional by another clause, which describes all the liquors contemplated as "intoxicating liquors;" alcoholic liquors, spirituous liquors, malt liquors, and intoxicating bitters being comprehended in the phrase "intoxicating liquors."

2. The special local option law for Monroe county, enacted in 1882, does not vary the prior

general law touching the granting of licenses to retail spirituous liquors; the one relates to prohibiting sales altogether, and the other to regulating sales, or making them lawful on certain conditions.

3. The evidence in behalf of the state, fairly construed, showing that the liquor sold was not whisky, but rice beer, and there being no evidence that rice beer is a malt liquor, or that it is intoxicating, the verdict was without evidence to support it. In the present state of public information, courts cannot notice judicially that rice beer is intoxicating. Whether it is or not is a question of fact for the jury on evidence adduced at the trial.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. S. Boynton, Judge.

Jordan Bell was convicted of selling intoxicating liquors unlawfully, and brings error. Reversed.

Cabaniss & Willingham and Harrison & Peeples, for plaintiff in error. John J. Hunt, Sol. Gen., for the State.

BLECKLEY, C. J. 1. The act in question is found in the Acts of 1882-83, p. 548. The title is as follows: "An act to prohibit the sale of alcoholic, spirituous or malt liquors, or intoxicating bitters in the county of Monroe, after submitting the same to the qualified voters of said county, to provide a penalty, and for other purposes." The enacting clause, prescribing a penalty, reads thus: "That should a majority of the votes cast at said election have upon them the words 'Against the sale of liquor,' then and in that event the provisions of this act shall go into effect on the first day of January, 1883, and on and after that day it shall not be lawful for any person or persons to sell, directly or indirectly, any alcoholic, spirituous or malt liquors or intoxicating bitters in any quantity in said county of Monroe, and any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished as described in section 4310 of the Code of Georgia." A preceding clause declares "that an election shall be held in the county of Monroe on Thursday, the twenty-first day of December, 1882, to determine whether intoxicating liquors shall any longer be sold in said county." There can be no doubt that the phrase "intoxicating liquors" embraces all the "liquors" mentioned, first, in the title, and then in the penalty clause, of the act. If it be capable of embracing more, as well as these, the act is not vitiated thereby; for it shows on its face that the legislature did not intend the phrase to include any but the liquors specially enumerated. Taking the whole act together, no court could rationally hold that the legislature meant to prohibit the sale of any liquor not comprehended in the description "alcoholic, spirituous, malt liquors, or intoxicating bitters." Moreover, we doubt whether, considering the wide range of the word "alcoholic," any intoxicating liquor used as a beverage lies outside

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of this enumeration. Alcohol is understood to be the intoxicating principle in all liquors capable of producing intoxication, and, rather than declare a statute unconstitutional for want of conformity to its title, the adjective "alcoholic" might perhaps be construed as synonymous or coextensive with the adjective "intoxicating." But, granting that "intoxicating" is broader than "alcoholic," it is not, as used in this statute, broader than this and all the other descriptive words combined. The result is that nothing in the body of the act is substantially different from what is contained in the title.

2. The act is a special law, but it in no wise varies the prior general law touching the granting of licenses to retail spirituous liquors. The special law prohibits sales in Monroe county altogether, or provides for it; the general law, as contained in section 1419 of the Code, relates to regulating sales, or making them lawful on certain conditions. Special local option laws could be constitutionally enacted in this state until a general local option law was passed, which was done later.

3. The indictment charged the sale of "a quantity of whisky and intoxicating liquor." Fairly construed, the evidence failed to show the sale of any whisky, but did show the sale of rice beer. What is rice beer, and what is its effect when taken into the human stomach? The evidence, as brought here, throws no light upon these questions. Rice beer is not shown to be a malt liquor, nor is it shown to be intoxicating. In the present state of public information, courts cannot notice judicially that it is one or the other. Some beverages, such as whisky, brandy, etc., are in such common and notorious use as intoxicants that no proof is requisite to stamp them with this character; but rice beer is comparatively a rare liquor. Whether it will produce intoxication or not ought to be proved. Were it shown to be a malt liquor, this would suffice; but the evidence is silent both as to how it is produced and what effect attends its use. Without at least some slight evidence tending to give it character, the jury could not rightly treat it as a prohibited article of sale. The question was one of fact for the jury to decide, and they have decided it adversely to the accused, without any evidence to guide them. For this reason alone the court erred in not granting a new trial. Judgment reversed.

REDDING v. STATE.

(Supreme Court of Georgia. Nov. 9, 1892.)

INTOXICATING LIQUORS—INDICTMENT—CONSTITUTIONALITY OF ACT—UNLAWFUL SALES.

1. The constitutional questions in this case are the same as those ruled upon in *Bell v. State*, 18 S. E. 288, (just decided.) Other questions on the indictment are ruled in principle

by *Carter v. State*, 68 Ga. 826; *Hill v. Mayor*, etc., 72 Ga. 314; and *Williams v. State*, (Ga.) 15 S. E. 552.

2. The evidence being that the accused, a practicing physician, sold a half pint of whisky to a certain person, who went to his store and said he was sick, and thought whisky would help him, there being no evidence that the person was in fact sick, or that he was a patient under treatment by the accused, who did nothing but examine him, and then sell him the whisky, the jury were warranted in finding that the transaction was not within the exception of the statute which allows practicing physicians to furnish liquors as medicine to their patients under treatment. There was no error in denying the application for a new trial.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. S. Boynton, Judge.

C. E. Redding was convicted of selling intoxicating liquors unlawfully, and from an order denying a new trial he brings error. Affirmed.

Cabaniss & Willingham and Harrison & Peebles, for plaintiff in error. John J. Hunt, Sol. Gen., for the State.

BLECKLEY, C. J. 1. The constitutional questions raised by demurrer to the indictment are ruled by the decision in *Bell v. State*, 18 S. E. 288, (this term.) The act on which the indictment is based is not unconstitutional for either of the causes specified in the demurrer. Other questions on the indictment are ruled in principle by *Carter v. State*, 68 Ga. 826; *Hill v. Mayor*, etc., 72 Ga. 314; and *Williams v. State*, (Ga.) 15 S. E. 552. The indictment was not insufficient by reason of any of the deficiencies imputed to it.

2. The accused sought to protect himself under the exception in the statute which allows practicing physicians to furnish liquors as medicine to their patients under treatment. There was no evidence to uphold this theory, save that the person to whom the whisky was furnished said he was sick. It does not appear that any prescription or treatment was applied for, furnished, or paid for. The patient selected his own medicine, paid for it, received it, and administered it to himself. The accused—doubtless as matter of form—examined him, and then sold him the whisky. A man professing to be sick wanted whisky because he thought it would help him. The doctor examined him, but what he thought either as to the sickness or the remedy no one but himself knows or ever knew, save from his own statement at the trial, and as might be inferred from the fact that he furnished the whisky, and received pay for it. The jury could well conclude that this was more like selling whisky than practicing medicine. The exception in the statute does not contemplate that a physician may take a thirsty man under treatment for the sole purpose of supplying him with the desired beverage. But the only ground of the motion for a new trial was that the court erred in overruling

the demurrer to the indictment. Of course, there was no error in denying this motion. Judgment affirmed.

RICHMOND & D. R. CO. v. MITCHELL.

(Supreme Court of Georgia. May 15, 1893.)

INJURIES TO EMPLOYEE—LAW OF FORUM—DEGREE OF CARE—ASSUMPTION OF RISK—RULES OF MASTER—INSTRUCTIONS.

1. In the trial of an action for a tort committed in another state, the rules of evidence applicable to a tort of like class, committed in this state, are to be administered, whether the rules of evidence in the other state be the same as in this or not.

2. So far as appears, the degree of diligence due respectively between employer and employee under the laws of Alabama is not more than ordinary diligence. Ordinary diligence is that care which every prudent man exercises under the same or similar circumstances.

3. Inasmuch as the plaintiff below, when he undertook to make the coupling, knew that the supply of hands ordinarily requisite to the occasion was deficient, and nevertheless consented without objection to make the coupling, and inasmuch as the mode of making it, and the care and diligence to be exercised, would in no way, after the plaintiff engaged in the work, be affected by the want of more hands, the deficiency was irrelevant to the issue on trial, and it was error to give in charge to the jury anything whatever on that subject.

4. A written or printed rule, carefully prepared, which prohibits brakemen "from coupling or uncoupling cars except with a stick," and declares that "brakemen or others must not go between the cars under any circumstances for the purpose of coupling or uncoupling, or adjusting pins, etc., when an engine is attached to such cars or train," does not apply to a case in which the engine was not attached to any car or train, and in which the brakeman stationed himself, in the way usually practiced by employees, upon the footboard of the pilot on the tender, and while there attempted to withdraw with his hand, without using a stick, a pin and link from the coupling apparatus of the engine, the engine and tender moving backwards at the time towards a standing car in the rear, for the purpose of being coupled thereto.

5. It is error for the court to assume that there is a conflict in the evidence, when there is none, and to charge the jury on that subject, even though such charge be connected with relevant and correct propositions of law applicable to the case. This ruling applies to the eighth ground of the motion for a new trial.

6. In view of the evidence and the true law applicable thereto, there was no error in refusing any of the requests to charge the jury, made by counsel for the company.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action for personal injuries by W. J. Mitchell against the Richmond & Danville Railroad Company. Plaintiff was employed by defendant as a brakeman, and was injured while coupling cars in the state of Alabama. There was judgment for plaintiff, and from an order denying a new trial defendant brings error. Reversed.

Jackson, Leftwich & Black and E. Womack, for plaintiff in error. *Glenn & Slaton*, for defendant in error.

BLECKLEY, C. J. 1. Touching the evidence requisite to make a prima facie case in behalf of the plaintiff below, the court gave in charge to the jury the rule of law applicable in this state between the parties where the action is against a railroad company for a personal injury sustained by one of its employes in consequence of the negligence of the company or of a coemployee. This was correct, although the injury sued for was sustained in the state of Alabama. The quantity or degree of evidence requisite to sustain an action or to change the burden of proof is determined by the law of the forum, and not by the law of the place where the cause of action arose. It belongs not to the law of rights, but to the law of remedy. It is matter of procedure and practice, or of the law of evidence in its relations thereto. What evidence, and how much, will suffice for verifying in the courts of this state a right to recover in a given action or class of actions, is determined by the laws of this state, and them alone. These courts often have to look elsewhere for the law of rights, but they never look elsewhere for the law of remedies, or for any part of the same. A tort committed in Alabama is proved here just as the same class of torts, when committed here, are proved. The same presumptions prevail, and the same measure and degree of evidence will shift the burden of proof from the plaintiff to the defendant.

2. The court instructed the jury that the degree of diligence to which the plaintiff was entitled while engaged in the service of the railway company in Alabama was ordinary diligence, and that the company was entitled to a like degree from him. Nothing appears, either as matter of law or evidence, tending to show that in that state any higher degree is due from either to the other. In defining ordinary diligence the court said it is that care which every prudent man exercises under the same or similar circumstances. This was correct.

3. The charge of the court touching a deficiency in the supply of hands was irrelevant to the issue and to the facts in evidence. When the plaintiff undertook to make the coupling he knew that the supply of hands ordinarily requisite to the service was deficient. With this knowledge, and without objection, he consented to make the coupling. No change in the supply occurred between that time and the time of his injury. He has no right now to blame the company, or to excuse himself on account of any deficiency in the supply of which he had knowledge when he consented to make that particular coupling, and engaged in the work of making it. The mode of making it, and the care and diligence to be exercised by him, underwent no variation in consequence of anything that happened after he consented to make it. If the number of hands on whose co-operation he relied, or had a right to rely, had been diminished

without his knowledge after that consent was given, he would have had a right to complain; but, as nothing of the sort occurred, his duty was to make the coupling in a proper manner if he could, and, if he could not, to leave it unmade. He certainly had no reason to think that the company desired him to do anything which could not be done in the usual manner, and by the exercise of ordinary diligence on his part. The evidence that he consented to make the coupling is found in the fact that, without objection, he undertook to make it, and was injured in the attempt. If some one else, ought to have been present to do the work, or aid in doing it, and he meant to make that an excuse for not succeeding in it, in the event he failed, he ought to have made that an excuse for not trying to do it, and should have forborne the attempt.

4. As part of his contract of employment with the company the plaintiff subscribed to an instrument of writing declaring as follows: "I fully understand that the rules of the Richmond & Danville Railroad Company positively prohibit brakemen from coupling or uncoupling cars, except with a stick, and that brakemen or others must not go between the cars, under any circumstances, for the purpose of coupling or uncoupling or adjusting pins, etc., when an engine is attached to said cars or train; and in consideration of being employed by said company I hereby agree to be bound by such rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof. I have read the above carefully and fully understand it." It may be fairly presumed that the rules referred to and quoted from in the contract were carefully prepared, deliberately adopted, and embodied in some written or printed document. It is allowable, therefore, to notice the phraseology critically in order to ascertain whether or not, fairly construed, that phraseology embraces such a coupling as was attempted in this case. The plaintiff was neither coupling nor uncoupling cars, nor did he go between the cars, nor was the engine attached to any cars or train. The evidence is, in substance, that the plaintiff, who was a brakeman, stationed himself, in the way usually practiced by employes, upon the foot-board of the pilot on the tender, and while there attempted to withdraw with his hand, without using a stick, a pin and link from the coupling apparatus of the engine; the engine and tender being in motion backwards at the time towards a standing car in the rear, for the purpose of being coupled thereto. Certainly the rules as quoted do not, by their letter, cover such a transaction as that in which the plaintiff was engaged. It is said, however, that they do cover it in spirit and intention. This seems to be altogether too doubtful, for, as we have already said, there is a presumption that such rules would be carefully considered and ac-

curately expressed, and we may add that they ought to be construed more strongly against the party who made and adopted them than against one who merely assented to and agreed to be bound by them when they were presented to him as a basis of contract. The strong probability is that in preparing the rules such a case as the present, though it might frequently occur, was overlooked, and therefore was not provided for. We think this is the truth of the matter, and we hold with confidence that the rules have no application to the present case.

5. In charging the jury as set out in the eighth ground of the motion for a new trial the court assumed that by possibility the jury might find a conflict in the evidence, the language of the charge being: "And if you find from the evidence in this case that there is a conflict between the plaintiff and the defendant on any material issue in the case, and you should find that there is a witness or witnesses accessible whose evidence would throw light upon that issue, and that witness or those witnesses were not introduced or accounted for, that circumstance may be considered by you in passing upon that issue; and this rule of law is applicable to both plaintiff and defendant in this case." We have scrutinized the evidence very carefully, and there is no conflict in it on any material issue, and no charge upon the subject was appropriate. No harm would have been done by an instruction merely to reconcile conflicts in the evidence, if any existed, and if the jury could reconcile them; but to put the jury on the lookout for other witnesses, witnesses not introduced or accounted for, was rather a dangerous thing; and every one knows to which of the parties it was dangerous. It is true that this irrelevant charge was connected with and immediately followed certain relevant and correct propositions of law applicable to the case, but they were not on this same subject; and, this being so, the fusing of them with this in the same ground of the motion for a new trial, and without pointing out wherein the error consists, will not constrain this court to pretermit the whole ground, more especially where there is to be a new trial on account of another error which the trial court committed.

6. We have read and considered the requests to charge the jury made by counsel for the company, and no error is discoverable in the refusal of the court to charge as requested. But the court erred in not granting a new trial. Judgment reversed.

RICHMOND & D. R. CO. v. BELL.

(Supreme Court of Georgia. May 22, 1893.)
INJURIES TO EMPLOYE — RULES OF MASTER—NEW TRIAL—DISCRETION OF COURT.

1. Touching the rule of the company which is involved in this case, the decision in Rail-

road Co. v. Mitchell, 18 S. E. 290, (this term,) applies.

2. On its merits the case is a very weak one, and the trial court, in the exercise of the legal discretion which the law confides to it, might well have granted a new trial; but there was no manifest abuse of discretion, and, this being so, the judgment must be and is affirmed. (Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action for personal injuries by Mack Bell against the Richmond & Danville Railroad Company. Plaintiff had judgment, and from an order denying a new trial, defendant brings error. Affirmed.

The following is the official report:

Bell sued the railroad company for damages for injuries sustained by him while coupling cars for it. He obtained a verdict for \$500. Defendant's motion for a new trial was overruled, to which it excepted. The motion contained the general grounds that the verdict was contrary to law, evidence, etc., and to the charge of the court. Also because the court erred in overruling the motion for nonsuit made by defendant, defendant alleging that this action was error, in that the evidence of plaintiff showed beyond a doubt that he was violating a rule of the railroad company, which he admitted, at the time he was hurt. Because the court erred in, of its own motion, and without the objection of plaintiff's counsel, refusing to allow in evidence the statements of O'Toole, regular conductor in charge of the engine at the time plaintiff was hurt, and of the brakeman, Patterson, both statements being made immediately after the accident. Movant alleged that while it was true these statements did not constitute admissible evidence, if the objection were made by counsel for plaintiff, yet without said objection the court did not have the right to refuse to admit them. What these statements were is not set out in the motion nor in the bill of exceptions. What appear to be such statements are in the brief of evidence sent up in the record, and are therein followed by a statement that they were refused by the court. This ground was approved with the following explanation: The same character of evidence was offered by defendant before these statements were offered, and the evidence was objected to by plaintiff's counsel, and rejected. When these statements were offered by defendant the court rejected them, adhering to its former ruling as to such evidence. One objection of counsel to the same character of evidence was deemed by the court sufficient. Also that the verdict was contrary to the following charge: "If you find from the evidence in this case that the defendant had a rule which prohibited the employes from coupling and uncoupling cars and adjusting pins while attached to the engine, and the plaintiff had knowledge of such rules, or should have known it by the exercise of or-

dinary diligence, (and in this instance I charge you he had such knowledge, because he had the rules, and had contracted to obey them,) and he violated such rules, and on that account he was hurt, he could not recover, notwithstanding you should find that the other employes frequently or customarily disregarded such rule. To make this reply (that is, that other employes frequently or customarily disregard such rules) available as an excuse for the nonobservance of a rule by the plaintiff, you must believe from the evidence that the defendant, knowing the practice of the employes to disregard the rules, acquiesced in it in such way as to sanction or as to be held practically to have abrogated it. If the plaintiff had orders always to couple and uncouple cars with sticks, and not to adjust pins to cars when attached to engines, he should not have taken any license from the conduct of other employes, as long as he had reason to think that the rule was still in force, and that he was expected to abide by it. If you find that the rule was disregarded so often and by so many of defendant's employes, with the knowledge of the defendant, that the plaintiff was authorized to believe that the rule was not in force, then a violation of it would not bar his recovery." Movant further alleged that the verdict was contrary to the above charge, because no evidence was introduced, except that of plaintiff himself, going to show that employes of defendant had so frequently and customarily disregarded the rule in regard to coupling cars and going between the same when in motion as to have abrogated it, and that the preponderance of evidence was that said rule was still in force. Movant also alleged, in this connection, that the court did not leave to the jury the question as to whether or not said rule was reasonable, but left to them simply the question as to whether or not it had been so disregarded as to have amounted to an abrogation of the same.

Jackson, Leftwich & Black, for plaintiff in error. P. F. Smith and W. W. Gaines, for defendant in error.

PER CURIAM. Judgment affirmed.

HALL v. CARLISLE.

(Supreme Court of Georgia. July 24, 1893.)

PRACTICE IN JUSTICE'S COURT — TRIAL AFTER REMAND.

When, on certiorari from the verdict of a jury rendered in a justice's court, the case is remanded for a new trial, the new trial must be had by another jury, and not by the presiding justice. If the plaintiff refuses to try by jury, and the justice for that reason dismisses the case, no appeal on the judgment of dismissal lies to the superior court, and dismissal of the appeal in the latter court is not erroneous.

(Syllabus by the Court.)

Error from superior court, Talbot county; J. H. Martin, Judge.

Action by Jesse D. Hall against B. S. Carlisle. From a judgment dismissing his appeal from the court of a justice of the peace, plaintiff brings error. Affirmed.

Jesse J. Bull, for plaintiff in error. Willis & Persons and Morgan McMichael, for defendant in error.

BLECKLEY, C. J. In a justice's court, no case can reach a jury, except by appeal, and nobody but a jury can try an appeal. The only trial which can be had by the presiding justice of the peace must take place before appeal. The justice is the organ of trial appealed from, not the one appealed to. Here there was an appeal from a judgment of the justice. It was tried by a jury, and, on certiorari from the verdict of the jury to the superior court, a new trial was ordered. The plaintiff refused, after the case was remanded to the justice's court, to proceed to try it by jury. This was a virtual abandonment of the case, and the justice rightly dismissed it. It would be a perversion of the law of appeal to apply it to this judgment of dismissal. An appeal from a justice's court to the superior court must present, either actually or by legal possibility, something for trial by jury. What is there for a jury to try, when the sole question presented, and which could be presented, is whether a case was properly dismissed by the presiding justice because the plaintiff declined to prosecute it before the only branch of the tribunal which had any power to try it? We are sure that such a question of mere practice or procedure is not one on which an appeal can be taken to the superior court. Indeed, we know no instance in which an appeal is allowed to a jury in the superior court when the same party has already appealed in the same case to a jury in the justice's court. In certain cases a party in a justice's court may elect between appealing to a jury in the same court, or to one in the superior court. But even in those cases he is restricted to one appeal or the other, and cannot, by successive appeals, present his case in both courts. No such piling of appeal upon appeal is provided for, or has ever been thought of before, so far as we are aware. Judgment affirmed.

HALL et al. v. MORRISON.

(Supreme Court of Georgia. July 24, 1893.)

ACTION ON NOTE — PLEADINGS — CONSIDERATION — SALE — DELIVERY.

1. A special plea that the payee of a promissory note would not execute a deed of conveyance which he was bound by contract to execute, unless the person entitled to the deed would execute and deliver a promissory note for a pretended debt which he did not owe, and which had no connection with the consideration of the deed, is virtually a plea of want of con-

sideration for the note, and as such is a good defense to an action founded on the note. Allegations of fraud and duress contained in the plea may be regarded as surplusage.

2. If at the time of taking a conveyance of real estate, upon which a mine was situated and mining operations had been conducted, the vendee purchased from the vendor the mining and transportation machinery and implements which were then upon the premises and accessible to the purchaser, giving his promissory note for the price thereof, and the vendee went into possession, or was already in possession, of the realty, no further delivery of the personality was necessary, unless there was actual stipulation in the contract for subsequent and more formal delivery.

3. There being a plea that the note was in part without any consideration whatever, and also a plea of total failure of consideration, and there being evidence tending to show that it was understood at the time of giving the note,—which was the time of the purchase,—that the plaintiff, the payee, was to get up the tools, etc., and put them where defendant could get them, and he subsequently refused to do this, and that defendant never did get them, it was error to charge the jury that if the defendant had notice of where the property was, and at that time he could have gotten possession of it by the exercise of ordinary diligence, and failed to do so, that would be constructive delivery to him, unless he asked the plaintiff to actually deliver the property at the time of the trade. A request to get up the tools, etc., subsequently made, would be equally effectual, if such was the understanding of the parties.

(Syllabus by the Court.)

Error from superior court, Dade county; T. W. Milner, Judge.

Action on a promissory note by W. G. Morrison against G. J. Hall and another. There was judgment for plaintiff, and defendants bring error. Reversed.

Payne & Walker, for plaintiffs in error.
R. J. & J. McCamy, for defendant in error.

BLECKLEY, C. J. 1. The court erred in striking the special plea, for, disregarding allegations of fraud and duress contained in it, which may be treated as surplusage, the plea was in substance one of want of consideration for the note sued on, and, if established, would be a good defense to the action. If the note was given as a promise to pay for doing something on the part of the payee which he was already bound to do, and which he refused to do, using that refusal as a means of morally coercing the makers of the note to execute it, the payee parted with no consideration, nor did the makers get any.

2. Upon the assumption that at the time of taking a conveyance from Morrison the Halls purchased from him the mining and transportation machinery and implements which were then upon the premises, and gave the note sued on for the price thereof, and the Halls went into possession, or were then already in possession, of the realty conveyed to them by Morrison, and the personality so purchased was accessible to them, Morrison would not be bound to make any further delivery of the personality, unless he stipulated in the contract of sale for the making of sub-

sequent and more formal delivery. Possession of and title to the realty on which the personality was would be enough to invest the purchasers with full dominion over it, unless there was some obstacle to the exercise of such dominion; and it could and should be presumed that no other or different delivery was contemplated by the parties unless something was expressly mentioned from which a different intention could fairly be inferred.

3. The trial took place on a plea alleging that the note was in part without any consideration whatever, and another plea of total failure of consideration. There was evidence tending to show that in the contract for the sale of the personality it was agreed and understood that Morrison was to get up the tools, etc., and put them where the Halls could get them, and that he subsequently refused to do this, and the Halls never did get them. If this was the truth of the case, delivery of the property to which this understanding was applicable was never completed, and the court was mistaken in holding and charging that notice of where the property was and ability to get possession by the exercise of ordinary diligence would be constructive delivery, unless at the time of the trade Hall requested the plaintiff to actually deliver the property. There was no use for such a request at the time of the trade, for that was not the time contemplated in the agreement of the parties. The getting up of the tools, etc., was to be done afterwards, and a request subsequently made would be more in line with the agreement, and certainly as effectual as a request made at that time. For the errors indicated, there ought to be a new trial. Judgment reversed.

JOSEPH v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. July 26, 1893.)

SETTLING BILL OF EXCEPTIONS—PRACTICE.

1. Where the term at which the case was tried had ended by adjournment on the 15th of July, and on the 13th of August counsel for the plaintiff tendered to the judge a bill of exceptions complaining of a judgment of nonsuit rendered during the term, this bill of exceptions having in it material errors, both of omission and commission, in setting out a brief of the evidence, and for that reason it was returned by the judge to the counsel with his objections indorsed thereon in extenso, the return taking place on the 18th of August, five days after the bill of exceptions was tendered, and the counsel did not tender a correct bill of exceptions until the 22d of November, the delay was inexcusable and unreasonable; the same, so far as appears, not having been occasioned by providential cause.

2. The act of November 11, 1889, in declaring that the judge shall, by any needful alteration, cause the bill of exceptions to conform to the truth, does not require him to make and insert in the bill of exceptions a brief of evidence substantially different from that set forth in the bill of exceptions presented to him, but

only that he shall make such corrections as can properly be made by erasures and interlineations. If counsel, on being notified in writing of the judge's objection, does not at once make the desired alterations, or insist that the judge shall make them, but raises an issue with the judge, and keeps that issue pending for two or three months, finally conceding that the judge was correct, and on that account tendering a new bill of exceptions, the failure of the judge to himself make the requisite alterations in the first bill of exceptions will not save the second. (Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by Ella S. V. Joseph against the East Tennessee, Virginia & Georgia Railway Company. From a judgment of nonsuit, plaintiff brought error. Defendant now moves to dismiss the writ of error. Granted.

Harris & Harris, for plaintiff in error. Hill, Harris & Birch, for defendant in error.

BLECKLEY, C. J. It was the duty of counsel to tender to the judge a correct bill of exceptions within 30 days after the adjournment of court. In this instance no such bill of exceptions was tendered until more than four months after adjournment. What transpired in the mean time is indicated in the first headnote. We think the delay was inexcusable and unreasonable. The second headnote sets forth what we deem a proper construction of the act of November 11, 1889, with reference to the judge's duty in altering bills of exception, when found to be incorrect. The motion to dismiss must prevail. Writ of error dismissed.

FIRST NAT. BANK OF ROME et al. v. RAGAN et al.

(Supreme Court of Georgia. July 26, 1893.)

ATTACHMENT—FRAUD—OBJECTIONS TO JURISDICTION—APPEARANCE AS WAIVER.

1. The act of February 21, 1873, providing for the issuing of attachments against debtors on the ground of fraud, confers no authority for issuing attachments returnable to any court except the superior court; and the local act applicable to the city court in Floyd county (Acts 1882-83, p. 534) does not vary the general law on this subject.

2. The statutory rule (Code, § 3309) that valid general judgments may, after notice of the pendency of the attachment, be rendered against the defendant, notwithstanding the attachment be dismissed, does not apply when the court to which the attachment was returnable has no jurisdiction of that class of attachment; and the appearance of the defendant, and a traverse filed by him of the ground on which the attachment was issued, will not render valid a general judgment against him in favor of the attaching creditor, as against third persons, although such appearance and filing of traverse might operate to make the judgment good as against the defendant himself, under section 3309 of the Code, and cases construing the same.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action on attachment by the First National

Bank of Rome and others against R. J. Ragan and others. The action was brought in a city court on the ground of fraud, and on removal to the superior court the action was dismissed. Plaintiffs bring error. Affirmed.

Dean & Smith, Donald Harper, Dabney & Fouché, and W. W. Broodes, for plaintiffs in error. Reece & Denny, E. P. Treadaway, W. J. Nunnally, C. A. Thornwell, and Alexander & Wright, for defendants in error.

BLECKLEY, C. J. 1. From the whole tenor and phraseology of the act of February 21, 1873, (Code, §§ 3297, 3298 et seq.) it is manifest that no authority for ordering or issuing attachments against debtors on the ground of fraud was intended to be conferred, except as to attachments returnable to the superior court. True, that court is not expressly mentioned as the one to which the attachments are to be returnable, but we think that court, and it alone, was in contemplation. It surely was not the purpose of the statute for the judge of the superior court to prepare business for justices' courts, city courts, and all others which might have jurisdiction over ordinary attachments. The act, as shown by section 3301 of the Code, made the decision of the judge granting an attachment, or refusing it, subject to review by this court. Can it be supposed that the legislature intended to make preliminary orders passed by a judge of the superior court on business returnable to and triable in a justice's court matter for review by the supreme court? Could the legislature do so, if such was its purpose, in view of the provisions of the constitution (Code, § 5133) which makes this a court alone for the trial and correction of errors from the superior courts and from city courts? As the act makes provision for carrying to this court any decision of the judge granting or refusing an attachment, it is evident that the legislature intended the power of review to apply to all cases which the act provides for; and it could not apply to all, constitutionally, unless all were regarded as business pertaining to the superior court, and this could not be if some of the attachments could or might be made returnable to other courts. Another consideration tending to show that the business contemplated was superior court business, only, is that, after property has been attached without a hearing, the defendant in attachment may apply to the judge to dissolve or remove the attachment wholly or partially, and on this application the judge is empowered to act; so that, even after the attachment has been levied, it is treated as still under the jurisdiction of the judge of the superior court who ordered it to issue. Code, § 3299. Could it have been the purpose of the act to have that judge pass upon the levies which had been made on attachments returnable to the justices' courts or other

jurisdiction, such as city and county courts? We are convinced that no such scheme was or could have been in the legislative mind. The judges of the superior court were clothed with the powers conferred by this act, because they were in the nature of equity powers, and equity powers had always been confided, in this state, to the superior courts, and to none others. The local act applicable to the city court of Floyd county (Acts 1882-83, p. 534) does not, if it could, trench upon the general law touching this class of attachments. The attachments of which it speaks and to which it refers are ordinary attachments, not these special—and, as they might be called, equity—attachments, which the judges of the superior court alone are empowered to grant.

2. It was contended that although the attachments, as such, might be void, the city court had power to render valid general judgments in the cases by virtue of sections 3309, 3328, of the Code; Holt, the defendant in attachment, having appeared in the city court, and traversed the ground on which the attachment issued. The first of these sections says that "no declaration shall be dismissed because the attachment may have been dismissed or discontinued, but the plaintiff shall be entitled to judgment on the declaration filed as in other cases at common law, upon the merits of the case." The latter is in these words: "When the defendant has given bond and security, as provided in section 3319 of this Code, or when he has appeared and made defense by himself or attorney at law, or when he has been cited to appear, as provided in section 3309 of this Code, the judgment rendered against him in such case shall bind all his property, and shall have the same force and effect as when there has been personal service, and execution shall issue accordingly, but it shall be first levied upon the property attached. In all other cases, the judgment on the attachment shall only bind the property attached, and the judgment shall be entered only against such property." But these were not such attachments as that any declarations in the city court founded upon them could have been legally filed. That court had no jurisdiction of the attachments, and consequently no jurisdiction of the declarations which were based upon them. The defendant could not be brought into the city court by that means. If he chose to come voluntarily, and thereby waive the question of jurisdiction, he could do so, by virtue of section 3100 of the Code, so far as his own rights were concerned, but not so as to prejudice third persons. As this section has been construed in cases heretofore decided by this court, other creditors of his are to be considered as third persons; and, as they cannot be prejudiced by his waiver in respect to jurisdiction, their general judgment liens against his property are to be treated just as though the judgment requiring this waiver

to support it had never been rendered. Had the attachments belonged to a class over which, by any legal possibility, the city court could have exercised jurisdiction, then the sections of the Code cited would have been applicable, for the attachments would have been such as these sections speak of and refer to. But with attachments ordered and issued on the ground of fraud, no matter by whom the order is made, the city court has no concern. Relatively to that court, such an attachment is none at all, and the defendant might as well have gone there, and confessed judgment, without any process ever having issued to call for his appearance, as to have gone in consequence of these attachments; they being utterly void, so far as the city court was concerned. Judgment affirmed.

SLATER v. KIMBRO et al.

(Supreme Court of Georgia. Nov. 9, 1892.)

MALICIOUS PROSECUTION — WRONGFULLY OUSTING TENANT—DAMAGES.

1. One who, by written contract, lets premises to another for one year, with a privilege of renewal for two years longer, admits the tenant into possession, and at the expiration of the first year sues out a summary statutory process maliciously and without probable cause to dispossess the tenant as a tenant at will holding over, is liable to an action for malicious prosecution of a civil proceeding, if any special damage to the tenant is occasioned thereby.

2. The premises being occupied and used by the tenant as a boarding house, the loss of boarders occasioned by suing out the malicious process was special damage. So, too, were trouble and expense, including counsel fees, incurred by the tenant in giving bond and security to prevent summary expulsion from the premises by virtue of the malicious process. The declaration, though loose, and needing amendment to give it full certainty, set forth a cause of action, and it was error to dismiss the same on motion or general demurrer.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action for malicious prosecution by Mary F. Slater against R. P. S. Kimbro and others. From a judgment dismissing the action, plaintiff brings error. Reversed.

P. L. Mynatt & Son, for plaintiff in error. Arnold & Arnold and W. B. Farley, for defendants in error.

BLECKLEY, C. J. 1. The declaration is good in substance. It sets forth a substantial cause of action. The plaintiff being in possession of the premises under a written contract for one year, "with privilege of two years longer at same agreed rate," she was not subject to rightful expulsion at the end of the first year as a tenant at will holding over. She was not a tenant at will, and was not holding over, unless she had relinquished or forfeited the "privilege of two years longer at same agreed rate;" and this, so far as appears, she had not done. On the

contrary, by remaining in possession after the year expired, she signified her intention to avail herself of the longer term provided for by the contract, and, if an express renewal was contemplated, (which, under the words of the writing, seems improbable,) some demand to execute a renewal contract should have been made upon her. It seems to us that merely continuing to occupy would spread the original contract over the two additional years, just as it had previously covered the first year's occupancy, and that any further express contract on the subject would be needless. The monthly rent was not payable in advance, and there is no hint in the declaration that the plaintiff was in any fault or default whatsoever. The year did not expire until the 1st of October, and the warrant to dispossess her was sued out the next day. The want of probable cause is manifest, and malice on the part of the defendants is distinctly alleged. Though the warrant was not executed by eviction, if the suing of it out maliciously and without probable cause and the attempt to execute it by eviction occasioned special damage to the plaintiff, she can recover. The warrant was aimed at her possession, and would have deprived her of it had she not given the bond and security required by section 4079 of the Code. It failed to expel her from the premises, but it brought her possession into imminent peril, and forced her to give bond and security as the price of preserving it. Had she not paid this price, she would have been expelled, and the groundless and malicious proceeding would have been triumphant. It did triumph so far as forcing her into making a bond and procuring sureties to join with her in its execution was concerned. Had she failed to avail herself of this alternative, and if she had been turned out of possession in consequence, no one can doubt that she would have had a cause of action for the special damage occasioned thereby, the warrant having been voluntarily dismissed by those who procured it to be issued. Doubtless the course she took lessened her damages, and was therefore favorable to her persecutors. Shall she recover nothing because she rendered their unfounded and malicious proceeding as harmless to herself, and consequently to them, as possible, instead of leaving it to work all the mischief which they intended? The dismissal of the warrant after it had coerced the plaintiff to give bond and security terminated the proceeding; consequently the present action was not prematurely brought.

2. The declaration alleges that the premises were occupied and used by the plaintiff as a boarding house, and that a loss of boarders was occasioned by suing out the malicious process. Such would be the natural and proximate effect of thus menacing the plaintiff's possession. It might be expected that boarders would drop out when they ascertained that their landlady was

about to be expelled, and that persons who might have become boarders would be deterred from so doing. This interference with her business as a boarding house keeper might well cause her special damage, and the declaration alleges that it did so in fact. If she incurred trouble and expense, including counsel fees, in giving bond and security to prevent expulsion, this also would be special damage. The declaration is loose and vague as to some of these matters, and needs amendment in order to give it full certainty; but, as we have already said, it sets forth a cause of action in substance. This being so, it was error to dismiss the action on motion or on general demurrer. Judgment reversed.

WESTERN UNION TEL. CO. v. HUTCHESON.

(Supreme Court of Georgia. Nov. 16, 1892.)

TELEGRAPH COMPANIES — FAILURE TO TRANSMIT MESSAGE ON SUNDAY—WORK OF NECESSITY.

1. By section 4579 of the Code, it is made unlawful for any person (and this includes a telegraph company) to pursue his business or the work of his ordinary calling upon the Lord's day, works of necessity or charity only excepted. It follows that a telegraph company is not put by law, and cannot put itself by contract, under any duty to transmit and deliver messages on that day, unless, by reason of the subject-matter of the messages in question, their transmission and delivery can be fairly considered as a work of necessity or charity.

2. A message from a son to his mother, informing her that a particular person, a friend of the family, will arrive on a particular train,—the object being to apprise her that he, in company with the son, would be with her to take dinner,—is not a message which can give to the work of transmitting and delivering it the character of either necessity or charity. A failure to perform the work on the Lord's day with reasonable dispatch will not subject the company to the statutory penalty imposed by the act of 1887, and an action therefor is not maintainable.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

Action by Claud H. Hutcheson against the Western Union Telegraph Company to recover the statutory penalty for failure of duty. There was judgment for plaintiff, and defendant brings error. Reversed.

Bigby, Reed & Berry, for plaintiff in error. Hutcheson & Key, for defendant in error.

BLECKLEY, C. J. 1. There is no good reason to doubt that the prohibition of section 4579 of the Code, upon ordinary Sunday labor, applies no less to telegraph companies and their employes than to other persons, the language of the section being: "Any tradesman, artificer, workman or laborer, or other person whatever, who shall pursue their business or work of their ordinary callings upon the Lord's day (works of necessity or charity only excepted) shall be guilty of a misdemeanor, and, on conviction shall be punished as prescribed in section 4310 of

this Code." Anything that is prohibited by law, under a penalty, cannot become a legal duty by reason of any contract or agreement which may be entered into concerning it. A so-called "contract" to violate the law is no contract at all. A telegraph company is not by law, and cannot put itself by contract, under any duty to transmit and deliver messages on Sunday, unless, by reason of the subject-matter of the messages in question, their transmission and delivery can fairly be considered as a work of necessity or charity. It makes no difference that the company, in addition to undertaking to perform the work, received and accepted full compensation for its performance. This might subject it to refund the money, but could not oblige it to render the service.

2. In the present case the contents of the message furnish no indication whatever of any necessity or charity to be subserved by the message, and incidentally by the work of transmission and delivery; nor is any such object brought in sight, or even faintly suggested, by the testimony. The sender of the message was a witness, and he did not pretend that any object of necessity or charity was contemplated or involved in the transaction. From his testimony, and the message itself, the object seems to have been to apprise his mother that a certain friend of the family would be with her to take dinner, in company with the sender, her son. This object is properly classed as a social one, but it is wholly wanting, so far as appears, in any character of necessity or charity; and we think neither of these characters is to be assumed by mere presumption, and without any proof whatever. The general rule is, with respect to Sunday work, that messages are not privileged. He who asserts privilege for a particular message should be required to prove it. The charge of the court to the jury conflicted with the views expressed in this opinion, and was, we think, erroneous. Judgment reversed.

WILLINGHAM v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. March 27, 1893.)

TELEGRAPH COMPANIES—FAILURE TO TRANSMIT MESSAGE ON SUNDAY.

Where a telegraphic message delivered on Sunday for transmission did not show on its face that it related to a subject-matter which would render transmission and delivery a work of necessity or charity, and where there is no averment in the declaration either that the dispatch in question did relate to such a subject-matter, or that the telegraph company, its agent or servant, was informed that it had relation to any such matter, the failure to transmit and deliver it on Sunday is not actionable. There was no error in dismissing the action on demurrer, taken in connection with the facts orally admitted by counsel at the hearing.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. Turnbull, Judge.

Action by Mary Willingham against the Western Union Telegraph Company for failure to transmit a message. There was judgment for defendant on demurrer dismissing the complaint, and plaintiff brings error. Affirmed.

Wrights & Harper, for plaintiff in error. McHenry, Nunnally & Neel, for defendant in error.

BLECKLEY, C. J. It was admitted that the dispatch was in these words, "Meet the E. T. train at 3 o'clock," and that the day on which it was received for transmission, and on which the delay complained of occurred, was Sunday. That ordinary telegraphic messages, or rather the work and labor of transmitting and delivering them, are within the prohibition of the Sunday law was ruled in the case of *Telegraph Co. v. Hutcheson*, 18 S. E. 297, this term. Neither on the face of the message, nor by any averment in the declaration, does it appear that the subject-matter of the message concerned anything in the nature of charity or necessity, or that these characteristics would or could be made to attach to the work of transmission and delivery, so as to bring the same within the exception of the Sunday law, as laid down in section 4579 of the Code. The general rule being that Sunday work cannot be done, and the only exception being in behalf of works of necessity or charity, it devolves upon him who complains that any particular work was not done on Sunday to show that it was not covered by the general rule, but was embraced in the exception. Were this shown on the face of the message, that would be *prima facie* sufficient; but, where it is not thus shown, it should be alleged and proved in order to hold the company penally responsible for not executing the work promptly on that day. There was no error in sustaining the demurrer and dismissing the action. Judgment affirmed.

JACKSON v. STATE.

(Supreme Court of Georgia. Feb. 20, 1893.)

HOMICIDE—KILLING WIFE'S PARAMOUR—INSTRUCTIONS—REASONABLE DOUBT.

1. A husband is not justifiable in killing a man whom he knows or believes to be his wife's paramour, when the latter is peaceably working at his daily labor in the field, and the wife is at her home, more than a mile distant. Under these circumstances there is no such urgent and pressing danger of a new act of adultery as to make the killing absolutely necessary in order to prevent it. It is only where there is such absolute necessity that a killing perpetrated to prevent adultery with the slayer's wife is upon the same footing of reason and justice with cases of justifiable homicide expressly enumerated in the Code. The doctrine of reasonable fear as a defense does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing.

2. A request to charge the jury, which has

no proper application either to the evidence or to the prisoner's statement, should be declined. For this reason, if for no other, it was not error to deny a request couched in these terms: "If you believe from the evidence that when the prisoner came upon the deceased, upon the sight of him he became so enraged at the thought of past or attempted wrongs upon his wife or family that reason was dethroned by passion, and carried away by such passion, and not in a spirit of revenge; that the defendant, under such influences, killed the deceased,—such killing could not be of a higher grade than manslaughter."

3. Where there is nothing in the evidence to indicate that the killing was not voluntary, and where no charge is requested on that subject, involuntary manslaughter is not an issue in the case, and no allusion should be made to it in charging the jury, even though the prisoner's statement by indirection suggest such a theory.

4. Where there was evidence tending to impeach one of the state's witnesses by contradictory statements as well as by bad character, and the court charged the law applicable to impeachment by the latter means, but omitted, apparently by inadvertence, to mention the former, this is not cause for a new trial; the attention of the court not having been called to the omission by counsel, and the general charge on the subject of conflict and credit of witnesses being full and correct.

5. Where the court charged the jury that they were to pass upon the law and facts both, apply the facts to the law as given them in the charge, and from both together make up a general verdict of guilty or not guilty upon the issue submitted, and in that way judge of both the law and the facts, it was not error to charge also thus: "The law of the case I am responsible for. It is made my duty to instruct the jury properly as to the legal principles applicable to this case, and you are bound to take the law of the case from me, just as I am bound to absolutely refrain from suggesting or intimating any opinion at all about the evidence. The one is your domain; the other is mine."

6. It is not true that, if the jury have any doubt as to which grade of homicide the accused has committed, they should give him the benefit of the doubt, and find him guilty of the lesser grade. Only a reasonable doubt would work this consequence.

7. The verdict was correct, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

John Jackson was convicted of murder, and a new trial denied. Defendant brings error. Affirmed.

Roland Ellis and E. A. Cohen, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

BLECKLEY, C. J. 1. There is no law of this state, or of any other state or country of which we have ever heard, which will justify a husband in going into a field where a man is at work and killing him because he has committed adultery with the slayer's wife. To do such an act is murder absolute and unqualified. It is taking the law in one's own hands, and punishing a man with death for a past transgression. This is contrary to all principles of law and the administration of law. Under the facts of this case there was no necessity for the killing to prevent a future act of adultery between

the slain man and the slayer's wife. No such act was in progress, or could have been in progress, for the parties were separated by such distance that the act was impossible. The doctrine of reasonable fear as a defense has no application to any homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing.

2. The request to charge the jury touching the prisoner's excitement to such an extent that his reason was dethroned by passion, and he was carried away by the passion, had no application either to the evidence or to the prisoner's statement. Without considering other objections to it, this was sufficient to render it an improper charge to submit to the jury. In his statement the prisoner did not pretend or profess to have acted under any such influence, and there was no evidence giving the slightest color to such a theory.

3. Nor was there any evidence to indicate that the killing was not voluntary, and no charge was requested on the subject of involuntary manslaughter. It was not an issue in the case, and the court was right in making no allusion to it in his charge to the jury. If the indirect suggestion bearing that way in the prisoner's statement was any ground for such a charge, an express request should have been made to give the charge. On the subject of conflict of evidence and credit of witnesses the charge was full and correct. Apparently by inadvertence, there was an omission, in charging on the subject of impeaching witnesses, to mention impeachment by contradictory statements. There was evidence tending to impeach one of the state's witnesses by that means as well as by proof of bad character. The attention of the court was not called to the omission, although, in the nature of things, counsel must have known that it was most probably made by inadvertence. We think this mere slip is no cause for a new trial.

4. On the subject of taking the law from the court and applying that law to the facts of the case, the charge was not in conflict with what has become the settled meaning of the rule that the jury are judges of the law as well as of the facts. The organ for acquainting them with the law is the court; and when they thus ascertain it they are to apply it to the evidence, and from both together make up a verdict of guilty or not guilty upon the issues submitted. By saying, "The one is your domain; the other is mine," the court did not exclude, nor mean to exclude, the jury from dealing with law after he had expounded it to them, for the very object of instructing them upon it was to enable them to use it in applying it to the facts of the case and arriving at their verdict.

5. It is not a correct proposition of law that if the jury have any doubt, but only if they have any reasonable doubt, as to which grade of homicide the accused has

committed, they should give him the benefit of the doubt, and find him guilty of the lesser grade. They can find the higher grade, not alone where they are convinced beyond all doubt, but where they entertain no reasonable doubt of that being the real grade of the offense.

6. If evidence can manifest guilt of the crime of murder, the evidence does so in this case. It certainly does not shut out sympathy for this unfortunate man, but it manifests fully his guilt under the law. There was no error in denying a new trial. Judgment affirmed.

COMER v. COMER.

(Supreme Court of Georgia. March 3, 1893.)

MARRIAGE—BETWEEN SLAVES—COMPLIANCE WITH ENABLING ACT.

1. Applied to a negro man, who, at the passage of the act of March 9, 1866, touching the relation of husband and wife between persons of color, had two reputed wives, both of whom he had espoused under the forms of marriage during the existence of slavery, the act contemplated that he should not continue to cohabit with both of them on any condition; that he might continue to cohabit with one of them, by selecting her and making her his lawful wife in the mode prescribed, which was by having the usual marriage ceremony known to the law performed between her and himself; and that, after this was done, the general laws of the state, civil and criminal, should apply to them as to other persons duly united in wedlock. According to the intent as well as the letter of the act, it required both the selection and the ceremony to take place immediately, but postponing compliance only made cohabitation penal; it did not disable the parties from complying, or inhibit compliance, at any time, however late. Acts 1865-66, p. 240; Code, § 1667.

2. The selection of one of the reputed wives, and subsequent cohabitation with her, whether exclusive or attended by cohabitation with the other also, was no compliance with the act without performance of the marriage ceremony. Unless that was performed, the selection counted for nothing, and was no obstacle to afterwards selecting the other, and making her the lawful wife by going through the marriage ceremony with her, she consenting to it.

3. After the husband's death, the reputed wife whose marriage was celebrated by means of the marriage ceremony was his widow, and as such is entitled to administer upon his estate. The other reputed wife has no claim upon the estate whatever, even if he continued to cohabit with both until he died.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

Action between Ann Comer and Eliza Comer. From the judgment rendered, Ann Comer brings error. Affirmed.

Lanier & Anderson, Jas. L. Anderson, and Marion Harris, for plaintiff in error. Harde-man, Davis & Turner, for defendant in error.

BLECKLEY, C. J. 1. "Persons of color now living together as husband and wife, are hereby declared to sustain that legal relation to each other, unless a man shall have

two or more reputed wives, or a woman two or more reputed husbands. In such event, the man, immediately after the passage of this act by the general assembly, shall select one of his reputed wives, with her consent, or the woman one of her reputed husbands, with his consent, and the ceremony of marriage between these two shall be performed. If such man thus living with more than one woman, or such woman living with more than one man, shall fail or refuse to comply with the provisions of this section, he or she shall be prosecuted for the offense of fornication, or fornication or adultery, or fornication and adultery, and punished accordingly." Code, § 1667; Acts 1865-66, p. 240. This is the act of March 9, 1866. At that date the negro man Comer had two reputed wives,—the one Eliza, the other Ann,—each of whom he had espoused under the forms of marriage used by colored persons during the existence of slavery. The evidence indicates that he continued to cohabit with both of them at separate places, and in separate establishments, up to the time of his death, which occurred in the year 1888. It also indicates that he selected Ann as his wife as early as December, 1866, but it is clear that no marriage ceremony was ever performed or celebrated to give sanction or effect to that selection, though he held her out and treated her as his wife. In all probability the facts were such as would have constituted a good common-law marriage with Ann, if he and she had been legally competent to contract such a marriage with each other. So far as appears, he made no selection of Eliza as a wife until April, 1867, but in that month he was regularly married to her under a marriage license, the ceremony being performed by a minister of the gospel. Touching a man having two reputed wives at the date of the act of 1866, the scheme of that act evidently was to require him unconditionally to desist from cohabiting with both, and to interdict cohabitation with either unless he selected one and had the marriage ceremony performed between her and himself. The ceremony contemplated was the usual one known to the law, and not a mere agreement, formal or informal, between the parties to be man and wife. The selection was to be evidenced and made known by the ceremony, and no other means of declaring and publishing it would suffice. Because of his peculiar relation to both women, he was disabled from contracting a valid marriage with either of them, save in the mode prescribed. Each being already a reputed wife, he could not make either of them a real wife by adding to that reputation. He must have a statutory marriage with one, or none at all with either. Strict compliance would require that the marriage should take place "immediately;" but postponement, though it would render cohabitation in the mean time penal, would not work any legal disability to com-

ply at any time, however late. It would be a misconstruction of the act to hold that if the marriage was not immediate it might take place otherwise than in the mode prescribed, or, on the other hand, that it could not take place at all. Whenever selection was sealed by ceremony, then there would be a valid marriage, but not till then. Of course, no other selection would be essential than that implied and necessarily involved in going through the ceremony of marriage with one of the reputed wives. One would be taken and the other left; one would be selected and the other rejected. After the ceremony, the special act of 1866 would cease to concern itself with the relation of the parties or their future conduct. The general laws of the state, civil and criminal, would then apply to them the same as to other persons duly united in wedlock.

2. Applying the construction of the act of 1866 which we have just announced to the undisputed facts in evidence, it is manifest that the selection of Ann by Comer as his wife counted for nothing, that selection not having been attended nor followed by the performance of a marriage ceremony; and it is equally manifest that it constituted no obstacle to afterwards selecting Eliza, and making her his lawful wife by duly celebrating a formal marriage between himself and her, with her consent, as was in fact done.

3. Upon the death of Comer, both women surviving, Eliza was his widow, and, as such, is entitled to administer upon his estate. Ann has no claim either upon the estate or upon the administration, although he may have continued to cohabit with her as long as he lived. The legal right is controlled by the marriage, not by the cohabitation. Judgment affirmed.

VON POLLNITZ v. STATE.

(Supreme Court of Georgia. March 10, 1893.)

HOMICIDE — RES GESTÆ — DYING DECLARATION — EXPERT EVIDENCE — FAILURE TO INSTRUCT ON DEGREES OF HOMICIDE — REMARKS OF COUNSEL.

1. What the deceased said at the door of the room in which she was beaten, on coming out immediately after the beating took place, was admissible in evidence as a part of the *res gestæ*.

2. The sayings of the deceased, admitted as dying declarations, and not objected to at the trial, were properly received. This court, in the absence of anything showing the contrary, will presume that the trial judge did his duty in passing upon the admissibility of such evidence as a preliminary question, before allowing it to go to the jury.

3. A practicing physician is presumptively competent to give evidence as an expert touching the probable effect of wounds such as other witnesses describe, with reference to their adequacy and tendency to produce death. No question was raised as to whether the examination should have been on a hypothetical, rather than on the actual, case.

4. The evidence showing that the manner of inflicting the mortal wounds was by striking,

throwing down, and stamping upon the deceased,—she being a woman probably in a pregnant condition, and her assailant being her husband,—and there being no provocation shown, and no mitigating circumstances, and he, in his statement to the court and jury, denying that he used any violence, the failure of the court to charge the jury upon the law of manslaughter, voluntary or involuntary, was not error.

5. That the solicitor general used grossly improper language touching the defendant, in his argument to the jury, is not cause for a new trial; no objection being made thereto by the accused or his counsel at the time, and no ruling of the court thereon being invoked or made.

6. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Decatur county; B. B. Bower, Judge.

J. R. Von Pollnitz was convicted of murder, and a new trial denied. Defendant brings error. Affirmed.

Frank Harrell and A. H. Russell, for plaintiff in error. W. N. Spence, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

BLECKLEY, C. J. 1. The deadly assault was made in a closed room in a boarding house,—the room occupied by Von Pollnitz and his wife,—and though some of the blows, as well as the outcry of the wife, were heard by one or more of the witnesses, there was no eyewitness to the infliction of the blows. Immediately after the beating took place, the door of the room was opened, and the wife, on emerging from it, made certain declarations, which were admitted in evidence. These declarations were a part of the *res gestæ*, and as such were competent evidence.

2. Certain sayings of the deceased were admitted as dying declarations. They were not objected to, and seem to have been properly received. It is contended that the trial judge did not pass upon their admissibility, as a preliminary question, before allowing them to go to the jury. It does not affirmatively appear that he did or did not. It was his duty to do it, and we cannot presume that he failed to perform that duty properly and faithfully.

3. A practicing physician was allowed to give in evidence his opinion as an expert touching the probable effect of wounds such as other witnesses described, though he had never seen or examined the wounds himself. He gave his opinion with reference to their adequacy and tendency to produce death. It appearing that he was a practicing physician, he was a competent witness to form and express an opinion upon this subject as an expert. The examination should have been on a hypothetical, rather than on the actual, case. But no question was raised as to this point; his competency, and not the mode of his examination, being the matter raised by objection, and submitted to the court for decision.

4. It is complained that the court gave no instruction to the jury touching the law

of manslaughter, voluntary or involuntary. The manner of inflicting the mortal wounds was, according to a fair, if not a necessary, inference from the facts in evidence, by striking, throwing down, and stamping upon the deceased, who was at the time, probably, in a pregnant condition. There could be no voluntary manslaughter without some provocation, and there was not the slightest evidence of any provocation whatever, and the accused did not set up or pretend that there was anything involuntary either in the blows or in their effect. He neither proved nor stated anything in mitigation, but in his statement to the court and jury denied that he used any violence. It did not appear, and was not suggested, that any other person was in the room, by whom the injuries to the wife could or might have been inflicted. If they were the cause of her death, which occurred shortly thereafter, although there might be a guess or conjecture that the killing was involuntary, yet, unless there had been some evidence or some statement of the prisoner tending to show that it was so in fact, or unless that defense had in some way been set up or insisted upon, instead of being wholly negatived by the prisoner's statement, we cannot rule that the trial judge was bound, as matter of law, to submit any question concerning it to the jury. We do not say that it would have been unlawful for him to do so, if such a course had been dictated by his own conscience, but we are clear that the law did not impose it upon him as an official duty.

5. The language imputed to the solicitor general as having been used in his argument to the jury touching the defendant was grossly improper, but no objection was made thereto by the accused or his counsel at the time, and no ruling thereon by the court was invoked or made. This being so, it was not cause for a new trial.

6. The impression made by the transcript of the record, taken as a whole, is that the accused was indiscreet and unwise, both in conduct and expression, while his trial was in progress, and that, owing to the youth and inexperience of the zealous and faithful young gentlemen who were assigned by the court to act as his counsel, he was not defended with the tact and skill which older and more experienced counsel might have brought to bear in his behalf, yet we can discover no reason for holding that the conviction was illegal or improper. The evidence, if it did not require, certainly warranted, the verdict, and there was no error in denying a new trial. Judgment affirmed.

BOHANAN v. STATE.

(Supreme Court of Georgia. March 14, 1893.)

CRIMINAL LAW—EVIDENCE—CONFESSION.

1. On the trial of an indictment for a misdemeanor, a witness for the state having testi-

fied to a confession by the accused, and having detailed the circumstances under which it was made, which circumstances consisted of detecting him in the criminal act, of a consequent threat to prosecute, and an attempt by the accused to bribe him not to prosecute, and the confession having then been repeated in the presence and hearing of another witness, the subsequent testimony of the first witness that he extorted the confession should, in the absence of all further explanation, and when there was no motion made to withdraw the confession from the jury, be interpreted as a mere conclusion of the witness' mind upon the legal effect of the circumstances which he had before detailed under which the confession was made. These circumstances were not sufficient to render the confession incompetent as evidence to be considered by the jury.

2. The evidence warranted the verdict, and the motion for a new trial was properly denied. (Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Dick Bohanan was convicted of a misdemeanor, and a new trial denied. Defendant brings error. Affirmed.

G. W. Austin and Cobb & Bro., for plaintiff in error. T. A. Atkinson, Sol. Gen., by Reid & Stewart, for the State.

BLECKLEY, C. J. 1. After the witness stated as a part of his testimony that he extorted the confession, there was no motion made to withdraw from the jury the confession or the testimony which the same witness had previously given concerning it. At the time this previous testimony was received it appeared to be legal, for nothing was then, or had been, disclosed which could suggest that the confession was not freely and voluntarily made. On the contrary, it was shown that the accused had repeated it in the presence and hearing of another witness, thus confessing twice,—once to the person who had threatened to prosecute him, and again to that person and the other witness, these two being together when the confession was repeated. Is it erroneous to allow evidence to remain before the jury when no reason for excluding it appeared until after it was received, and no motion to withdraw it is made at any time? Must the court, without any request from the accused or his counsel, withdraw evidence which has been legally admitted, if subsequent testimony discloses that it was incompetent? But should this confession have been withdrawn, even on motion, because the witness said he extorted it? We think not. The witness had previously detailed what he said and did. He detected the accused in the act, threatened to prosecute him, and rejected a bribe which the accused offered him to induce him not to prosecute. Was there any extortion in this? Surely not. There was no invitation to confess, no threat to prosecute if he did not confess, no appeal to either hope or fear to induce a confession. No confession was suggested or mentioned. No reference was made to the subject, either expressly or by implication. If any fear or hope calculated

or having any tendency to prompt a confession arose in the mind of the accused, it was of his own creation. An unconditional threat to prosecute for an offense has no natural tendency to induce a confession, but rather the contrary; and the hope implied in the offer of a bribe, the offer being unsolicited, has its origin in the thoughts of him who makes the offer, and is not chargeable to him who rejects it. If a man rears a crop of hope in his own mind from seeds of his own planting, and under its influence makes a confession, this will not exclude the confession as evidence. The hope that excludes is that, and that only, which some other person kindles or excites. Some inducement must be held out by another person, tending, according to human nature and the law of human motives, either to overpower the will or seduce it, either to coerce through fear, or persuade through hope. It seems to us that the right and only construction to be put on what the witness testified as to extorting the confession is that this was a conclusion of his own mind, drawn from the facts which he had detailed, the principal fact being that he had threatened to prosecute. Doubtless he supposed that a threat to prosecute amounted in law to extortion, but in this he was mistaken. Why he was not called upon to explain what he really meant does not appear, and we are unable to conjecture. Had a motion been made to withdraw the confession from the jury, very likely some explanation would have been elicited.

2. There was no lack of evidence to warrant the verdict, but rather a surfeit of evidence. Judgment affirmed.

WHEELLESS v. STATE.

(Supreme Court of Georgia. March 14, 1893.)

CRIMINAL LAW—REMARKS OF COUNSEL.—FAILURE TO CHARGE ON DEFENDANT'S STATEMENT.

1. Where the solicitor general, in examining a witness, makes an irrelevant or improper remark, and is reproved by the court for it, and thereupon apologizes, there is no cause for a new trial. Nor is a remark made by him to the jury, on which no ruling of the court appears or was invoked, cause for a new trial.

2. In charging the jury on the prisoner's statement, the court should give all the provisions of the statute; and, if one of them be casually omitted, attention should be called thereto by counsel, so that the omission can be supplied. Failure to complain until after verdict is not correct practice. In order to have a charge of the court reviewed, the matter complained of must be set out in the motion for a new trial, or in the bill of exceptions.

3. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Oglethorpe county; J. H. Guerry, Judge.

Hardy Wheelless was convicted on a criminal indictment, and, a new trial having been denied, he brings error. Affirmed.

W. G. Johnson and Thomas & Strickland, for plaintiff in error. W. M. Howard, Sol. Gen., by J. H. Lumpkin, for the State.

BLECKLEY, C. J. 1. For his first impropriety the solicitor general was reproved by the court, and he made a prompt and public apology. In all probability, this counteracted and corrected any effect, harmful to the accused, which that impropriety was calculated to produce on the jury. His second impropriety was passed sub silentia until the trial was over. The wait was too long. Nobody complained, the court's attention was not called to it, no ruling upon it was requested or made. The solicitor general erred, but we cannot say the court did,—at all events, not to such extent as to be cause for a new trial.

2. In charging the jury upon the prisoner's statement, the court omitted to say, either in the words or the sense of the statute, that they could believe the statement in preference to the sworn testimony. Of course, this ought to have been said, for the whole law of the statement should be charged. The omission was evidently by oversight, and the faintest suggestion from the able and vigilant counsel of the accused, if made in time, would have caused the court to supply the omitted words. But this would have lost the point afterwards made on the charge; and to save it was, perhaps, desirable, as matter of deliberate forethought. Counsel should aid the court, rather than seek to store up a mere lapse of this sort as ground for a new trial.

3. The evidence was sufficient, and overruling the motion for a new trial was not error. Judgment affirmed.

COOPER v. STATE.

(Supreme Court of Georgia. March 20, 1893.)

LARCENY—VENUE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. The evidence warranted the verdict as to both venue and the commission of the offense.

2. According to many authorities, the newly-discovered evidence, inasmuch as it applies to specific facts, touching which there was no evidence at the trial, would be held not to be cumulative, although the new facts have no value except as tending to establish the same defense which was in question, and touching which there was some evidence in behalf of the accused at the trial. Authorities to the contrary are numerous, but the conflict raises a serious doubt as to the true law. In view of this doubt, and because the newly-discovered evidence would, if believed by the jury, be morally certain to produce a verdict of acquittal, a new trial is ordered, so that the accused may have the benefit of this evidence. *Mathews v. State*, 56 Ga. 469.

(Syllabus by the Court.)

Error from superior court, Hancock county; H. McWhorter, Judge.

Thomas Cooper, having been convicted of larceny, brings error. Reversed.

T. M. Hunt and J. T. Jordan, for plaintiff in error. W. M. Howard, Sol. Gen., by J. H. Lumpkin, for the State.

BLECKLEY, C. J. 1. Though the evidence as to the fact of larceny by the accused, and also as to whether the scene of it was in Hancock county, was circumstantial, we think it was fully sufficient to warrant an affirmative finding on both questions, if the jury failed to credit the testimony in behalf of the accused, as they must have done in order to reach a verdict of guilty. Nothing but the newly-discovered evidence is suggestive of any legal merit whatever in the motion for a new trial.

2. In consequence of the wide range of investigation, and the thorough course of study, into which the writer was led by the exigencies of this one case, he feels prepared to produce a treatise on cumulative evidence, and yet he is quite unprepared for the minor and more moderate task of writing a judicial opinion on the subject. The exact truth is that, though he well knows what cumulative evidence is, he does not know what evidence is cumulative. He can define, but cannot distinguish. Of course, this statement is meant to be taken literally in rare instances only. Perhaps, in the great mass of instances, there is no real difficulty in discriminating evidence which is merely cumulative from that which is not so. According to many authorities, the newly-discovered evidence in the present case was not cumulative, because it relates to specific facts, touching which there was no evidence at the trial. Many other authorities would treat it as cumulative, because the new facts have no value except as tending to prove and establish the same identical defense which the accused set up at the trial, and touching which he not only adduced some evidence, but enough to clear him, if the jury had given it credit. There is a doubt, consequent upon this conflict, and we are not sure how the doubt ought to be solved. Of one thing, however, we are morally certain, which is that the new evidence would and ought to produce a verdict of acquittal, if it is submitted to a jury, and the jury believe it. We are impressed with the belief from the record, as a whole, that this man is probably innocent, and that he ought to have the benefit of this new evidence. Using our power of direction, as was done in *Mathews v. State*, 56 Ga. 469, we direct that the case be tried over. Judgment reversed.

FAULK v. CENTRAL RAILROAD & BANKING CO.

(Supreme Court of Georgia. March 20, 1893.)

ACCIDENTS AT RAILROAD CROSSINGS—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Though a boy 12 or 13 years of age may have capacity to know that it is dangerous to

climb over the bumpers of a standing freight train having a locomotive attached to it, yet where the train obstructs a public crossing contrary to a city ordinance, and the flagman stationed by the railway company to guard the crossing and tell the public when to cross, and when not, invites such a boy, who has been delayed by a standing train, to cross over the bumpers, it is not negligence in the boy to act on the invitation, inasmuch as he might well assume that the flagman had assured himself the train would stand still long enough for the invitation to be complied with safely. It was consequently error to charge the jury: "If you further believe he had the capacity I have just described, [capacity to know the danger of crossing between the cars,] and had the capacity and intelligence to understand the risks, and to know the danger of going between the cars that had the engine attached to them, and with that knowledge the flagman of the company suggested to him to go, or directed him to go across, and he, with that knowledge of his own, acted still on the flagman's suggestion, he would not be entitled to recover."

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

Action by Freddie Faulk against the Central Railroad & Banking Company for personal injuries. There was judgment for defendant, and plaintiff brings error. Reversed.

Hardeman & Nottingham, for plaintiff in error. R. F. Lyon, for defendant in error.

BLECKLEY, C. J. In charging the jury as quoted in the headnote, the court assumed that it would be negligence in the boy to climb over the bumpers and pass between the cars at the flagman's suggestion, if the boy had capacity to know the danger, and the intelligence to understand the risk of so doing. If the court referred to the risk and danger which would have been incurred had the flagman said nothing to invite or encourage the boy to climb over the bumpers and pass between the cars, this instruction was irrelevant to the hypothesis with which the court was dealing; and if the reference was to risk and danger which might be expected to attend such an act when done under the prompting of the flagman, the doctrine of the charge is wholly unsound, for little or no danger whatever was reasonably to be expected on account of changing the train from a state of rest to a state of motion before sufficient time had elapsed for doing that by the boy which the flagman suggested to be done. As the flagman was stationed by the railway company to guard the crossing, and tell the public when to cross and when not, the boy, whatever his capacity might have been, could well assume that the train would stand still long enough for the suggestion or invitation to be complied with safely, and that the flagman knew or had ascertained with adequate certainty that it would do so. To say the least, it was a question for the jury whether the boy, who was only 12 or 13 years of age, acted rashly or otherwise in not judging of the situation for himself, and

in not deciding that what the flagman's suggestion implied could safely be done was too hazardous to be undertaken. The jury might have come to the conclusion which we have above indicated, namely, that, with the lights before him, the boy had good ground for thinking that he took little or no risk whatever in attempting to pass between the cars at the time and in the manner which the flagman had indicated. They might conclude, also, that as the flagman was probably a grown man, and was probably familiar with his business, the boy was not to blame, even if his own opinion differed from that implied in the suggestion made to him, since it is not uncommon for men, to say nothing of boys, to yield their own opinion, and govern their conduct by that of others having more wisdom and experience than themselves. As a question of probability, the chances are very many that the flagman knew much better than the boy whether it was safe at the particular time and place for the latter to proceed as he did, and it might be possible that the flagman was more surprised than the boy was by the sudden movement of the train. Judgment reversed.

THOMAS v. STATE.

(Supreme Court of Georgia. Oct. 8, 1892.)

ASSAULT WITH INTENT TO MURDER—RESISTING ILLEGAL ARREST—INSTRUCTIONS.

1. The drunkenness, if any, being voluntary, and no request being made to charge anything on the subject, it was not error, as against the accused, for the court to omit any reference to section 4301 of the Code, or to its provisions touching drunkenness as an excuse for crime.

2. Generally, the killing of an officer or other person to prevent an illegal arrest is not murder, but manslaughter. Consequently, shooting at him for the same purpose, without killing him, is *prima facie* not an assault with intent to murder.

3. The evidence of the policeman being that he was called to arrest the accused by an old woman who keeps a boarding house on the corner of Oak and Third streets, whose name he did not know or had forgotten; that she stated to him the accused had broken in her trunk, and taken twenty-nine dollars and a few cents and a coat; that she described him, and said she wished the policeman to look out for him; and that this was about three hours after the property had been stolen,—it was error to charge the jury, upon the trial of the accused for an assault with intent to murder by shooting at the policeman while the latter was endeavoring to arrest him without a warrant, thus: "If you believe from the evidence that the officer had been notified to look out for him as a thief, and that evening he approached to arrest him, and the defendant fled before the officer drew the weapon, and without endeavoring to attack the defendant in any way, the defendant, while fleeing, and the officer pursuing, drew the pistol, fired upon him, and you believe the pistol was a weapon, likely to produce death, you would be authorized to convict him of assault with intent to murder." This charge assumes that the facts enumerated would constitute probable cause for making the arrest without a warrant, whereas they might or might not, and whether they would or would not would be for determination by the jury in

the light of all the circumstances attending the case, including the facilities for obtaining a warrant according to the spirit of section 4723 of the Code.

4. One who, on seeing an officer approach, takes to flight, and continues to fly, has no right to express information that the purpose of the officer is to arrest him. To entitle him to receive such information, he should not put and keep himself beyond the officer's reach.

5. The court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

Will Thomas was convicted of assault with intent to murder, and from an order denying a new trial he brings error. Reversed.

John R. Cooper, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

BLECKLEY, C. J. 1. If the accused was drunk, his drunkenness was voluntary, and was, therefore, no excuse. Code, § 4301. The jury would know whether, under all the circumstances, the intoxication would throw any light on intention to kill; and, there being no request to charge on the subject, the omission to do so was not error. Certainly it was not error as against the accused. Generally, a drunken man would not be less likely to intend his shot to kill than a sober one, but rather more so.

2. The evidence indicates that the offense for which the policeman was endeavoring to arrest the accused when the shooting occurred was larceny of money and property from the house. If this was the offense, and if the effects stolen were of less value than \$50, the arrest contemplated was not for a felony, but for a misdemeanor only. The policeman had no warrant, nor was the offense committed in his presence. This being so, he had no legal authority to make any arrest, unless it was reasonably proper to do so in order to prevent a failure of justice for want of an officer to issue a warrant. Code, § 4723. With ample time and opportunity to obtain a warrant after he was informed of the offense, and before he commenced looking out for the offender, the policeman had no right to proceed without it. He could not attempt an illegal arrest, even for a real crime, and then justify the attempt on the ground that the person sought to be arrested would not stand still until the arrest was made, but ran away to avoid it. To call this endeavoring to escape, and to treat it as legalizing what would otherwise be an illegal arrest, would be going round in a circle. Every man, however guilty, has a right to shun an illegal arrest by flight. The exercise of this right should not, and would not, subject him to be arrested as a fugitive. A policeman stands upon the footing of those public officers, such as sheriffs or constables, whose duty it is to make arrests. Generally, it is not murder, but manslaughter, to kill an officer or other person to prevent an illegal arrest. 1 East, P. C. 310; 1 Russ. Crimes,

*708, *803; 1 Whart. Crim. Law, § 414; Roberts v. State, 14 Mo. 138; Jones v. State, Id. 409; Com. v. Drew, 4 Mass. 396; Com. v. Carey, 12 Cush. 246; Com. v. McLaughlin, Id. 615; Rafferty v. People, 69 Ill. 111, 72 Ill. 37. There can be no assault with intent to murder where the homicide, if committed as intended, would be only manslaughter. Consequently, shooting at an officer without killing him, if done to prevent an illegal arrest, is prima facie not an assault with intent to murder, but the statutory crime of shooting at another, described in section 4370 of the Code.

3. No one who properly appreciates the sacredness of personal liberty, and the jealousy of the law in guarding the same, can doubt that, as a general rule, the law requires a warrant in order to render an arrest legal, whether it be made by a policeman or any public officer. Only three exceptions to this rule are recognized by the Code. See section 4723. The first is where an offense is committed in the officer's presence; the second, where the offender is endeavoring to escape; and the third, where from other cause there is likely to be a failure of justice for want of an officer to issue a warrant. Where an arrest for a past offense is intended, and there is no present emergency, no want of time or opportunity for obtaining a warrant, why should a policeman be allowed to dispense with a warrant when other officers of the law could not? Any information as to the commission of an offense which would serve as a reasonable basis for making an arrest would serve for suing out a warrant. The policeman could himself apply for and obtain it if the injured party or other person giving information declined to do so, since the affidavit required to obtain a warrant need not charge the offense absolutely and without qualification, but only to the best of the affiant's knowledge and belief. Code, § 4715. In the present case the evidence indicates that there may have been, and probably was, no just reason for failing to procure a warrant, and for attempting an arrest without it. The testimony of the policeman himself, as summarized in the third headnote, suggests to our minds that there was no probable cause for making an arrest without a warrant, there having been ample time to apply for it, and, so far as appears, no obstacle to obtaining it. Whether, under all the circumstances, including the facilities for obtaining a warrant according to the spirit of section 4723 of the Code above cited, there was or was not cause for attempting the arrest without a warrant, was a question for the jury; and it was therefore error for the court to assume that the facts enumerated in the charge would constitute such cause. For this error a new trial is necessary. In Johnson v. State, 30 Ga. 426, the power discussed is that of arresting for a felony. In Johnson v. Mayor, 46 Ga. 80, the arrest was made for a breach of the

peace committed in presence of the policeman. In Harrell v. State, 75 Ga. 842, the attempt to arrest was made while the offender was in the act of flight from the scene of the offense, and about to cross the line of the state. One of the policemen was making pursuit, and called upon his fellow for assistance.

4. An arresting officer is not bound to disclose his purpose before getting near enough to make the capture. It would be absurd for him to give warning in order to prevent flight, when so doing would only tend to provoke it. No doubt the accused knew well enough that the policeman intended to arrest him; but, if he did not, the way to obtain the information was not to put and keep himself out of reach, but to wait for a closer approach. No right to shoot the policeman, or to shoot at him, resulted from failure of the latter to give express notice of his purpose. Judgment reversed.

WATSON v. RICHMOND & D. R. CO.

(Supreme Court of Georgia. Nov. 9, 1892.)

ACTION AGAINST LESSEE OF RAILROAD — PLEADINGS—JURISDICTIONAL AVERMENTS—INJURIES TO EMPLOYEE.

1. It is competent for the general assembly to make the residence of a lessee corporation for the purposes of suit the same as that which the lessor corporation had when the relation of lessor and lessee originated. By section 3407 of the Code, the lessee or person or corporation having possession of a railroad is liable to suit in the same court or jurisdiction as was the lessor or owner before the lease. A declaration which names the defendant corporation as lessee of a specified railroad, and which indicates that the defendant is in possession and operating the road, is to be construed as seeking to charge the defendant in its character as lessee, though no lease be set out or expressly alleged.

2. As the statute virtually makes the county of the principal office or place of business of the lessor before the lease the county of the principal office or place of business of the lessee, a declaration against the lessee, alleging that its principal office within this state is in the county where the suit is brought, shows jurisdiction over the person of the lessee, though the latter be a foreign corporation.

3. The lessee of a line of railroad partly within this state and partly within the state of Alabama is subject to suit here by an employee for a personal injury sustained in Alabama while engaged in his duties as an employee upon the line.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action for personal injuries by Gabe Watson against the Richmond & Danville Railroad Company. Plaintiff was injured in the state of Alabama, while in the performance of his duties as brakeman on defendant's road. From a judgment dismissing the action for want of jurisdiction, plaintiff brings error. Reversed.

Reid & Stewart, for plaintiff in error. Jackson & Jackson, for defendant in error.

BLECKLEY, C. J. 1. By the constitution, the county in which a defendant is subject to be sued is ordinarily that in which he resides, and no other. Code, § 5172. But a person may be a resident of two or more counties at the same time. Code, § 1691. Where a railroad is not confined to one county, but extends from one to others, so as to be partly in several, the owner may, relatively to causes of action arising out of or connected with operating it, be treated by the legislature as residing in each of the several counties in which the road is located. This has been done to a limited extent by certain provisions of the Code. Sections 712, 3406. Where the owner is a domestic corporation, the general rule of law that it resides also where its principal office or place of business is situated still prevails. The corporation has this common-law residence for general purposes, in conjunction with the superadded statutory residences for special purposes which the Code ascribes to it. By making it a resident of each and every county in which the road is located, for the purpose of certain specified suits brought against it, the Code does not make it cease to be a resident of the county in which its principal office or place of business is located, for all purposes whatsoever, including the same classes of suits which, by reason of the special enactment may be brought against it elsewhere. The qualified residences do not absorb or obliterate the unqualified one, either wholly or partially. They merely supplement, without otherwise affecting it. In this state there is certainly legislative competency to establish this composite system of residence for all railroad corporations which the general assembly has chartered. It follows, obviously, that there is like competency to make the residence of a lessee corporation, for the purposes of suit, the same as that which the lessor corporation had when the relation of lessor and lessee originated. This has been done by the act of April 17, 1863, (Acts 1862-63, p. 161, Code, § 3407,) which declares that "the lessees of any railroad, or the person, or persons, or company having possession of the same, shall be liable to suit of any kind in the same court or jurisdiction as the lessors or owners of the railroad were before the lease." We are now to inquire, first, whether the declaration in the present case shows on its face that the suit is against a lessee corporation. No lease is set out or expressly alleged, but the defendant is thus described: "The Richmond & Danville Railroad Company, lessees of the Georgia Pacific Railway Company, a corporation existing by law." Besides this, the general tenor of the declaration indicates that the defendant is in possession of the Georgia Pacific Railway, and engaged in operating the same. These data are certainly too meager to amount to good pleading, but, as against a mere motion to dismiss the action, we think

the declaration can and should be construed as seeking to charge the defendant in its character as lessee from the Georgia Pacific Railway Company. We can discern what the pleader intended, though, with that perverse and unaccountable repugnance to full and accurate expression which seems to prevail widely at the Georgia bar, he has only vaguely suggested, rather than plainly declared, what was in his mind. Why counsel should be so reluctant to frame their pleadings carefully and correctly is to us an impenetrable mystery.

2. We are to inquire, secondly, whether the declaration shows on its face, either expressly or by fair inference, that the principal office or place of business of the Georgia Pacific Railway Company was, before the lease, in Fulton county. If the courts of that county then had jurisdiction of that company, the lessor, they now, by virtue of the statute, have jurisdiction of the Richmond & Danville Railroad Company, the lessee. The city court of Atlanta, in which the action was brought, is one of the courts of Fulton county at large; its jurisdiction extending over all residents of the county, and not being confined to residents of the city. The declaration describes the defendant as "having an office and agent and doing business in said state and county;" and by an amendment it adds that "said defendant corporation had at the time of the filing of said suit its principal office in said state, in said county." In the usual manner, the declaration opens with the state and county, thus: "State of Georgia, Fulton county." It is quite silent as to any office or place of business of the Georgia Pacific Railway Company before the lease, or at any other time; but that the principal office of that company was, before the lease, in Fulton county, is sufficiently apparent from the allegation that "said defendant corporation had at the time of the filing of said suit its principal office in said state, in said county." The statute which we have quoted virtually makes the county of the principal office of the lessor corporation before the lease the county of the principal office of the lessee after the lease. Consequently, when either the one or the other is ascertained, both are known, for they are one and the same. Can a corporation, the lessee of a railroad, admit that it is sued in the county in which its own principal office within this state is located, and yet contend that the proper court, or one of the proper courts, of that county, has no jurisdiction over it? We should say it is subject to suit in that county, *prima facie* so at least, whether it be a domestic or a foreign corporation. If, as lessee, it could locate its principal office elsewhere than in the county in which the lessor's principal office was located before the lease, there is certainly no presumption that it has so done. Any principal office which it has beyond this state counts for nothing, since, under the

scheme and policy of our law, if it exercises franchises granted by Georgia, it is subject to suit here, the same as the corporation to which the franchises were granted would be if no lease had been made. In fact, the Richmond & Danville Railroad Company is a foreign corporation, but this makes no difference in the present case.

3. The declaration is in many respects lamentably meager and deficient. It does not even allege that the Georgia Pacific Railway is located partly in Georgia and partly in Alabama, but that this is so is matter of common knowledge and general public information. We can therefore notice the fact judicially. The plaintiff was injured while engaged in the performance of his duties as an employe of the defendant, he being a brakeman upon a freight train run on the line of the leased road. The injury took place in Alabama, and for that reason it is contended that the defendant, a foreign corporation, is not subject to suit here by an action in personam. The case of *Bawknicht v. Insurance Co.*, 55 Ga. 194, is relied upon in support of this contention. We distinguish this case from that by the fact that operating the line of road in both states was not carrying on a separate and disconnected business in each state, but the very contrary. It is fairly probable that by one and the same contract the plaintiff was employed to perform services in both states upon each trip which his duties required him to make. At all events, it does not affirmatively appear, either by express averment or by the nature of the business, that there was any separate outfit or agency for the work of running trains in Alabama, or, if there was, that the superintendence of these operations did not belong to officers or agents located in Georgia. It seems to us manifest that the lessee of a continuous line of railway is liable to suit by an employe for an injury sustained by him anywhere on the line while engaged in his duties, and that the suit may be brought at the general residence of the lessee corporation in this state in all such cases, without respect to whether the scene of the injury was within the state or beyond its limits. The court erred in dismissing the action, on motion, for the want of jurisdiction. Judgment reversed.

WAPPOO MILLS v. COMMERCIAL GUANO CO.

(Supreme Court of Georgia. March 27, 1898.)
CONTRACT OF SALE—BREACH—DAMAGES—REVIEW
ON APPEAL.

1. The purchaser of goods cannot recover of the seller damages for nondelivery, measured by his profits on a particular contract of resale and by his losses on account of inability to perform that contract, unless the seller at the time of making the contract of sale had notice of such contract of resale. In the present case there was no evidence of notice. It was therefore error to charge the jury thus: "You

have the right to include what it may have been compelled to pay out, or what it may have lost in the way of profit, if it be shown to you in figures what such payment or loss is."

2. In a motion for a new trial, a complaint of the charge of the court in these terms: "The court erred in its charge as to the next following clauses as to the telegrams which passed in regard to shipment of the thirty tons,—same being a question for the jury,—the illustrations tending to confuse the jury on the point, and should not have been given in charge; said telegrams, along with all testimony on said point, being exclusively for the jury under the issue,"—does not state what the charge was, and consequently is not for adjudication by the supreme court.

(Syllabus by the Court.)

Error from Savannah city court; W. D. Harden, Judge.

Action for breach of contract by the Commercial Guano Company against the Wappoo Mills. There was judgment for plaintiff, and a new trial denied. Defendant brings error. Reversed.

Garrard & Meldrim, for plaintiff in error.
Charlton & Mackall, for defendant in error.

BLECKLEY, C. J. 1. We feel constrained to reverse the judgment for error in that part of the charge of the court to the jury which instructed thus: "You have the right to include what it may have been compelled to pay out, or what it may have lost in the way of profit, if it be shown to you in figures what such payment or loss is." The pronoun "it," as first used, and then repeated in this quotation, refers to the Commercial Guano Company, the plaintiff in the court below; and the profit mentioned as recoverable has reference not merely to any difference between the contract price and a higher one which the commodity would have brought in market when the breach occurred, but to the profit the company would have realized on a particular contract of resale which it had made, and which the breach sued for prevented it from fulfilling. And the phrase, "what it may have been compelled to pay out," has reference to the amount which the company was required to pay and did pay to its own vendee in the contract of resale, by reason of its inability to perform that contract, in consequence of nonperformance by the Wappoo Mills of its contract with the company. There was no evidence showing, or tending to show, that the Wappoo Mills had, at the time of making its contract with the company, any notice of any particular contract of resale which the company had made or would make. Nothing appears which would justify the assumption that the profits or losses resulting, or which might result, from any particular resale, were in the contemplation of the parties, so as to make these the measure of damages, rather than that measure which the law prescribes in ordinary cases where a contract for the sale and delivery of goods is made and broken. Commercial fertilizers have long been a com-

modity of general commerce, and there would seem to be no reason why damages for the breach of a contract of sale of which they are the subject-matter should not be measured with reference to market price at the time and place appointed for delivery, instead of the price which a particular purchaser from the first purchaser might agree to pay. The general rule is that one who, by his contract, is entitled to have goods, not yet paid for, delivered to him at a particular time and place, is compensated for his disappointment when he is allowed the difference between the price at which he purchased and the market price of the article in the market of delivery. This rule excludes any reference to a particular sale, except in so far as it may be evidence of the market price; and it wholly excludes any addition to the damages by reason of payments, voluntary or involuntary, made on contracts of resale, as the result of a breach thereof occasioned by an antecedent breach of the original contract of sale.

2. Instructions so vaguely and inadequately stated as those referred to in the second headnote cannot be reviewed. Complaint of them in a motion for a new trial, without setting them out more fully and distinctly, presents nothing for adjudication by the supreme court. Judgment reversed.

BALDWIN v. MARQUEZE et al.

(Supreme Court of Georgia. March 27, 1893.)

CONTRACT OF EMPLOYMENT—BREACH—DAMAGES.

1. By the correspondence between the parties, a contract was entered into which contemplated a continuance of business for the season of 1890, of the same kind which had been previously carried on, to wit, the procurement of orders for merchandise upon the usual credit, and not for cash only; the new feature being that plaintiff was to be compensated for his services by a specified commission on the amount of such orders, instead of by a salary.

2. It was a breach of the contract for the defendants to withdraw the power to take orders for credit sales, and restrict the plaintiff to the procurement of orders for cash sales only. As this breach would result naturally, or most probably, in a material reduction of the plaintiff's compensation, he was justified in discontinuing his services, and in declining to execute the contract on his part.

3. By the breach above referred to, the plaintiff had a cause of action for all the damages which he sustained thereby. His damages were not speculative, nor too remote, and the evidence warranted the verdict as to amount. The court erred in granting a new trial.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by F. S. Baldwin against Marquese & Varney for breach of contract of employment. There was a verdict for plaintiff, and a new trial awarded. Plaintiff brings error. Reversed.

Lumpkin & Burnett, for plaintiff in error. Barrow & Thomas, for defendants in error.

BLECKLEY, C. J. 1. The correspondence between the parties, reading it all together, concluded a contract for the continuance of business by Baldwin as drummer or traveling salesman for the firm, for the season of 1890; and the business contemplated was of the same kind as that previously carried on, which was the procurement of orders for merchandise upon the usual credit, not for cash only. One new feature, and but one, was introduced: the compensation of Baldwin was to be a specified commission on the orders he procured, and not a fixed salary, as it had previously been.

2. It was necessarily implied in the contract that Baldwin should have and retain power to take the class of orders which the contract contemplated until the season of 1890 closed. When this power was withdrawn, and he was restricted to soliciting and receiving cash orders only, the contract was broken. Because of this breach, he was justified in withdrawing from the business, and declining to execute the contract on his part. Such cutting down of his power would be almost sure to result in a very material reduction of orders, and thereby curtail his compensation. This would be a natural—certainly, a most probable—consequence, for it is matter of common information that, in mercantile business, cash orders plus credit orders would amount generally to very much more than cash orders alone.

3. It would be a reproach to the law if one seriously injured by a breach of contract could not recover therefor all the damages which he actually sustains. Under our Code, no such defect in the law of damages exists, whatever may be infirmities of other legal systems. The damages recovered in this case were neither speculative nor too remote, nor were they excessive in amount. No error was committed, for which a new trial ought to be granted, and the court erred in granting the motion. The verdict must stand. Judgment reversed.

CLAFLIN et al. v. BALLANCE et al.

(Supreme Court of Georgia. March 27, 1893.)

FRAUDULENT CONVEYANCES—MORTGAGE BY DEBTOR TO CREDITOR—DECLARATIONS OF MORTGAGEE'S AGENT—SUFFICIENCY OF EVIDENCE.

1. In a contest between the mortgagee of an insolvent debtor and other creditors who attack the mortgage as fraudulent, acts and declarations of the debtor tending to prove fraudulent intent and motive on his part may be received in evidence for this purpose only, though such acts and declarations were subsequent to the execution, or even to the foreclosure, of the mortgage. They would, however, not affect the mortgagee without some evidence to connect him with the fraud of the mortgagor at or prior to the execution of the mortgage, either by actual participation or by having notice or grounds for reasonable suspicion.

2. Declarations of the mortgagee's agent, who represented him in taking the mortgage, if made not at the time of its execution, but

after its foreclosure, and while an official sale under it was in progress, the declarations not being pertinent to any business of the principal in which the agent was engaged at the time of making them, but only by way of recital either of what the agent had known or suspected, or of what he then knew or suspected, would not affect the mortgagee, his principal, so as to warrant any finding based thereon against the bona fides of the mortgage.

3. The evidence being wholly insufficient to warrant the jury in finding that the mortgagee either participated in the fraud of the mortgagor or was chargeable with notice of the same, whether by reason of actual knowledge or grounds of reasonable suspicion, the court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Clarke county; N. L. Hutchins, Judge.

Action by Ballance & Sorrels and others against H. B. Claflin & Co. to cancel a mortgage. There was a verdict for plaintiffs, and a new trial denied. Defendants bring error. Reversed.

Lumpkin & Burnett, for plaintiffs in error. T. W. Rucker, Barrow & Thomas, A. S. Erwin, Tuck & Henley, and Thomas & Strickland, for defendants in error.

BLECKLEY, C. J. 1. For a mortgage made by a debtor in favor of one of his creditors to be defeated by his fraudulent intent as against other creditors two things must be shown: First, that such fraudulent intent existed; and, second, that the mortgagee was connected with the fraud, either by participating in the intent, or by having notice of it, or grounds for reasonable suspicion. On the first of these questions, acts and declarations of the debtor, indicative of such intent, are competent evidence, without reference to whether they were known to the mortgagee or not; and to render them competent it is not necessary that all of them should have transpired at or before the execution of the mortgage, or even before its foreclosure. A scheme of fraud may manifest itself partly before and partly after the main fact. Indeed, the only decisive external circumstances capable of proof may all occur afterwards. The perpetration of a fraud rarely happens as an isolated act; it usually comprehends a course of conduct projected and pursued as means of securing the fruits of the fraud. The fraudulent mind is selfish; it wants to make something by its rascality. Acts embraced in the fraudulent scheme, and performed in carrying it out to the ultimate selfish result contemplated, belong to the *res gestae* of the fraud; and the same is true of any declarations accompanying these acts which tend to explain and give them character. To run down and expose an alleged fraud it is generally necessary to frame some hypothesis concerning the whole course and range of conduct which would be involved in the fraudulent scheme to render it successful. If the hypothesis, as such, be sound

in itself, the next step is to ascertain by evidence whether the accomplished facts of the case conform to it. The investigation would be futile as a verification of the hypothesis were the evidence limited to a field of accomplished facts less extensive than that covered by the hypothesis. The unaccomplished facts, if any, though a necessary part of the hypothesis, could only be inferred as embraced in the projected scheme of conduct, since their nonaccomplishment would preclude proof of them as actual conduct. As evidence to establish the fraudulent intent of Hirschfield & Blumenthal, the mortgagors, in executing the mortgage to Claflin & Co., their acts and declarations connected with the hypothetical fraudulent scheme. Their acts done and declarations made at any time from the conception of the scheme down to the time of trial, would be competent; for so long as the scheme was pending, and anything remained to be done to take or to secure its fruits, it would neither be too early nor too late for them to manifest their real intention. But the effect of the evidence was properly restricted to the one purpose of convicting them of a fraudulent intent. It could not be used to prove notice on the part of Claflin & Co. of that intent, or that they had grounds for reasonably suspecting it, or that they participated in the fraud in any manner whatever. It would simply supply one of the two necessary links in the chain of evidence necessary to vitiate the mortgage; it would neither dispense with the other link nor supply any part of it.

2. The declarations made by Frank, the agent of Claflin & Co., while the official sale of the goods under the mortgage was in progress, merely asserted his own knowledge or suspicions, past and present, touching the fraudulent nature and purpose of the mortgage. He was certainly not the agent of his principals to make these declarations, for they were not pertinent nor appropriate to the transaction of any business which he was then transacting in their behalf. Surely an agent cannot destroy a mortgage by talking it to death after he has taken it, and while attending a sale which an officer is making to convert the mortgaged goods into money. Any finding against the bona fides of the mortgage, based on these declarations, would be wholly unwarranted. What Frank knew, or what he suspected on reasonable grounds of suspicion, at the time of taking the mortgage, would be imputable to his principals; but this would have to be proved by evidence other than his subsequent declarations. Any mere recital of his knowledge or suspicions by subsequent narration would not affect them. Nor would any knowledge acquired by him, or even by themselves, after the mortgage was executed and delivered, or any suspicions originating thereafter, count for anything.

3. As stated in the third headnote, the evi-

dence was wholly insufficient on a vital part of the case, and the court erred in not granting a new trial. Judgment reversed.

PRINTUP et al. v. PATTON et al.

(Supreme Court of Georgia. March 27, 1893.

FERRY—LIABILITY OF OWNER FOR TORT OF FERRYMAN—EVIDENCE—PROOF OF OWNERSHIP.

1. The admissions contained in an answer of the defendant, made and filed by him in another case, are admissible in evidence against him when pertinent to a question involved in the case on trial.

2. Such admissions, together with other evidence, may show that defendant was owner of the ferry at the time the tort sued for was committed. But as the admissions related to a time a year or two previous to the tort, they alone were not sufficient to charge him as owner.

3. A receipt signed by the father of defendant, acknowledging that a sum of money had been paid to him by the administrator with the will annexed of a former owner of the ferry upon a judgment, is not relevant where the question is as to defendant's liability for a tort committed by the ferryman several years after the date of the receipt.

4. The opinion of a witness that the ferryman was not as careful as he should have been is not admissible evidence.

5. Under Code, § 690, the owner of the land on which a public ferry is situated, unless the ownership of the ferry be separated from that of the land, is liable for negligent torts committed by the ferryman in the performance of his duties as such, whether the owner object to the use of the ferry or not. In order to avoid responsibility to the public he must prevent his ferry from being used as a public ferry by a tenant of the land, or at least show that he did all in his power to prevent it.

6. One of several owners of a ferry, unless he pleads the nonjoinder of his co-owners, is liable for a negligent tort committed by the ferryman. But where there is no evidence from which the jury could possibly find such joint ownership, no charge to the jury on that subject is appropriate.

7. The appointment of an administrator with the will annexed is not necessarily void because an executor had previously been duly qualified, and letters testamentary issued to him. The executor may have resigned or been removed before the administrator was appointed.

8. Where one pays the consideration for the purchase of land, and causes the conveyance to be made to his brother, an intended gift is probable, and consequently a trust will not necessarily result.

9. The court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Gordon county; T. W. Milner, Judge.

Action in tort by Patton & Jackson against John C. Printup and one Talley, respectively, as owner and operator of a ferryboat. There was a verdict for plaintiffs, and a new trial denied. Defendants bring error. Reversed.

Dabney & Fouché and E. J. Kiker, for plaintiffs in error. W. K. Moore and O. N. Starr, for defendants in error.

BLECKLEY, C. J. 1, 2. As to the competency and effect of admissions made by J.

C. Printup in his answer filed in another case, the headnotes speak all that need be said.

3. The alleged tort was not committed by J. C. Printup, but by his codefendant, Talley, who was the ferryman. It was sought to hold Printup liable, if not as employer of the ferryman, as owner or part owner of the land. Whether he was such owner or not was a controverted fact. How a receipt signed by his father, in which he, the father, acknowledged payment of a sum of money on a judgment in his favor, would illustrate this question, or any other involved in the case, we are unable to see. That the defendant in the judgment paid the money and was administrator with the will annexed of J. J. Printup, who formerly owned the ferry, seems utterly immaterial. What connection did the judgment, or the payment or the receipt, or Printup's father, have with the ferry or the land on which it was situated? None whatever, so far as appears. The receipt was several years older than the tort complained of.

4. Jury, not witness, ought to determine whether the ferryman was as careful as he should have been. Negligence is a question of fact dependent upon other facts. Witnesses supply the latter, and from them the jury infer the former, when the inference can properly be drawn.

5. The Code, § 690, reads thus: "Any proprietor of any bridge, ferry, turnpike, or causeway, whether by charter or prescription or without, or whether by right of owning the lands on the stream, are bound to prompt and faithful attention to all their duties as such; and, if any damage shall occur by reason of nonattendance, neglect, carelessness, or bad conduct, he is bound for all damages, even if over and beyond the amount of any bond that may be given." We construe this section as stated in the fifth headnote. Where ownership of the ferry is separated from that of the land, the owner of the latter has no control over keeping the ferry open, using it, or the manner of its use; but where he owns the ferry as well as the land, he must keep it closed, or take the consequences. He must at least do all in his power to prevent any tenant of the land from using it as a public ferry. The policy of the statute is to protect the public against injuries by careless or incompetent ferrymen who may be too indigent to respond in damages. Another object is to make it easy for strangers and wayfaring men to ascertain whom to sue in case they are injured. The name and residence of the particular ferryman in whose charge the ferryboat was when the injury was sustained might be hard to prove, but to whom the ferry or the adjacent lands belonged would generally be widely known in the neighborhood, and readily established. We say this would generally be so, though in the present case the reverse seems to be true.

6. It must be conceded that, where ownership of the ferry or the land is the sole ground of liability, and such ownership is in two or more persons jointly, they should all be joined as defendants in the action. But the nonjoinder, unless pleaded in abatement, would not defeat a recovery. In the present case, however, there was no adequate evidence of joint ownership, and no charge to the jury on that subject was appropriate.

7. It did not affirmatively appear that the executor of J. J. Printup, deceased, though still living, had not resigned or been removed before Forsyth was appointed administrator with the will annexed. The fact of Forsyth's appointment by the court of ordinary, which had jurisdiction of the subject-matter, implied that there was a vacancy in the office of executor, since, were there not a vacancy, no occasion for such an appointment would have existed. That court, being one of general jurisdiction touching the administration of estates, testate and intestate, every presumption is in favor of the regularity and validity of its judgments. Nothing appeared to impeach this one, save the previous qualification of the executor, and the issuing to him of letters testamentary. There was no necessary inconsistency between the two representations of the same estate, one succeeding the other, though the first representative was not yet dead. Had it been shown that he had not vacated the office when Forsyth was appointed, that would have branded the appointment as void.

8. As between husband and wife, parent and child, brother and brother, or sister and sister, payment of the purchase money of land by one of the correlatives, and causing the conveyance to be made to the other, will generally suggest an intention to make a gift. This may or may not prevent a resulting trust, according to the circumstances of the particular transaction. Certainly a trust for the benefit of the one paying the money does not necessarily result.

9. We are clearly of opinion that the court erred in not granting a new trial. Judgment reversed.

THOMAS v. FUNKHOUSER.

(Supreme Court of Georgia. April 3, 1893.)

PRINCIPAL AND AGENT—RIGHTS INTER SE—BREACH OF DUTY BY AGENT—BURDEN OF PROOF

By the law of this state (Code, § 2794) a contract of insurance must be in writing, though the writing need not be delivered if in other respects the contract is consummated. Where it is not delivered, an agent whose duty it is to keep the property of his principal insured is under obligation to see that in other respects the contract is consummated; and, on being sued for a breach of duty, the burden of proving that it was in fact consummated is on him. If he seeks to show this by evidence of a local custom, whereby it was the practice of insurance companies to renew any policy about to expire by sending out a new policy shortly before the expiration of the former one, and

presenting a bill for the premium within a month or two after such expiration, the burden is on him to establish that this custom was complied with in the particular instance. If a new policy, though written up in the company's office, was never sent out, nor any bill for premium presented, nor any premium paid or tendered, and if the premises were destroyed by fire long after the usual time for thus consummating a renewal contract had elapsed, the agent is liable.

(Syllabus by the Court.)

Error from city court of Floyd; W. T. Turnbull, Judge.

Action by E. C. Thomas against Samuel Funkhouser to recover damages for a breach of duty as plaintiff's agent of certain premises in failing to keep the premises insured against loss by fire. There was a verdict for defendant, and a new trial denied. Plaintiff brings error. Reversed.

Dean & Smith, for plaintiff in error. O. N. Featherston, for defendant in error.

BLECKLEY, O. J. Whether tested by the general law, irrespective of the particular custom which seems to have prevailed at Rome in the transaction of insurance business, or by that custom itself, there was a prima facie liability on the defendant to answer for damages in the present case. He was the plaintiff's agent to keep the premises insured. She had reason to rely upon him, and to believe that he had done so. Under Code, § 2794, there could be no valid contract of insurance without writing. The duty of keeping the property insured would, therefore, embrace the duty of seeing that some contract of insurance in writing was kept on foot. No such contract covering the period at which this loss occurred was ever consummated, though a policy was written up, and might possibly have been delivered, if the local custom in respect to collecting the premium had been complied with. But that was not complied with, and hence the writing up of the policy counted for nothing. It is said that it was the company's fault that the premium was not paid, because the custom was for the companies to send out bills for premiums, and in this instance no bill was sent. But it is not sufficient for an agent employed to keep up insurance to put the company in fault. The owner of the property does not want any company to be put in fault, because that would most probably involve a lawsuit. What the owner wants is to have right and regular insurance kept up, so as to avoid trouble and litigation in case loss should occur. It would be unreasonable to allow an agent to turn over a lawsuit to his principal, even though a recovery might ultimately be had, instead of a proper and regular contract of insurance, at least one fully consummated with the insurance company, instead of lacking a material element of consummation according to both general law and the local usage. The court erred in not granting a new trial. Judgment reversed.

McELMURRAY v. BLUE et al.

(Supreme Court of Georgia. April 10, 1893.)

**HOMESTEAD EXEMPTION—NEW TRIAL—NEWLY-
DISCOVERED EVIDENCE.**

1. A note payable to the vendor or bearer, given for the purchase money of land, being transferred to a bearer by delivery, and renewed from time to time, and the last renewal note being reduced to judgment, the land is subject to pay the judgment, as against a homestead in the same land claimed and set up by the vendee, the defendant in the judgment. *Wofford v. Gaines*, 53 Ga. 485.

2. The supreme court will not reverse a judgment denying a new trial for newly-discovered evidence, where it appears from the brief of evidence that some of the material facts alleged to be newly discovered were known to the movant at the time of trial. His affidavit to the contrary, being discredited by the brief, may be wholly disregarded, especially where it is the only evidence of his diligence in preparing for trial, and no specific acts of diligence are disclosed even by it.

(Syllabus by the Court.)

Error from superior court, Marion county; J. H. Martin, Judge.

Blue & Stewart, having recovered judgment against McElmurray on a note, levied on certain land which defendant claimed as a homestead. Judgment for plaintiffs, and, from an order refusing a new trial, defendant brings error. Affirmed.

C. J. Thornton, Morgan McMichael, and W. D. Crawford, for plaintiff in error. Miller & Munro, for defendants in error.

BLECKLEY, C. J. 1. A homestead in land will not protect the land against paying its own purchase money. Code 1873, § 5135; Code 1892, § 5211. There was a conflict of evidence as to whether the judgment in question was founded on a note given for the purchase money of goods, (a store account,) or in renewal of a note given by McElmurray to Chapman for land. The jury settled this conflict against the debtor, and in favor of the creditors. The note given to Chapman was payable to him, or bearer, and by him transferred, by mere delivery, to Blue & Stewart. According to their evidence, it was renewed from time to time, and the last renewal note was the basis of the judgment. On this state of facts, the land would be subject to pay the judgment, as against a homestead claimed and set up by McElmurray, Chapman's vendee. *Wofford v. Gaines*, 53 Ga. 485. That part of the charge of the court which is assigned as error was apparently not adjusted accurately to the facts in evidence; but the deviation was too slight to be material, as the real contest between the parties was as to whether the note reduced to judgment represented the purchase money of land or the purchase money of goods.

2. From the brief of evidence, we think it clearly appears that some of the material facts alleged to be newly discovered were known to the movant at the time of trial.

His affidavit that all of them were discovered afterwards is thus discredited, and may be disregarded. There is no evidence of his diligence in preparing for trial, except as stated in this affidavit, and even it discloses no specific acts of diligence. Our conclusion is that there was no error in overruling the motion for a new trial. Judgment affirmed.

KING, Sheriff, v. CASTLEN et al.

(Supreme Court of Georgia. April 3, 1893.)

**ACTION ON REPLEVIN BOND—VARYING CONDI-
TIONS BY PAROL.**

1. As the statute (Code, § 3728) prescribes the condition of all forthcoming bonds which the levying officer is authorized and required to take in claim cases, the officer has no power to take a forthcoming bond with a different condition, or to qualify or vary the prescribed condition, by any agreement whatever made with the claimant or with the surety by whom the statutory bond is executed. Any such agreement is simply void and without effect as against an action upon the bond, brought after the termination of the claim case by the plaintiff in execution, or by the officer for his use.

2. The sheriff having levied on personal property which was claimed by another, who replevied the same by giving a bond with security, conditioned, as required by section 3728 of the Code, to deliver the property "at the time and place of sale" in case the same should be found subject to the *fi. fa.* levied, and there having been a failure to deliver the property at the courthouse door, after the same had been found subject, and duly advertised for sale by the sheriff, it was no defense to an action upon this bond, brought by the sheriff for use of the plaintiff in *fi. fa.* against the claimant and the surety for breach thereof, that he had induced the defendants to sign the bond by promising them he would not require the property, which was heavy, and expensive to transport, to be brought to the courthouse door, but would sell it where it was; or that he repeated this promise after the bond had been executed. The courthouse door was the only place where the sale could be legally made, whether the sheriff brought and exhibited the property there or not, and consequently the terms of the bond as to time and place of delivery were not ambiguous, and could not be varied by parol evidence tending to show that the defendants had agreed to deliver at some other place. The provisions of section 3046 of the Code, relieving levying officers in certain instances from removing heavy property to the courthouse door, were made for the benefit of the officers and the parties to processes levied by them, and not for the benefit of other persons who may voluntarily contract in writing by a statutory bond to deliver such property at the courthouse door.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. S. Boynton, Judge.

Action on a replevin bond by C. A. King, sheriff, for the use of Rhodes & Waters, against Mary A. Castlen and another. There was a verdict for defendants, and a new trial denied. Plaintiff brings error. Reversed.

The following is the official report:

King, sheriff, suing for the use of Rhodes & Waters, brought his action against Mary A. Castlen, principal, and I. S. Maynard, security, upon a forthcoming bond, given by Mrs. Castlen and Maynard for the forth-

coming "at the time and place of sale" (sheriff's) of a stationary boiler and detached engine, coupler, and fixtures of a gin, feeder and condenser, which had been levied on under an execution in favor of Rhodes & Waters against I. H. Castlen, and claimed by Mrs. Castlen. The pleas of defendants were demurred to, except that of the general issue, on the ground that they set forth no valid or legal defense to the suit, and were an effort to ingraft by parol additional stipulations upon the written contract sued on. This demurrer was overruled, to which plaintiff excepted. A verdict was rendered for defendants, and plaintiff's motion for new trial was overruled, to which also he excepted.

The pleas in question were: It was lawful for the sheriff to have sold the property levied on, as the same was difficult and expensive to transport, and it was upon the statement of the sheriff that he would sell the property where it was that defendants were induced to sign the bond sued on. Defendants cared for and protected the property where it was, and had it there, subject to the order of the sheriff, on the day of sale; and the sheriff desired to carry out his agreement with defendants, and sell the property where it was, as the law allowed him to do, but was prevented from doing so by plaintiff's attorney. Defendant Maynard further pleaded the bond sued on has not been forfeited in terms of the law. Further, he was induced to sign the bond through fraud, accident, and mistake; for at the time of signing it the sheriff told him it would be no trouble to him, (defendant,) because, if the property was ever sold, he, the sheriff, would sell it where it was, and not require the property to be brought to the courthouse on the day of sale; that the law allowed the sheriff to do so; and the sheriff then and there promised to sell it where it was, and not require it to be brought to the courthouse on the day of sale. To be sure about this being lawful, defendant went with the sheriff to the office of a firm of lawyers, (not plaintiff's attorney,) and asked them if the law would allow the sheriff to sell the property where it was, and not require it to be brought to the courthouse on the day of sale, and they answered that the sheriff could sell the property as aforesaid, and it was upon this representation and understanding that defendant was induced to sign the bond. Further, that the sheriff made the same promise, and entered into the same agreement, after the bond was executed.

The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc. Also that the court erred in admitting the testimony of Maynard to the effect that Sheriff C. A. King told defendant that it would be no trouble to him, because, if the property was ever brought to sale, he, the sheriff, would sell the same where it was, and not require the property

to be brought to the courthouse on the day of sale, before he signed the bond sued on; and that the sheriff made the same promise and entered into the same agreement after the bond sued on was executed, etc. Plaintiff objected to said testimony, because all stipulations made prior to the execution of the bond were merged in writing; because it is not competent to vary the terms of the written contract by parol; and because, the plaintiff in *fi. fa.* being the real party in interest, and for whose benefit a forthcoming bond in claim cases are taken, no subsequent conversation or agreement by the sheriff can affect the rights of the plaintiff in *fi. fa.*; and because the bond sued on was not ambiguous, and its terms needed no explanation; because the court erred, for the same reasons, in admitting the testimony of plaintiff as to conversations had with Maynard both before and after signing the bond, which testimony was objected to as incompetent, irrelevant, and inadmissible for the reasons set forth in the ground last above. Error in charging: "The law authorized the sheriff to sell the property without having it present at the county site, but to sell as located at the place where it was found and levied upon, if he saw proper to do so, if it be heavy machinery, and difficult and expensive to move. The law would authorize him to make such a sale, and it was in his power and discretion so to sell it, without removing it to the county site; and, it being in his power to sell it that way, if he stipulated with Mrs. Castlen, principal, and Mr. Maynard, her security, to take a bond that the property should be sold without being brought to the county site, but that it would be sold at the place where he found it, and where it was located,—if he stipulated with them that the property should be sold in that way, and that the delivering the property at the place designated would be recognized by him as a sufficient compliance with the bond,—he had the right to make such a contract; and if he made such a contract with them, and they became liable for the delivery of the property under the terms of such a contract as that, then, if you believe from the testimony that the property was machinery, heavy machinery, difficult and expensive to move, and that the sheriff determined that he would sell it without moving it, would sell it as located upon the premises where it was found and levied upon, and if he so notified the bondsmen as an inducement for them to give the bond, and stipulated with them that the delivery of the property at the place stipulated for the delivery would be a compliance with the bond, then the sheriff would have no right to recover unless the bondsmen had placed it out of his power to deliver the property at that place. If you believe from the evidence that such a contract was made, that such a stipulation was made by the sheriff with the bondsmen, and that the property was advertised for sale, and if the sher-

iff failed to advertise it for sale as being at the place where it was at time of levy, yet if the securities were then ready and offered to deliver it then to the sheriff whenever he should demand it,—that is, to deliver it at that place where the property was found, when he should demand it,—and if the sheriff failed to advertise it for sale in that way, then the plaintiff would not be entitled to recover.” Alleged to be error in that it allowed the right to add to and vary the written contract sued on by parol, because it recognized the right of the sheriff to bind plaintiff in *fi. fa.*—the real party in interest—by conversations in his absence; and because the sheriff only has a right under the law to sell personal property at a place different from the regular place of sheriff's sale, when there is no forthcoming bond, and when the property is in the custody and control of the sheriff; with which principle of law the charge conflicts.

S. N. Woodward, for plaintiff in error.
Berner & Bloodworth, R. L. Maynard, and Cabaniss & Willingham, for defendants in error.

BLECKLEY, C. J. The two sections of the Code referred to in the headnotes read as follows: “In all cases where a levy is made upon property that is claimed by a third person, and such person shall desire the possession thereof, it shall be the duty of the sheriff, or other levying officer, to take bond with good security for a sum equal to double the value of the property levied on, to be estimated by the levying officer, for the delivery of such property at the time and place of sale, provided the property so levied upon shall be found subject to such execution; provided that it shall not be lawful to require or take a forthcoming bond for real estate.” Section 3728. “No sales shall be made, by the sheriffs or coroners, of property taken under execution but at the courthouse of the county where such levy was made, on the first Tuesday in each month, between the hours of 10 A. M. and 4 P. M. and at public outcry; provided, that in all cases where any sheriff, coroner or other levying officer, shall levy any execution or other legal process, upon any corn, lumber, timber of any kind, bricks, machinery, or other articles difficult and expensive to transport, it shall and may be lawful for said officer to sell said property without carrying and exposing the same at the courthouse door on the day of sale; provided, also, that said levying officer shall give a full description of said property, and the place where said property is located, in the advertisement of the sale.” Section 3646. Read in the light of these provisions of the Code and of the official report, the headnotes will be clearly understood, and they are so full that no expansion of them seems necessary. The court erred in not granting a new trial. Judgment reversed.

CENTRAL RAILROAD & BANKING CO.
OF GEORGIA v. ROBERTS.

(Supreme Court of Georgia. April 10, 1893.)

COMPETENCY OF JUROR—CARRIERS—EJECTION OF PASSENGER—CONTRACT OF CARRIAGE—MANNER OF EJECTION—DAMAGES.

1. A juror is not incompetent to try the case because his stepdaughter married the brother of the plaintiff. The marriage established no relationship or affinity between the juror and the plaintiff.

2. A railway agent who sells a Sunday excursion ticket consisting of two parts, one of which signifies that it was to be used in going and the other in returning, but neither of them indicating any particular train, is a proper person of whom to inquire, at the time the ticket is purchased, as to whether it would afford the right to return on a fast train, called the “Canon Ball,” of the same day or night. His reply in the affirmative, together with the possession of the return part of the ticket, and its production to the conductor of the fast train, would entitle the passenger to return on that train, and be put off at the proper station, unless he knew, or had sufficient reason to believe, that the agent was misinforming him, or that there was some rule or order of the company either denying to the agent authority to answer such a question, or forbidding the recognition of such a ticket by the conductor of the fast train.

3. If the passenger was not told by the agent that he could return on the fast train, and if he knew that the fast train did not usually stop at the station, he would have no absolute right to return on that train, provided there was another on which he could return before his ticket expired.

4. There being no conditions on the face of the ticket, and no controversy as to the right of the passenger to return on some train, it was error to charge the jury that one who buys a return ticket has a right to return, if he performs all the conditions of the ticket, and that, if the agent told the passenger that he could go and return on this ticket, the passenger had a right to presume that he could do so, and if, in his effort to do so, he was put off at any other station, he would be entitled to damages. The pressure of the case was upon the right of the passenger to return on the fast train, and the charge, though correct as abstract law, was not pertinent to that question, and might have misled the jury.

5. In order for a passenger to recover for wrongful expulsion from a train, it is not necessary that the conductor should have put his hands on him.

6. A passenger who brings an action of tort for wrongful expulsion from a train is not restricted to a recovery as for breach of contract, but may recover for his injury as a tort. The amount of general damage, no special damage being proved, is matter for the enlightened conscience of an impartial jury.

(Syllabus by the Court.)

Error from superior court, Quitman county; J. H. Guerry, Judge.

Action by T. J. Roberts against the Central Railroad & Banking Company to recover for an alleged wrongful ejection from a train. There was judgment for plaintiff, and defendant brings error. Reversed.

R. F. Lyon and J. R. Cooper, for plaintiff in error. G. A. Whitaker, for defendant in error.

BLECKLEY, C. J. 1. Marriage will relate the husband, by affinity, to the wife's blood

relations, but will not relate the husband's brother to any of her relations. The husband of the juror's stepdaughter was not related to the juror, but only to the juror's wife. The husband's brother, the plaintiff, was further off still. He was not related even to the juror's wife.

The groom and bride each comes within
The circle of the other's kin;
But kin and kin are still no more
Related than they were before.

2. The agent who sold the Sunday excursion ticket represented the company in making the sale, and the information which he gave as to whether the ticket would afford a right to return on a particular train could be relied on, unless it was known to be incorrect, or unless some known rule or order of the company made the agent incompetent to give such information, or forbade the recognition of such a ticket by the conductor of the designated train, or of trains belonging to that class. The ticket being silent on its face as to trains, and one of the parts of the ticket being for a return passage, of course it would be proper for the company to authorize some one to answer questions when the ticket was sold, so that the buyer might know how to use it, and no other person would seem to be so proper for this purpose as the agent selling it.

3. If, when he bought the ticket, the passenger was not told that he could return on the fast train, and if he knew that train did not usually stop at the station, and with this knowledge bought the ticket, he certainly would have no absolute right to return on that train, provided there was some other on which he could return before his ticket expired. Although tickets sold may not expressly include or exclude any of the trains, yet if it be known to the buyer, at the time of his purchase, that such tickets are not recognized on a particular class of trains, but only on trains of a different class, he should be understood as consenting to use his particular ticket as such tickets were used by others, and as the company expected tickets of that class to be used. Such would be the fair meaning of the contract really made between the parties by the purchase and sale of the ticket.

4. There was no dispute that the passenger had a right both to go and return on his ticket. The whole pressure of the case was upon the question whether he had a right to return on the fast train, which did not usually stop at the station at which the ticket was sold, or whether his right was limited to return on some other train, which did stop there. The ticket itself had no conditions on its face touching the matter. This being so, it was obviously misleading, or calculated to mislead, for the court to charge the jury that one who buys a return ticket has a right to return, if he performs all the conditions of the ticket, and that, if the agent told the passenger that he could go and

return on his ticket, the passenger had a right to presume that he could do so, and if, in his effort to do so, he was put off at any other station, he would be entitled to damages. It is to be observed that this charge says, in general terms, that, if the agent told the passenger that he could go and return on his ticket, the passenger had a right to presume that he could do so. This is certainly true, and what immediately follows—that is, if, in his effort to do so, he was put off at any other station, he would be entitled to damages—would also be true, if the agent had told him, not merely that he could return on his ticket, but that he could return on it upon the fast train. The court did not make this a condition of his right to recover, but left it out entirely. As abstract law, the charge was correct, but it was not applicable to the only real question in the case about which the parties disputed. There was a conflict of evidence as to whether the agent told the passenger he could return on the fast train. The charge, as given, would authorize the jury to find against the company without settling that conflict. This error vitiated the whole trial.

5. The contention that, in order for the passenger to recover for wrongful expulsion, it was necessary that the conductor should have put his hands on him, is manifestly unsound. A conductor may expel a passenger as effectually by ordering him off as by pushing him off. He is a man in authority, and may exert that authority by words as well as by using physical force.

6. In such an action as the present, where it is well founded, a recovery may be had for the injury as a tort, as a breach of a public duty by a common carrier,—a duty imposed by law,—though involving in this breach a breach of contract also. The passenger could elect to sue only for the breach of contract, and, did he so elect, his recovery would be limited to nominal damages, if he failed to prove any special damage. But this action being for a tort, and no special damage being proved, proof of the tort, and the circumstances attending it, would entitle the plaintiff to recover such amount as the enlightened conscience of an impartial jury would sanction as fit for the plaintiff to have, and the defendant to pay. There is no other measure of damages for such a case. Judgment reversed.

PURYEAR v. FOSTER, Sheriff, et al.
(Supreme Court of Georgia. March 27, 1893.)
COMPETENCY OF WITNESSES—TRANSACTIONS WITH
DECEDENTS—LOST DOCUMENTS.

One who, by himself or another, has bid off property at sheriff's sale, is generally competent, under the evidence act of 1889, to testify in his own favor, against the administrator of the defendant in the execution under which the sale was made, as to any fact involved in the controversy, except "as to transactions or communications with such deceased

person." The sheriff being still alive, transactions and communications with him may be proved, the same as if the defendant in execution were alive also. So may any knowledge of the witness as to the existence and contents of the lost execution, entries thereon, contents of other lost papers, destroyed records, etc.

(Syllabus by the Court.)

Error from superior court, Walker county; J. W. Maddox, Judge.

Action by John Puryear against W. A. Foster, sheriff, and others. From a judgment of nonsuit, plaintiff brings error. Reversed.

The following is the official report:

A petition was brought, February 23, 1886, by John Puryear, to require Foster, sheriff, to make to him a deed to a certain land lot in pursuance of a sale alleged to have been made by Strange, former sheriff, on the first Tuesday in August, 1873, under a mortgage *fi. fa.* alleged to have issued from the superior court in favor of John Y. Jackson & Co. against Rial Stancel, at which sale Puryear claimed to be the purchaser. He excepts to the rejection of evidence, and to the grant of a nonsuit. His application was resisted by the administrators of Stancel, who had died. This fact was the ground of objection to the testimony which was ruled out. The following evidence was introduced without objection: All the records and papers of every kind belonging to the office of the clerk of the superior court, including the files of the newspapers containing the official advertisements of sheriff's sales, were destroyed by fire in 1883. Strange was sheriff in 1873, and published his advertisements in the Rome Courier. He now lives in the Indian Territory. He had no office in the courthouse. His office was in his pockets. The clerk of the superior court, who has been in office continuously since 1872, has no recollection of the foreclosure of a mortgage in favor John Y. Jackson & Co. against Stancel, or of any such papers ever having been of file. Foster has been sheriff continuously since 1885. No *fi. fa.* in favor of John Y. Jackson & Co. against Stancel ever came into his hands, nor was any such *fi. fa.* turned over to him by his predecessor in office, nor has he ever seen such *fi. fa.* since he has been sheriff. Strange was succeeded by Mize, deceased, who was succeeded by Withers, deceased, who was succeeded by another Mize, deceased, who was succeeded by Patterson. Patterson was sheriff before the courthouse was burned, (February 3, 1883.) No *fi. fa.* in favor of John Y. Jackson & Co. against Stancel was ever in his possession. He never saw any such *fi. fa.*, or any such papers as claimed by plaintiff. Puryear testified that Strange signed and delivered to him, on the day it bears date, the following receipt, which was exhibited to the witness and introduced in evidence: "Received of John Puryear nine dollars, payment of costs on mortgage *fi. fa.* of J. Y. Jackson &

Co. vs. Rial Stancel. This August 5th, 1873. Wm. Strange, Sheriff." He further testified that soon after Strange went out of office he went to Patterson, then the sheriff, in search of said *fi. fa.*, and failed to find it in his office or among his papers, and has since made diligent search, and failed to find it. J. W. Jackson testified that he was a member of the firm of John Y. Jackson & Co. He thought the land in question was sold in 1869, and Strange was sheriff, as he remembered. John Puryear bid off the land for John Y. Jackson & Co. The reason why a deed was not made at time of sale was because they were in debt, and hoped to sell the land soon after the sheriff's sale, and did not demand a deed, thinking that when they did sell the lot they would get the sheriff to make it to their vendee, instead of to them. Subsequently to the sale, in pursuance of an arrangement between the plaintiff, John Y. Jackson & Co., and John Puryear, said Puryear was entitled to a deed to the land. Witness does not know that they ever made but one effort to sell it. Thinks they advertised it for sale only once, in the Rome Courier. Does not know who levied on the land. Was not present when it was sold. Thinks it brought \$50. The *fi. fa.* should have been credited with that sum, less costs. Plaintiffs in *fi. fa.* had the land bid off for them. Following is the rejected testimony: By John Puryear: That Strange, as sheriff, sold at public sale on the first Tuesday in August, 1873, the land in question, as the property of Stancel, under a mortgage *fi. fa.* issued from the superior court in favor of John Y. Jackson & Co. against Stancel; that witness bid off the land at sheriff's sale, and no deed was made to him by the sheriff at the time; that some time afterwards he saw the mortgage *fi. fa.* under which the sale was made in the office of the clerk of the superior court, having the entry of levy on the land, and of the sale on the day named to John Puryear for \$50, and the disposition of the money arising from the sale; that John Y. Jackson & Co. had a mortgage executed by Stancel to them to secure \$500 due them by him, and the land in question was included in the mortgage; and that this mortgage was regularly foreclosed in the superior court, *fi. fa.* issued thereon, and Strange, as sheriff, levied the *fi. fa.* upon the land, and sold it at regular sheriff's sale on the first Tuesday in August, 1873, and witness bid it off for \$50. By J. W. Jackson: That John Y. Jackson & Co. had a mortgage given to them by Stancel for about \$500 principal, which they foreclosed in 1868 or 1869, to the best of his recollection; that execution issued on the foreclosure, and was levied on the land in question; that, after the sale of the land, Stancel came to see witness, to get permission to cut three trees off of the land, and said he thought witness was the right one to come to, as he did not want to get into

any trouble about it; that witness told him to go ahead and get the trees; that Stancel recognized John Y. Jackson & Co. as owners of the land, or their survivors, after the sale, so far as witness knows. He never heard of Stancel claiming any rights on the land after the sale, earlier than 1882.

Lumpkin & Shattuck and Payne & Walker, for plaintiff in error. R. M. W. Glenn, for defendants in error.

BLECKLEY, C. J., (after stating the facts.) The evidence rejected because of the supposed incompetency of the witnesses Puryear and Jackson, on account of the death of Stancel, appears in the official report. Under the evidence act of 1889, the whole of Puryear's evidence was admissible. None of it referred to any transaction or communication with Stancel. It related to a transaction with the sheriff, who is still alive, and to the existence and contents of lost documents and destroyed records. The statement that the mortgage referred to was executed by Stancel meant simply that the mortgage purported to be so executed. As we understand the evidence, the witness did not mean to testify as a fact that it was so executed, or that he knew personally of its execution. He meant to describe and identify the mortgage to which the judgment of foreclosure mentioned by him related, and give the contents of the mortgage, so far as was requisite to the proceeding in hand. The judgment of foreclosure would prove the execution of the mortgage, and, that judgment being destroyed, the witness was competent to prove its contents. The scheme of the evidence was for the witness to prove the judgment, and the judgment to prove the execution of the mortgage. With respect to the testimony of Jackson, some of it was clearly inadmissible, if Jackson had any interest in this proceeding, but some of it was admissible whether he was interested or not. His interest is not clearly apparent, for, although Puryear originally bid off the land for Jackson's firm, and that firm withdrew from the purchase, and allowed Puryear to take the benefit of it, and have the conveyance made to himself, yet, so far as appears, the firm made no warranty in this transaction with Puryear; and, whether he fails or succeeds in this application for a deed from the sheriff, no liability upon Jackson or his firm will necessarily arise or be discharged. Even if we should be mistaken in this, Jackson was certainly competent to prove the foreclosure of the mortgage, the levy of the execution, and the sale of the land under it. It strikes us that Jackson's interest may not be clear enough to exclude him as to any of his proposed evidence, but, of course, this question can be cleared up hereafter. What we adjudge at present is

this: The court erred in holding Jackson and Puryear incompetent to testify as to some of the facts ruled out, they being competent to testify to all the enumerated facts except that the mortgage was in fact made by Stancel, and the further fact that Stancel applied for and obtained leave to cut trees on the land. Of course, what Stancel said to Jackson, and Jackson to him, would be included in this exception. Judgment reversed.

GATEWOOD et ux. v. TOMLINSON et al.
(Supreme Court of North Carolina. Nov. 14, 1893.)

DOWER—ALLOTMENT—LAND SOLD ON EXECUTION.

Under Code, § 2103, providing that on the death of her husband the wife shall be entitled to an estate for her life in one-third value of all the lands whereof her husband was seised during the coverture, a wife cannot in her husband's lifetime have dower allotted her in lands sold on execution against him, as against the purchaser.

Appeal from superior court, Anson county; Whitaker, Judge.

Action by Daniel and Margaret Gatewood against T. R. Tomlinson and others for allotment of dower in land. Judgment for defendants. Plaintiffs appeal. Affirmed.

R. T. Bennett, for appellants. R. E. Little, for appellees.

BURWELL, J. The plaintiffs were married in 1850. The husband acquired land in 1874. It was sold under execution against him in 1889. The defendant purchased it at the sale, and the feme plaintiff asks that her dower in this land be allotted to her. The summons was returnable to the superior court in term, and not before the clerk. A married woman's rights in her husband's lands are fixed by the statute. She has none therein except such as are thus secured to her. The act which is applicable here (Code, § 2103) provides that upon the death of her husband the wife shall be entitled to an estate for her life in one-third in value of all the lands of which her husband was seised during the coverture. By the express words of the statute, her enjoyment of the possession of one-third of the land is postponed until the death of her husband. The defendants have acquired the husband's rights. They stand in his place as to this land. She has, it is true, a right—an inchoate right or estate—in the land, but its enjoyment is postponed by the law until the death of her husband, and is contingent upon her surviving him. The case of Felton v. Elliott, 66 N. C. 195, is directly in point, we think. Three reasons were given by Chief Justice Pearson for dismissing that case. The first two there specified apply here. No error.

STATE v. GILCHRIST.

(Supreme Court of North Carolina. Nov. 14, 1893.)

MURDER—DEGREE—VERDICT.

Act Feb. 11, 1893, dividing murder into two degrees, includes, in the first, all murder perpetrated by any kind of willful, deliberate, and premeditated killing, and in section 3 declares that the existing form of indictment is not altered, but the jury shall determine the degree in their verdict. An indictment following the form authorized in Laws 1887, c. 58, presented that the accused, with force and arms, feloniously, willfully, and with malice aforethought, did kill and murder, etc. There was evidence that the accused and deceased had quarreled, and that accused had made threats. The only evidence as to the manner of the killing was that accused had concealed himself and waylaid deceased, striking him, as he passed, on the head with an axe, and killing him instantly. The court charged that the crime was murder in the first degree, or nothing. The jury found accused guilty of the felony and murder in the manner and form as charged. Held a good conviction of murder in the first degree.

Appeal from superior court, Richmond county; Connor, Judge.

Daniel Gilchrist, convicted of murder, appeals. Affirmed.

There was evidence that the prisoner and the deceased, Frank McKay, had some difficulty a short time before the homicide, and that prisoner had made threats against deceased. There was evidence tending to show that prisoner killed deceased by waylaying him on the road on which deceased was returning from his work at night; that prisoner concealed himself behind some trees on the side of the road, and, as deceased was passing by, knocked him on the head with an axe, killing him instantly. This was the only evidence as to the manner of the killing. The prisoner asked the court to instruct the jury that there was no evidence of murder in the first degree. This was refused, and the court instructed the jury that the prisoner was guilty of murder in the first degree, or nothing. The only evidence in regard to the time of the killing was that it was committed on a Thursday night, in February, 1893. The indictment charged the offense to have been committed on the 9th of February, 1893. Thursday was the 9th of February. The jury rendered a verdict of guilty in manner and form as charged in the indictment. The prisoner moved for a new trial, upon the ground that the jury, in their verdict, did not determine whether the homicide was murder in the first or second degree, and for error in that the court refused to give the instruction asked for. The motion was refused, and the prisoner excepted. A motion in arrest of judgment was also made, because the jury did not determine in their verdict whether the homicide was murder in the first or second degree. Prisoner excepted, and appealed from the judgment.

The Attorney General, for the State.

MacRAE, J. The bill of indictment was drawn under the form authorized in chapter 58 of the Laws of 1887, and reads as follows: "The jurors for the state, upon their oath, present that Daniel Gilchrist, late of the county of Richmond, with force and arms, at and in said county, on the 9th day of February, A. D. 1893, feloniously, willfully, and with malice aforethought, did kill and murder one Frank McKay, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state." At the time of the passage of the act of 1887, there were no degrees in the crime of murder in this state, but on the 11th day of February, 1893, an act was passed "to divide the crime of murder into two degrees, and define the same." This act read as follows: "Section 1. All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. Sec. 2. All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two nor more than thirty years in the penitentiary. Sec. 3. Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree. Sec. 4. That the provisions of this act shall not apply to any crime which shall have been committed prior to the ratification of this act, and shall not affect the existing distinction between murder and manslaughter nor the punishment for manslaughter as now provided by law. Sec. 5. That this act shall be in force from and after its ratification. Ratified the 11th day of February, 1893." It will be noted that the crime is alleged in the bill to have been committed on the 9th day of February, 1893, prior to the ratification of the act last recited, and that the only evidence as to the time of the homicide fixed it on a Thursday night, in February, 1893, and that the 9th of February was on Thursday. So it appears that there were two Thursday nights in February of this year before, and two after, the 11th. It will be assumed in favor of human life that the crime was committed after the passage of the said act.

The verdict is as follows: "That they find the prisoner at the bar, Daniel Gilchrist, guilty of the felony and murder in the manner and form as charged in the bill of indictment." Section 3 of the act of 1893, as above recited, provides that the jury before whom the offender is tried shall determine

in their verdict whether the crime was murder in the first or second degree. The bill of indictment, using the words, "feloniously, willfully, and of malice aforethought," charges a willful, deliberate, and premeditated killing, which, according to section 1 of the act of 1893, is murder in the first degree. The bill charges the highest crime, and the law permits a verdict of guilty of this crime, or of either murder in the second degree or of the felonious slaying called "manslaughter." The verdict should be taken in connection with the charge of his honor and the evidence in the case. *State v. Long*, 7 Jones, (N. C.) 24; *State v. Leak*, 80 N. C. 403; *State v. Thompson*, 95 N. C. 596; *State v. Toole*, 106 N. C. 736, 11 S. E. Rep. 168. A perusal of the testimony, as stated in the case on appeal, will show that there was no ground for the prayer for instruction; that there was no evidence of murder in the second degree; and that there was no error in the instruction that he was guilty of murder in the first degree, or of nothing. The cases cited above settle that where there are various counts in a bill of indictment, and testimony is offered as to one count only, and there is a general verdict of guilty, the verdict will be presumed to have been rendered upon the count to which the evidence was applicable. As the jury in this case, upon proper evidence, could have rendered either one of three verdicts of guilty, it is as if there had been three counts in the bill,—one for murder in the first degree, one for murder in the second degree, and one for manslaughter. There was no evidence on which to warrant a verdict of guilty of murder in the second degree or of manslaughter. The evidence, if believed, would warrant only a verdict of guilty of murder in the first degree, and that is what in manner and form is charged in this bill; and therefore the general verdict was in response to the charge of murder in the first degree, and determined the degree in accordance with the statute. We are not unmindful of the fact that our conclusion is apparently at variance with the decisions of the courts of several other states and with section 2640 of *Thompson on Trials*; but an examination of the cases cited will show quite a difference in the words of their statutes and ours. The bill of indictment charging murder in the first degree, this verdict determines the degree, for it alleges that he is guilty as charged. *Com. v. Earle*, 1 Whart. 525. After a careful examination of the record, we find that there is no error.

STEWART et al. v. BARDIN et al.
(Supreme Court of North Carolina. Nov. 14, 1893.)

MORTGAGES—CONSTRUCTION AND EFFECT.

A provision in a mortgage that after default the mortgagee or his assigns may take possession of the premises, and receive the

rents, "until the rights of the parties shall be fully adjusted according to law," is not inconsistent with the right to have the land sold under a decree of foreclosure if the debt is not paid.

Appeal from superior court, Pender county; Winston, Judge.

Action by J. L. Stewart and others against B. C. Bardin and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

R. O. Burton, for appellees.

BURWELL, J. The mortgage which the plaintiffs seek to foreclose in this action has in it no power of sale, and provides that after default the mortgagee or his assigns may take possession of the mortgaged premises, and receive the rents, "until the rights of the parties shall be fully adjusted according to law." We find nothing in this inconsistent with plaintiffs' assertion of right to have the land sold under a decree of foreclosure if the debt is not paid. It only incorporates in the deed, as an express stipulation between the parties, what the law, without its insertion therein, would have adjudged to be the mortgagee's rights. The right to receive the rents after default is in no wise inconsistent with the asserted right to have the land itself sold. No error.

MAXWELL et al. v. McIVER.

(Supreme Court of North Carolina. Nov. 14, 1893.)

TRIAL—SUBMISSION OF ISSUES—WAIVER OF ERROR.

The fact that one of the issues made by the pleadings was not submitted to the jury is not a ground for complaint by a party who failed to ask for such submission, and who took no exception to those submitted.

Appeal from superior court, Duplin county; Henry R. Bryan, Judge.

Action by J. F. Maxwell and others against Henry McIVER to foreclose a mortgage. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. R. Kornegay, for appellant. A. D. Ward, for appellees.

MacRAE, J. The pleadings disclose that an issue of fraud was raised, which ought to have been presented to the jury; but it does not appear that any such issue was tendered by defendant's counsel, and no exception was taken to the issues submitted. In *Kidder v. McIlhenny*, 81 N. C. 123, it was insisted by the defendant that the issues passed on did not dispose of the matters in controversy in the pleadings, and that there should have been, and should now be, a further issue passed on involving the validity of the mortgage as against the feme defendant, and the objection is thus disposed of in the opinion of the court: "Nor ought the defendants to have been content with the proposed issue, if they desired others.

They should have asked for other issues, and, if necessary, they would have been allowed; or, if not allowed, the refusal would have constituted matter of exception. It might produce serious inconveniences and delays if, when a party has opportunity to propose other and further issues, and he refuses or fails to do so, he could then be heard to complain of the consequences of his own neglect, and thereby increase the costs, as well as delay the determination of the cause." *McDonald v. Carson*, 95 N. C. 377. It is to be regretted that further issues were not tendered, for by reason of this failure the defendant seems to be cut off from his most vital defense. *Walker v. Scott*, 106 N. C. 56, 11 S. E. Rep. 364.

The issues submitted without objection were: (1) What payments have been made on the note sued on? (2) Is the plaintiff G. N. Maxwell indebted to defendant by way of counterclaim, and, if so, in what sum? Upon these issues the testimony offered and rejected and made the subject of exception was irrelevant. It might have been very material if other issues had been submitted, but, as defendant made no tender of others, nor exception to those submitted, we are unable to afford him any relief. The motion to be permitted to amend his answer and set up a plea of usury was denied, and to this the defendant excepted. The allowance of the amendment was within the discretion of the presiding judge, and is not subject to review. No error.

STATE v. ALBERTSON.

(Supreme Court of North Carolina. Nov. 14, 1893.)

AFFRAY—FORMER CONVICTION—SIMPLE ASSAULT.

On indictment for an affray, in that defendant and another did beat and wound each other with deadly weapons, where defendant pleads former conviction before a justice of the peace for a simple assault, and the evidence, both before the justice and in the superior court, shows that defendant used no deadly weapon nor inflicted serious injury, though the other did, the plea should be sustained. *Avery, J.*, dissenting.

Appeal from superior court, Duplin county; Bryan, Judge.

Yancey Albertson, convicted of affray, appeals. Reversed.

A. D. Ward, for appellant. The Attorney General, for the State.

CLARK, J. The indictment charges an affray, in that the defendant and one Maready did beat and wound each other with deadly weapons. The defendant, Albertson, pleaded former conviction. It was admitted that he had been tried before a justice of the peace, and punished for a simple assault. The evidence on the trial before the superior court, as before the justice, showed that he had used no deadly weapon and inflicted

no serious injury, though Maready had. Upon this evidence the plea of former conviction should have been sustained. In *State v. Coppersmith*, 88 N. C. 614, the indictment charged that each of the parties indicted for an affray had used a deadly weapon. The evidence showed that Coppersmith was guilty only of a simple assault. The court below thereupon held that it had no jurisdiction as to him. This was overruled on appeal. The reason for this more fully appears in *State v. Ray*, 89 N. C. 587, (and subsequent cases affirming it,) which is that the charge of using a deadly weapon confers jurisdiction, and that the court, being a court of general jurisdiction, will not dismiss the action upon it appearing that only a simple assault had been committed. The court in such cases will proceed to judgment, though of course it cannot impose a sentence beyond the limit for a simple assault when tried before a justice of the peace. *State v. Johnson*, 94 N. C. 863; *State v. Nash*, 109 N. C. 824, 837, 13 S. E. Rep. 874. Here an assault with a deadly weapon is charged. The proof as to Albertson is of a simple assault. The conviction could only be for a simple assault. It is admitted that Albertson had been tried and punished for that. He cannot be punished again. It was error to overrule the plea of former conviction. *State v. Price*, 111 N. C. 703, 16 S. E. Rep. 414. An affray is a mutual fighting, and an indictment therefor is a charge against each person. One may be acquitted and the other convicted of an assault, or one may be found guilty of an assault with a deadly weapon and the other of a simple assault. If convicted of the latter, a former conviction or acquittal therefor before a justice of the peace is a complete defense, though of course a judgment before a magistrate would not be a defense, when in the subsequent trial in the superior court it appears that the defendant pleading former conviction (or acquittal) had in fact used a deadly weapon or inflicted serious injury. *State v. Huntley*, 91 N. C. 617; *State v. Shelly*, 98 N. C. 673, 4 S. E. Rep. 530. In such case, the justice not having jurisdiction, the proceedings before him would be a nullity. Error.

AVERY, J., dissents.

COLE v. STOKES.

(Supreme Court of North Carolina. Nov. 14, 1893.)

EXECUTORS—PURCHASE OF HEIRS' INTERESTS—PRESUMPTION.

1. A deed by a distributee under a will conveying to the executor of said will, before the latter's final settlement, all the grantor's interest, real and personal, in the estate, is not a mere release, and the burden is on the grantee to show the absence of fraud.

2. The fact that the attorney of a cestui

que trust was present and advised his client at the latter's sale of trust property to the trustee may be considered in rebuttal of the presumption of the trustee's fraud, but does not relieve the trustee of the burden to prove his good faith.

Appeal from superior court, Person county; Henry R. Bryan, Judge.

Action by George F. Cole, administrator of the estate of Caroline Cole, deceased, against W. T. Stokes, executor of the will of Thomas Stokes, deceased, for the amount due said Caroline under said will. Judgment for defendant. Plaintiff appeals. Reversed.

Boone & Parker and W. W. Kitchin, for appellant. J. W. Graham and V. S. Bryant, for respondent.

SHEPHERD, C. J. In order to dispose of this appeal it is only necessary to determine whether there was error on the part of his honor in charging the jury that the burden was upon the plaintiff to establish the fraud alleged in the replication, and embodied in the first issue. The plaintiff is the administrator and sole distributee and heir of his deceased wife, Caroline Cole, and he brings this action against the defendant, who is the executor of Thomas Stokes, deceased, to recover the amount due his intestate under the will of her father, the said Stokes. The defendant denies his liability, and relies upon a deed executed to him by the plaintiff, on May 1, 1890, conveying to the defendant all of the plaintiff's interest, real and personal, in the said estate. At the time of the execution of the above-mentioned deed the defendant had not made his final settlement as executor, and the fiduciary relation therefore still existed between him and the plaintiff. It is well settled that an executor or administrator, in dealing with the estate, and with those who are interested therein, is regarded as a trustee, and as such is subject to that principle which raises a presumption of fraud against him when he undertakes to purchase the trust property from his cestui que trust. In respect to purchases of trust property, real or personal, directly or indirectly, from himself, whether privately or at auction, the law considers them invalid; and, says Pearson, J., in *Brothers v. Brothers*, 7 Ired. Eq. 150, even if the trustee "gives a fair price, the cestui que trust has his election to treat the sale as a nullity;" and this, "not because there is, but because there may be, fraud." *Patton v. Thompson*, 2 Jones, Eq. 285; *Stilly v. Rice*, 67 N. C. 178; *Froneberger v. Lewis*, 79 N. C. 426; *Gibson v. Barbour*, 100 N. C. 192, 6 S. E. Rep. 766. In respect to purchases, as in this case, from the cestui que trust, the court of chancery in the time of Lord Erskine seemed much inclined to impose a total disability on the trustee. This view, however, did not prevail, and his power to so contract is not absolutely prohibited,

though, remarks Ruffin, J., in *Boyd v. Hawkins*, 2 Dev. Eq. 195, the restrictions imposed "almost extinguish it." He further observes that such transactions are viewed with anxious jealousy, and that "it must appear that the relation has ceased, at least that all necessity for activity in the trust has terminated, so that the trustee and cestui que trust are two persons, each at liberty, without the concurrence of the other, to consult his own interest, and capable of vindicating it; or that there was a contract definitely made, the terms and effect of which were clearly understood, and that there was no fraud or misapprehension, and no advantage taken by the trustee of the distress or ignorance of the other party. The purchase must also be fair and reasonable. *Coles v. Trecothick*, 9 Ves. 246; *Fox v. Mackreth*, 2 Brown, Ch. 400. These cases are not allowed to turn on nice inquiries,—whether it might not possibly be for the benefit of the cestui que trust to make that particular contract rather than none at all,—but when there is a fair judicial doubt, as some of the cases express it, whether the trustee has not availed himself of his confidential situation to obtain selfish advantage, the contract cannot stand."

Lord Eldon said, in *Coles v. Trecothick*, supra, "that a trustee may buy from the cestui que trust, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the cestui que trust intended the trustee should buy, and there is no fraud, no concealment, no advantage taken, by the trustee, of information acquired by him in the character of trustee." Again, it is said "that the trustee must show that he took no advantage whatever of his situation, and that he gave to his cestui que trust all the information which he possessed." *Fox v. Mackreth*, supra; *Id.*, 1 White & T. Lead. Cas. Eq. 261, note. Mr. Pomeroy says that the trustee must show by "unimpeachable and convincing evidence that the beneficiary, being sui generis, had full information and complete understanding of all facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all knowledge or information * * * possessed by himself, or which he might with reasonable diligence have possessed," etc. 2 Pom. Eq. Jur. 958; *Hill, Trustees*, 237; *Bisp. Eq. § 237*; *Davoue v. Fanning*, 2 Johns. Ch. 251; *Baxter v. Costin*, Busb. Eq. 262; *McLeod v. Bullard*, 86 N. C. 210; *Atkins v. Withers*, 94 N. C. 581. The foregoing extracts are reproduced for the purpose of showing the nature and strength of the rule which equity has laid down for the protection of cestuis que trustent when contracting with their trustees, and we are very

clearly of the opinion that the principle applies in all its rigor to the present case. It was not contended that the trust was closed when this transaction took place, and the instrument set up in bar of the plaintiff's recovery is not, as insisted, a mere release, but most essentially a conveyance of the plaintiff's entire interest in the estate, both real and personal. Under these conditions the presumption of fraud arose, and the jury should have been so instructed. The fact that the plaintiff's lawyer was present and advised him in the matter is one of the circumstances to be considered in rebuttal of the presumption, but does not prevent the application of the presumption itself. Whether a full and complete disclosure was made to the plaintiff's lawyer, whether, indeed, the defendant's lawyer, who made the purchase for him, had been put into possession of all the circumstances by his client, (and this seems doubtful,) and whether, in consideration of the place and manner of the settlement, the means of inquiry were at hand, are elements to be considered in determining whether the trustee had placed himself in a condition to purchase of his cestui que trust; but, as we have seen, they do not prevent the operation of the presumption of fraud, so as to shift the burden of proof. We have examined with much care the cases cited in behalf of the defendant, and are entirely satisfied that they do not conflict in the slightest degree with the principles above stated. There was error in placing the burden upon the plaintiff instead of the defendant. New trial.

STROUSE et al. v. COHEN et ux.

(Supreme Court of North Carolina. Dec. 5, 1893.)

MARRIED WOMAN—MORTGAGES—SEPARATE ESTATE—WORDS OF CONVEYANCE—DESCRIPTION—CHARGE ON ESTATE.

1. The word "convey," in a mortgage, is sufficient to transfer the property without the use of any synonymous words.

2. The words "such an interest," in property already described, as will secure the debt, is sufficient description in a mortgage of the interest mortgaged.

3. "My real and personal property, all of which is situated in the city of N.," is a sufficient description in a mortgage of the property mortgaged.

4. The words "to secure the payment of the above-expressed amount" make an instrument a mortgage, and not a simple conveyance.

5. The addition to an instrument executed by a married woman, with the expressed purpose of securing an indebtedness, of the words, "hereby making said sum a charge upon said separate estate," does not change its nature from a mortgage to a mere charge.

6. Even if an instrument purporting to be a mortgage of a married woman's realty and personalty is invalid as to the realty, because the husband does not join in the body thereof, this does not invalidate it as to the personalty.

Appeal from superior court, Craven county; W. A. Hoke, Judge.

Action by Strouse, Loeb & Co. against W. H. Cohen and wife to foreclose a mortgage. From a judgment for plaintiffs so far as the personal property described in the instrument was concerned, defendants appeal. Affirmed.

O. H. Gulon and W. W. Clark, for appellants. Jas. W. Waters, for appellees.

CLARK, J. In the present case the married woman executed her note, payable September 1, 1892, recited to be for value received, and further recites in the same instrument: "The said amount is due the said firm of Strouse, Loeb & Co. by myself for goods sold and delivered to me by the said firm at the city of Newbern, county of Craven, and state of North Carolina, at which place I am engaged in the business of merchandising; and I being a married woman, and being possessed of a separate estate of both real and personal property, all of which is situated in the said city of Newbern, county and state aforesaid, and desiring to secure the payment of the above sum to the said parties constituting the said firm of Strouse, Loeb & Co.: Now, therefore, be it known that I hereby convey to the said parties aforesaid, their heirs and assigns, such an interest in the said separate estate, both real and personal, as will secure the payment of the above-expressed amount, hereby making the said sum a charge upon the said separate estate for the purposes herein expressed." This is signed under seal by the wife, and the husband appends his "full consent and agreement" to the execution of the above by his wife. The privy examination of the wife is duly had, and the instrument is probated, ordered to registration, and is duly registered. The officer certifies that both husband and wife "acknowledged the execution of the foregoing instrument as their act and deed." The instrument expresses a desire "to secure the payment of the above sum" to the party selling the goods, and then it proceeds: "Therefore be it known that I hereby convey to the said parties aforesaid, their heirs and assigns, such an interest in the said separate estate, both real and personal as will secure the payment of the above-expressed amount." Here is every essential of a mortgage. The debt and consideration for it are set out. The word "convey" is as complete a transfer as if a dozen or more synonymous words followed. Harris v. Jones, 83 N. C. 317. "To parties aforesaid, their heirs and assigns." While the words "heirs and assigns" are not necessary in a mortgage, they are customary words therein, but inappropriate and unusual in merely acknowledging a debt to be due. "Such an interest" in property already described is held sufficient in a mortgage. Pemberton v. Simmons, 100 N. C. 316, 6. S. E. 122. "My real and personal estate, all of which is situated in the city of Newbern," is held a sufficient description in Woodlief v. Harris, 95 N. C. 211; Har-

ris v. Alden, 104 N. C. 86, 10 S. E. 127, and other cases. Certainly these words would be sufficient in a deed, and of course in a mortgage also. "To secure the payment of the above-expressed amount" makes it a mortgage, and not a simple conveyance. If, at the end of such a conveyance, by a male person or a feme sole, there had been added, "hereby acknowledging such debt to be honestly due," no one would contend that this invalidated the mortgage which had just so solemnly described grantor's property, and conveyed it to secure the indebtedness. Yet the words added by a married woman, "hereby making said sum a charge upon said separate estate," can have the same effect no more. While a charge is not necessarily a mortgage, a mortgage is necessarily a charge. The use of those words is therefore mere surplusage, and not contradictory of the mortgage. They surely cannot revoke the conveyance of the property "to secure such indebtedness" in pursuance of the intention just therein above recited, "desiring to secure such payment." Indeed, no particular form is essential to the validity of a chattel mortgage. It is sufficient if the words employed express in terms or by just implication a purpose to convey the property as security for the debt. A power of sale is not essential. *Comron v. Standland*, 103 N. C. 207, 9 S. E. 317. Mortgages upon a stock of goods, however precarious, are not uncommon; besides, here the mortgage is upon all the personality of all kinds, and the realty is added. If it be true that the conveyance is defective as a mortgage of real estate because the husband does not join in the body of the deed, (*Ferguson v. Kinsland*, 93 N. C. 337,) that technically in no wise invalidates it as a mortgage of personality as to which the husband has no tenancy by the curtesy to release. It is immaterial to consider whether this is cured as between the parties by chapter 293 of the act of 1893, since there is no appeal brought up from the ruling that the mortgage was insufficiently executed as to the real estate.

There is no "beneficent provision of the constitution" which throws additional shackles around women in the management of their separate property. The provision of the constitution is in exactly the opposite direction, in accordance with the free spirit of the age and with the universal trend of legislation the world over. Its purpose is not to further assimilate married women to the condition of infants, but to make free women of them; to emancipate them from most of the restrictions formerly existing. To this end the constitution (article 10, § 6) provides that all the property of a married woman "shall be and remain the sole and separate estate and property of such female * * * and may be devised and bequeathed and with the written assent of her husband conveyed by her as if she were unmarried." Here she has made a conveyance which would be un-

questionably good as a mortgage if made by a feme sole, and it is made "with the written assent of her husband," which is the sole restriction placed by the constitution upon a married woman's right to convey her own property if she chooses to do so. The court cannot be astute to find an intention of the grantor contradictory to the express words of a conveyance, nullifying and revoking it. The intent is to be gathered from the deed itself, "from the four corners" thereof. *Lowdermilk v. Bostick*, 98 N. C. 399, 3 S. E. 844. But if such intent could be a subject of surmise, we might well ask why, if the intent was solely to charge the separate estate, words of conveyance were used and the words "heirs and assigns," and why there was a signing under seal, privy examination, probate and registration, and, further, why was there a description of the property set out, and a formal acknowledgment by both husband and wife of the instrument as "their act and deed," since none of these were necessary simply to charge the separate personal estate. *Flaum v. Wallace*, 103 N. C. 296, 9 S. E. 567. If this is not a mortgage, it will be hard to conceive what form or formality a married woman can use to execute a valid mortgage. If valid otherwise as a mortgage, the words added at the end, acknowledging the indebtedness as a valid charge, were mere surplusage, and certainly not intended by the parties as a repeal of the conveyance just made under seal with the expressed intent of securing the debt by the property therein described, (with the written assent of the husband,) not only to the creditors, but to their heirs and assigns, privy examination, acknowledgment of the instrument as their act and deed, and registration. The conveyance was doubtless prepared between the parties themselves. Like all laymen, they would naturally suppose the words "hereby charging the separate estate" to mean "hereby giving a lien" upon it, which words would of themselves be sufficient to create a mortgage. *Harris v. Jones*, 83 N. C. 317. This would be in accordance with and confirmatory of all the words used up to that time, and not a violent and unaccountable nullification of them. It is true a married woman might restrict herself to simply charging her estate, but she might go further, and mortgage it also; and here she used the very words and formalities which were requisite for mortgaging it, if she so desired. Possibly she could not have gotten the goods except upon a mortgage. The ruling of the court below that the mortgage is valid as to the personality is in accordance with both the letter and spirit of the constitution. It may be that, as between the parties to it, rights of third persons not having supervened, the mortgage is good also upon the realty by virtue of the curative act of 1893, (chapter 293;) but, the plaintiff not having appealed from the adverse ruling below, this point is not presented. No error.

DIXON v. STEWART et al.

(Supreme Court of North Carolina. Dec. 5, 1893.)

LANDLORD AND TENANT — ACCEPTANCE OF LEASE — ESTOPPEL.

Where one in possession of land accepts a lease, he is estopped to deny his lessor's title, as though he had taken possession under the lease.

Appeal from superior court, Moore county; Robert W. Winston, Judge.

Action by J. W. Dixon against E. T. Stewart and others to recover land. Judgment for plaintiff. Defendants appeal. Affirmed.

There was evidence that tended to show that in 1873 the defendant Stewart had leased the land in controversy from one Lane, under whom the plaintiff claimed, and whose deed to plaintiff for the premises was in evidence without objection thereto. The evidence also tended to show that Stewart was in possession long prior to the year 1873. He testified that he had never leased the land from Lane or the plaintiff, nor had he agreed to become their tenant, or hold for them; that he was put in possession by one Moody 40 or 50 years before the trial. No deed was shown, either to Moody, or from Moody to the plaintiff. The defendants introduced a deed made to them by the sheriff of Moore county, dated February 28, 1873, and covering the land in controversy.

The following is the report of his honor's charge, and the exceptions thereto:

"The court, among other things, charged the jury that the counsel on both sides have solemnly, and very properly, admitted that the title is out of the state. You will hence not consider that branch of the case. The plaintiff must recover on the strength of his own title."

The judge here read the special requests to the jury, and charged them, plainly, that the question of color of title, under a paper title, did not arise in the case, and that in no aspect of the case could the plaintiff recover, unless the jury shall find from the evidence that the defendants are in possession of the land as the tenants of the plaintiff; that if the defendants entered into possession of the land as the tenants of the plaintiff, or of Lane, then the plaintiff is entitled to the possession of the land, unless the defendants have made it appear that they have had the land 20 years after that relation ended, or after the last payment of rent. The court here fully arrayed the testimony on both these heads, and again, after reading the special requests, added and charged that the plaintiff's case rested solely on the question of tenancy, and unless such relation was shown by the plaintiff to exist between him, or them under whom he claimed, and the defendants, he could not recover.

The defendants requested his honor to charge the jury as follows: "(1) That if the defendant E. I. Stewart went into possession

of the land under a parol gift from A. S. Moody, and remained in exclusive possession for forty years, this gives him a good title against the world." His honor refused to charge the jury as requested, and the defendants excepted. "(2) That if the defendant E. I. Stewart went into possession of said land under a parol gift from A. S. Moody, and remained in the exclusive possession for forty years, this gives him a good title against any one except A. S. Moody." His honor refused the instruction, and the defendants excepted.

His honor charged the jury that if the plaintiff, or those under whom he claims, have been in the open, notorious, continuous, and adverse possession for seven years, under color of title, before this action was brought, and if the defendants were the tenants of the plaintiff, his title is perfect, and the plaintiff has shown no possession for seven years under color of title, and cannot recover, unless the defendants were the tenants of Lane. The defendants excepted to this part of the charge upon the ground that there was no evidence to sustain it, and for the further reason that there was no evidence that either McNeill or Stewart was a tenant of J. I. Lane.

His honor further charged the jury that if the defendants, or those under whom they claim, have at any time acquired the title to the lands in dispute by color of title, or by adverse holding of the same for 21 years adversely, then the plaintiff cannot recover, unless he shall establish in himself a complete title, acquired after the acquirement of such title, by showing that the defendants, thereafter became the tenants of the plaintiff, or those under whom he claimed. The defendants excepted to this part of the charge upon the same grounds assigned to first part of charge, viz. that there was no evidence to support it.

His honor further charged the jury that, "if the defendants were the tenants of Lane, then the possession of the defendants is Lane's possession until twenty years after that relation ended, and after the last payment of rent;" reading from the Code, and explaining the same. The defendants excepted to this part of the charge for the reason that there was no evidence to support it, and no evidence of any payment of rent.

His honor further charged the jury that the plaintiff has shown no possession for seven years under color of title, as requested by defendants, adding, "unless the jury shall find that the defendants were the tenants of Lane." The defendants excepted to the latter part of this charge upon the grounds that there was no evidence of the tenancy of the defendants.

His honor further charged the jury "that the purchaser of Tyson's title at sheriff's sale, and the holding under the sheriff's deed, if exclusive, and seven years' possession under said deed, gives the defendants a good

title," as requested by defendants, adding, "unless the purchasers at the sheriff's sale were the tenants of Lane, as explained in the charge." The defendants excepted to the latter clause of said charge upon the grounds that there was no evidence that the said purchasers were the tenants of Lane.

There was judgment for the plaintiffs, and the defendants appealed.

J. W. Hinsdale, Strong & Strong, and W. J. Adams, for appellants. J. C. Black and W. E. Murchison, for appellee.

BURWELL, J. On the trial some exceptions were taken, as appears from the record, to the introduction of certain deeds, by means of which the plaintiff sought to show that the title to the land in controversy, which was conceded to be out of the state, had become vested in him. His honor admitted these deeds in evidence over the objection of the defendants, but upon consideration of them, and of the plaintiff's evidence as to possession under them, he decided that the plaintiff had failed to show by a complete chain of title, or by possession under the deeds introduced, a title in himself to the land, "good against the world;" and he so charged the jury, and told them, in effect, that plaintiff, having failed to establish a title in that way, could not recover, unless he had established facts which constituted an estoppel on the defendants, and prevented them from disputing his title, and had thus proved in himself a title good enough for his purposes in this action. This ruling renders it unnecessary to consider the exceptions mentioned above, for the evidence, though admitted, was afterwards declared to be of no effect. The jury found that the plaintiff did have a title good against the defendants by estoppel, and, there being no exception to the admission of any of the testimony bearing upon this branch of the case, we have only to ascertain if the charge to the jury upon this subject was correct.

It is familiar learning that a tenant will not be allowed to deny that his landlord has title to the leased premises, in an action by the latter against the former for possession or for rents; and this general rule has application, we think, both to those instances where the landlord, himself having possession, delivered up that possession to the tenant, and also to those instances where one who is himself in the actual possession of land agrees to assume the relation of a tenant as to the land towards another, who asserts some title to it, there being no proof that this agreement was induced by fraud or mistake.

Mr. Bigelow, in his work on Estoppel, (page 527,) says: "There has been some conflict upon the question whether the bare taking a lease of land of which the tenant was already in possession may estop him to deny his lessor's title. It is agreed in all the

cases, as we have seen, that if the tenant was induced to take the lease by mistake, fraud, or misrepresentation on the part of the lessor, he may dispute his title. * * * The conflict arises in cases in which there is a simple question growing solely out of prior possession and later acceptance of a lease by the same person. In New York and Kentucky it is held that the estoppel prevails, while in California the contrary doctrine has been held in two recent cases, upon great consideration. But even in that state it is held that the estoppel arises if the tenant does not prove a paramount title, either in himself or in some one under whom he claims." And on page 534 the author continues: "The only room for the question raised in California is either in the case of an original lease, or when the attornment is made to a stranger to the title of the lessor. In such a case, is bare possession in the tenant, without mistake, fraud, or the like, in the leasing or attornment, sufficient to remove the estoppel? The landlord may still have changed his position, reasonably induced by the lessor's acceptance of a tenancy. There would then be the elements of an estoppel in pais; and without stopping longer than to refer to the fact that the doctrine that the act of the party against whom the estoppel is claimed must have been willful, in a literal sense, if it ever prevailed, has been overruled, it is enough to say that the case might present features quite as conclusive as those in the case of an estoppel of a tenant who has received possession from his landlord, for taking possession from a landlord is only one way in which a change of position may take place. It is immaterial what may be the nature or extent of the change, provided there has been a substantial change in fact, so that the landlord would be placed in a less advantageous position by allowing the denial of his title than he would have occupied, had not the tenancy been created."

If we were to adopt the rule laid down in the case cited by defendants' counsel, (*Franklin v. Merida*, 35 Cal. 558,) which is set out in the foregoing quotation from Mr. Bigelow, as modified by the later case referred to by him, (*Holloway v. Galliac*, 47 Cal. 474,) which rule is thus stated in the latter case: "A tenant is estopped by a lease which he takes when in possession, unless he proves paramount title in himself, or another under whom he claims,"—the plaintiff would not be helped, for he bases his claim of title solely upon "adverse possession for 43 years of the land in controversy," and also on "an adverse possession under color of title from February 20, 1873, to the commencement of this action." Under the charge of his honor, the verdict of the jury has a double effect. It establishes the fact that defendants held the land from 1873, the date of the alleged lease, as tenants of plaintiff's vendor, and thus destroys defendants' claim of title by pos-

session by establishing the fact that from 1873 the possession was not adverse. Hence, they proved no paramount title, and the estoppel would be left to work its effect.

But we think reason and the authorities sustain the rule which is approved by the eminent author quoted heretofore, and that the defendants were estopped in this action to deny the plaintiff's title, if in 1873 the defendant Stewart was in the actual possession of the land, and agreed to become the tenant of plaintiff's vendor. The defendant McNeill testified that he "never had any possession except through Stewart." The jury find that Stewart was holding as tenant of plaintiff's vendor. The salutary doctrine of estoppel requires that possession shall be surrendered to the landlord before the tenant can set up a title adverse to him. The rule goes no further. After the tenant has surrendered possession, he may turn upon his former landlord, and assert a better title than his, if he has one. Hence, it may be important, in cases where the recovery is had under this rule of practice, that the record should show the ground of the recovery, so that the judgment will not work another and more effective estoppel on the defendant.

We have not deemed it necessary to advert to the fact that his honor, in one part of his charge, said that the defendants would be estopped if they entered into the possession of the land as tenants of the plaintiff's vendor. The defendants contend that there is no evidence of such entry into possession, but that all the testimony shows that, if the alleged lease was made and accepted by the defendant Stewart, it was made and accepted while he was in possession. We need not give this matter consideration, because we have decided that the estoppel works even though the lessee was in possession at the time the lease was made and accepted. We find no error, and the judgment is affirmed.

NOTE.

BURWELL, J. The case on appeal states the date of the deed from J. J. Lane to plaintiff, under which he claims the land in controversy, as the 24th day of February, 1891, which is later than the date of the summons. No objection to this deed was taken on the trial on this account. We have caused a copy of this exhibit to be added to the record, and from it we learn that the date of the said deed is February 24, 1890, and thus it appears that, by a clerical error, 1891 was put for 1890.

JORDAN et ux. v. SPIERS et al.

(Supreme Court of North Carolina. Dec. 5, 1893.)

ACTION TO RECOVER REAL ESTATE—DEFENDANT'S BOND—RELEASE OF SURETY—AGREEMENT BY ONE ADMINISTRATOR—RATIFICATION.

1. The surety in a bond required by Code, § 237, of defendant in an action for recovery of

real estate, conditioned to pay costs and damages, is not released by a compromise of the damages and extension of time of payment by one of plaintiff administrators; one of several administrators having no authority to make such an agreement.

2. Ratification of such agreement by the other administrator is not shown where his only positive act was the repudiation thereof by a reply to a supplemental answer setting it up.

Appeal from superior court, Hertford county; Bynum, Judge.

Action by J. J. Jordan and wife against H. McD. Spiers to recover possession of mortgaged premises, for damages for detention, and for foreclosure of the mortgage. Defendant filed an undertaking pursuant to Code, § 237, with Sampson Rea as surety. Thereafter J. J. Jordan died, and P. B. Picot and John E. Vann were appointed administrators, and made parties plaintiff. At fall term, 1890, judgment for possession and for foreclosure was entered, and the case continued for trial of the issue of damages. Pending the continuance, Picot made an agreement with Spiers compromising the suit, \$100 being paid at the time, the balance to be paid on or before October, 1891, when a nonsuit was to be entered. Between the spring and fall terms of 1891 Picot died. At the spring term, 1893, the action was tried, a verdict given for plaintiffs, and on plaintiffs' motion, to which Rea answered, setting up the compromise agreement, and alleging a discharge thereunder, judgment was rendered against Spiers and Rea. Rea appeals. Affirmed.

B. B. Winborne, for appellant.

AVERY, J. In discussing the power of one of several personal representatives to act for his associates, in the case of *Gordon v. Finlay*, 3 Hawks, 239, Judge Henderson said: "One administrator cannot, alone, when there are more, make a sale. They are, in this respect, unlike executors, for all of the administrators together represent the intestate, whereas each executor represents the testator." *Wood v. Sparks*, 1 Dev. & B. 389. The appellant Rea cannot maintain the position that he, as surety, is discharged by indulgence extended to the principal in the undertaking (under Code, § 237) to pay such costs and damages, including rents and profits, as the plaintiff might recover, unless he can first show a binding agreement on the part of the creditor to forbear to proceed against the principal for a fixed period without reserving the right to move meantime against the surety. *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. 817. If, however, the surety shows a valid contract extending the time of payment for the benefit of the principal in a bond or undertaking, made without the knowledge or consent of the former, such agreement operates to exonerate the surety from liability. *Carter v. Duncan*, 84 N. C. 676; *Scott v. Harris*, 76 N. C. 205. If Picot had no authority to sell personal prop-

erty belonging to his intestate without the consent of his coadministrator, Vann, we do not think he could lawfully exercise the more important and dangerous power of compromising a debt due his intestate, and thereby release the debtor in part of responsibility on receiving only a portion of the amount due without consulting one who had been commissioned by the officer appointed by law for the purpose of securing the benefit of the judgment of both in reference to every such important transaction. It is in order to divide responsibility and multiply counselors that the clerk is empowered in his discretion to give letters of administration to one or more of the next of kin. Such precaution on his part is in vain, if either the widow or the next of kin can compromise all of the solvent credits and dispose of all of the choses in possession without consulting the other. We are aware that authorities differ upon this subject, but we prefer to adhere to the principle as stated by Judge Henderson, because it is safer and more reasonable to do so. A testator is supposed to repose a special trust and confidence in every person named by him as executor; but the object of our statute is to give the power to the clerk to utilize the combined wisdom of two or more agents in the management of fiduciary matters under his supervision. We fail to discover in the statement of the case on appeal any evidence tending to show a subsequent ratification by Vann of the agreement entered into by Picot, his coadministrator, without his knowledge or consent. It does not appear affirmatively that Vann was consulted as to the application of the \$100 paid down. When the agreement was subsequently set up by answer in the nature of a plea since the last agreement, the plaintiffs refused in their reply to recognize it, denominating it an "alleged agreement." After Picot had received the money without the consent of Vann, and presumably paid it over to the persons lawfully entitled to receive it, we cannot readily conceive of any step other than the expression of his dissent in the replication filed that it was incumbent on Vann to take, in order to show affirmatively that he repudiated the unauthorized conduct of his associate. If the money was within his control, he still claimed a balance due from Spiers for rent, in any view of the situation, amounting to more than \$100, and he was not authorized to refund the sum paid to Spiers when such was the state of accounts between Spiers and his intestate. It does not appear that Vann assented to a single continuance from the time he filed his reply repudiating the agreement until the trial term, when the court allowed the payment as a credit on the amount of damages for rents and profits found by the jury. The only positive act of Vann in relation to the matter was the filing of the reply, in which both he and Mary Parker joined, and in

which the agreement set up was denominated an alleged agreement. If the plaintiffs are bound by the contract made by Picot, it must be by reason of some positive act of affirmation or adoption of the agency of Picot by Vann after being informed of what he had done. No such act has been shown. The judgment of the superior court is affirmed.

SHOBER et al. v. WHEELER et al.
(Supreme Court of North Carolina. Dec. 5, 1893.)

FRAUDULENT CONVEYANCES — ACTION TO SET ASIDE — PARTIES — EVIDENCE — EXAMINATION OF ADVERSE PARTY — RIGHT TO OPEN AND CLOSE — TIME FOR REQUESTING INSTRUCTIONS — EXCEPTIONS.

1. It is in the discretion of the court to allow trial of an action to set aside a fraudulent conveyance without the bringing in, as parties, of mortgagees put on the land before the conveyance.

2. The fact that a party has examined an adverse party, under Code, § 581, prior to the trial, does not compel him to use the testimony on the trial.

3. Nor does such examination of an adverse party make him the witness of the party examining him.

4. In an action to set aside a conveyance of land as fraudulent, the fact that the grantee did not return the land for taxation is admissible, as showing that he did not consider himself the owner.

5. Under rule 6 of the superior court, a decision as to the right to open and close is not appealable.

6. Refusal to give special instructions presented after the time prescribed cannot be complained of.

7. An exception to a charge, containing several distinct propositions, that there was misdirection, is too general for consideration on appeal.

8. In an action to set aside a conveyance as fraudulent, it is not error to charge that, if an insolvent person executes a deed to a near relative of land worth \$3,000 for \$2,500, it is a suspicious circumstance, and the greater the discrepancy, the more suspicious is the circumstance.

Appeal from superior court, Forsyth county; Winston, Judge.

Action by F. E. Shober and others against W. H. Wheeler and others to set aside deeds of land as fraudulent. Judgment for plaintiffs. Defendants appeal. Affirmed.

The court, by way of illustration, charged the jury that if a man, being insolvent, executed a deed to a near relative for a tract of land worth, say \$3,000, and received only \$2,500 therefor, this discrepancy between the real value and the price obtained was a suspicious circumstance, and that it was more suspicious as the discrepancy was greater.

J. S. Grogan and Glenn & Manly, for appellants. Watson & Buxton, for appellees.

BURWELL, J. We will consider the defendants' exceptions seriatim, as set out in the case on appeal:

1. It was a matter entirely within the discretion of his honor to determine whether or

not the cause should be tried before some of the mortgagees were brought in. The plaintiffs were willing to try the case with the parties then in court. The defendants had excepted to the order, made at the instance of the plaintiffs, to bring in the mortgagees, thus insisting that they were not necessary parties. Plaintiffs seem, by their action, to have conceded that that exception was well taken, in part at least, and thereupon it was for his honor to say if a trial should then be had. If any good cause for a postponement had been shown, no doubt it would have been granted. It appears from the record that the mortgages spoken of were put upon the lands prior to the alleged fraudulent transfer by the mortgagor to his mother and father-in-law. Their validity is not in any way affected by the verdict and judgment.

2. The fact that the plaintiffs had examined the defendant W. H. Wheeler under the provisions of section 581 of the Code did not compel the plaintiffs to use that testimony on the trial, nor did it make that defendant, in any sense, the plaintiffs' witness. But, if so, we are unable to see how the defendants' cause could have been prejudiced by the questions and answers set out in this exception.

3. We think there was no good ground for this exception, but, if there were, it was completely obviated by the subsequent testimony of the defendant, fully establishing the very fact which the plaintiffs sought to prove by the evidence objected to here.

4. The tax returns made by defendants were properly submitted to the consideration of the jury. If they really owned the land here in dispute, it was their duty to return it for taxation. That they failed to so return it was some evidence that they did not consider themselves as the owners thereof.

5. This exception was not pressed before us.

6. The defendants excepted "to the ruling declining to permit defendants to open and conclude." The decision of his honor upon this point is not reviewable here. Rule 6.

7. His honor might have insisted that the plaintiffs' prayers for special instructions were handed to him after the time prescribed, and that he could not be required to consider them. That was his privilege, under the rule. The defendants could have no right to object to his exercising that privilege, or his failure to do so.

8. This exception is "for misdirection in charging the jury as requested by plaintiffs, which charge is recited above." A reference to the charge so "recited above" will show that it contains numerous distinct propositions. Exceptions should be specific. *Williams v. Johnson*, 94 N. C. 633. The evidence taken on the trial has not been sent up to us. It would be unjust to the appellants to allow the appellants, under such a general exception, to single out here some one of the propositions contained in that charge, and insist that there appeared error in giv-

ing it, when, if a specific objection had been noted, either on the motion for a new trial, or when the case on appeal was tendered by them, there might perhaps have been incorporated in the case evidence produced on the trial, or other parts of the charge, that would show the pertinence and propriety of that which is here pointed out as objectionable. We cannot, therefore, consider this exception. It is too general.

9. We find no reasonable objection to the illustration which his honor used in his charge to the jury. Inadequacy of price will not per se vitiate a sale made by an insolvent to a near relative, or to another, unless it is so gross that the court must sternly say to such purchaser that he got the property for nothing. *Fullenwider v. Roberts*, 4 Dev. & B. 278. But inadequacy of price, if found to exist, is always a suspicious circumstance in the examination into any transfer of property, for the very good reason that men do not usually sell their land for less than it is worth; and when we find them doing so, especially when insolvent, it is not unreasonable to look at such a transaction with suspicious scrutiny. And certainly the greater the discrepancy the greater the suspicion, until it reaches that point where, because of excessive inadequacy, the law stamps the pretended sale as no sale at all. We find no error, and the judgment is affirmed.

COWLES et al. v. HALL.

(Supreme Court of North Carolina. Dec. 5, 1893.)

LIMITATION OF ACTIONS—FEES OF OFFICERS—EXECUTION AGAINST DECEDENT'S ESTATE.

1. Code, c. 10, § 155, subd. 8, prescribing the period within which action may be brought for fees due an officer, by the judgment of a court, applies only to actions by officers, and not to a proceeding by a plaintiff for leave to issue execution on a judgment which included fees of officers of the court, which had been paid by him as they accrued.

2. Under Code, c. 10, § 440, providing for the obtaining of leave to issue execution on a judgment, one is not entitled to leave to issue execution against a decedent's estate on a judgment rendered against him in his lifetime, the proceedings for the enforcement against a decedent's estate of debts, including judgments, being prescribed by section 1448.

Appeal from superior court, Wilkes county; Graves, Judge.

Proceedings by Arthur D. Cowles and others against Nancy Hall, executrix of R. D. Hall, deceased, for leave to issue execution against the estate on a judgment recovered against deceased. From a judgment refusing execution, and holding that the collection of the judgment was barred, plaintiffs appeal. Modified.

Cowles & Barber, for appellants.

MacRAE, J. The statute of limitations (chapter 10, § 151, of the Code) is: "The pe-

riods prescribed for the commencement of actions, other than for the recovery of real property, shall be as follows: * * * Sec. 155. * * * (8) Fees due to any clerk, sheriff, or other officer, by the judgment of a court, within three years from the time of the judgment rendered or of the issuing of the last execution therefor." This statute, as will be seen, regulates the time for the commencement of actions. But the present proceeding, while not stated in the case with ordinary clearness, was evidently a motion for leave to issue execution under chapter 10, § 440, of the Code, for by reference to the record it will so appear.

His honor held that the collection of plaintiffs' judgment is barred by the statute of limitations. The record shows that a part of the judgment was for fees due the officers of the court, but the judgment was in favor of the plaintiffs, upon the presumption that they had paid the costs for which they were liable, as they accrued, and they were entitled to recover the same from defendant. As this is not an action by any officer to recover fees due him by the judgment of a court, we are of the opinion that the section of the statute of limitations relied on by defendant does not apply to this proceeding.

His honor also held "that the plaintiffs are not entitled to a renewal of their judgment, as to an execution upon the same." We concur with his honor that plaintiffs are not entitled to leave to issue execution upon their judgment. The motion seeks to have execution against the estate of a deceased person upon a judgment rendered against such person during his life. The Code, c. 33, provides elaborately for the settlement of estates of deceased persons; section 1416 prescribes the order of payment of the debts, including judgments; and section 1448 et seq. prescribe the proceeding by which creditors may enforce payment of the debts due them. While, therefore, the plaintiffs are not barred by chapter 10, § 155, (8,) from proper proceedings to enforce their claim, (the same being in favor of plaintiffs in the action, and not of the officers of the court,) they are not entitled to leave to issue execution. Modified and affirmed.

WHITE v. NORTHWESTERN NORTH CAROLINA R. CO.

(Supreme Court of North Carolina. Dec. 5, 1893.)

RAILROADS IN STREET—RIGHTS OF ABUTTING OWNER—ACTION FOR DAMAGES.

1. The use of a street for a steam railroad is not a legitimate use for public purposes, and, if abutting property is injured thereby, the owner is entitled to damages, whether the fee is in him or the city.

2. The railroad company's entry on the street not having been under statutory authority, but merely under license of the city, the abutting property owner is not confined to stat-

utory remedy, but may maintain an action for damages.

Appeal from superior court, Forsyth county; Boykin, Judge.

Action by Malvina T. White against the Northwestern North Carolina Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

E. B. Jones, for appellant. Glenn & Manly, for appellee.

SHEPHERD, C. J. The plaintiff is the owner of a lot abutting upon one of the streets of the city of Winston, and brings this action to recover damages for various injuries to her said property, inflicted by the defendant by reason of its having entered upon and constructed its railroad through the said street. It appears from the complaint that prior to the plaintiff's purchase of the property, in 1879, the street had been "located and opened for the use and benefit of plaintiff and others, and the public generally, who owned property north of Liberty street, which was almost inaccessible by or over any other street." It also appears that in the construction of its road the defendant made an excavation in front of said property 223 feet in length, and 35 or 40 feet in depth and width, and thereby reduced the width of the street from 30 to 18 feet. It is further alleged that by "reason of the nature of the soil and the proximity of the cuts, travel along the said street is rendered dangerous, and that, in order to sustain the width of the same 15 to 18 feet, the defendant has put in pillars or posts to hold and retain the earth composing the street in position, which plaintiff alleges is insecure and unsafe, and liable to destroy and render useless the said street." It is furthermore alleged that by reason of such excavation and occupation by the defendant the street at certain points along the line of plaintiff's property is almost entirely destroyed, and that plaintiff is greatly endangered. These allegations, extracted from the complaint, must, for the purposes of the appeal, be taken as true, as no evidence seems to have been introduced on the trial; and his honor rejected the issue as to the alleged damages sustained by the plaintiff on the ground that the defendant "had a license from the city to construct its road, and use the street if necessary." The questions presented, therefore, are whether, as against the abutting owner, the city can authorize the use of its streets for the purposes of an ordinary steam railroad, and whether such abutting owner has any proprietary rights, for the violation of which she can maintain an action. It does not appear how the city acquired its title to the street in question, nor do we learn from the record whether it owns the fee in the soil, or simply an easement therein. In the absence of evidence, however, the presumption is that the city has an easement only, and that the fee remains in

the abutting proprietor. *Elliott, Roads & S.* 110; *Rich v. City of Minneapolis*, 37 Minn. 423, 35 N. W. 2; 3 Kent, Comm. 432. In such a case "the abutting owner is entitled to every right and advantage in that part of the street of which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only." *Lewis, Em. Dom.* 113. It must follow, therefore, that if the city perverts the streets to illegitimate purposes, it is an interference with the proprietary rights of the abutter, and that he is entitled to relief at the hands of the courts.

This introduces us to the very important question, never before passed upon by this tribunal, whether or not the use of a steam railroad is a perversion of the street from its original and proper public purposes. There has been much discussion, and not a little conflict of judicial decision, upon this subject; but it is believed that the weight of authority greatly preponderates in favor of the affirmative view of the proposition. Judge Dillon, after a careful investigation, states his conclusion as follows: "The weight of judicial authority undoubtedly is that where the public have only an easement in the streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." 2 Dill. Mun. Corp. 725. In *Mills on Eminent Domain* (section 204) the same doctrine is laid down, and it is said: "The legislature may authorize the use of a street by the railroad, so as to make the entry lawful; but the use is an additional burden, and the right will not become fixed in the company until compensation is made. If no remedy is provided, there is remaining the remedy at common law." In *Lewis on Eminent Domain* (section 111) the able and discriminating author remarks: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able to understand how a court could reach a contrary conclusion." After stating that highways have from time immemorial been devoted to the common use of every citizen, and that no one had a private right or any exclusive privilege therein, the author proceeds: "The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks, which

would practically exclude all ordinary travel, and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence." In *Elliott on Roads & Streets* (page 528) the author cites many authorities, and concludes by saying that the weight of authority is that such an appropriation of a street is "a new and additional burden," for which the abutter is entitled to compensation. In support of his proposition he quotes the following language of Judge Cooley: "Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it. The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it, and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specially injurious." *Const. Lim.* (3d Ed.) 683. In *Hare, Const. Law*, 361, the foregoing doctrine is fully approved, and it is said: "It is immaterial, as regards the principle, whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the continuing uses of a street; if it is condemned, such also is the end in view. To convert a common highway over a man's land into a railroad is, therefore, to impose an additional burden upon the land, which greatly impairs its value, considered as a whole; and if the owner is not compensated his consent must be proved. It cannot be said with truth that in assenting to the laying out of the highway upon his land he consented to the building of a railroad upon it, because they are essentially different. The one benefits his land, renders access to it easy, and enhances the price; while the other makes access to it difficult and dangerous, and renders it comparatively valueless. Nor can it be justly contended that a railway is merely an improved highway. * * * Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved; and it was to guard against the bias arising from this source that the constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot (in the absence of the

exercise of the right of eminent domain) rely upon a grant from the legislature and the license or consent of the municipality as a justification." Booth, in his work on Street Railways, (section 78,) after stating that in the early history of commercial railroads the current of authority was contrary to the views above stated, remarks: "But, according to the weight of judicial opinion as expressed during the last thirty years, where the fee of the street remains in the adjoining owner, such use is inconsistent with the purposes of the original acquisition, and, without compensation, can only be acquired by the exercise of the power of eminent domain."

In the discussion of the question, we have preferred to reproduce the conclusions of eminent text writers, rather than attempt a review of the numerous decisions upon which they are founded. These decisions and others we could cite fully establish, upon principle and by weight of authority, the proposition that, where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will, and without compensation. Railroad Co. v. Heisel, 47 Mich. 393, 11 N. W. 212; Railroad Co. v. Reed, 41 Cal. 256; Imlay v. Railroad Co., 26 Conn. 249; Railroad Co. v. Steiner, 44 Ga. 546; Daly v. Railroad Co., 80 Ga. 793, 7 S. E. 146; Cox v. Railroad Co., 48 Ind. 178; Kucheman v. Railway Co., 46 Iowa, 366; Railroad Co. v. Hartley, 67 Ill. 439; Phipps v. Railroad Co., 66 Md. 319, 7 Atl. 556; Springfield v. Railroad Co., 4 Cush. 63; Harrington v. Railroad Co., 17 Minn. 215, (Gil. 188); Railroad Co. v. Ingalls, 15 Neb. 123, 16 N. W. 762; Chamberlain v. Cordage Co., 41 N. J. Eq. 43, 2 Atl. 775; Railroad Co. v. Williams, 35 Ohio St. 168; Ford v. Railroad Co., 14 Wis. 609; Carl v. Railroad Co., 46 Wis. 625, 1 N. W. 295; Buckner v. Railroad Co., 60 Wis. 264, 19 N. W. 56; Railroad Co. v. McAhren, 12 Ind. 552; Theobald v. Railroad Co., 66 Miss. 279, 6 South. 230; Barney v. Keokuk, 94 U. S. 324; Adams v. Railroad Co., 39 Minn. 286, 39 N. W. 629. The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must, of course, follow that the city had no right, in the exercise of its usual and ordinary powers relating to its highways, to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff. The plaintiff, therefore, taking her allegations to be true as to the damage inflicted upon her property, very plainly has a cause of action against the defendant. If, however, we are wrong in the assumption that the plaintiff is the owner of the fee in the said street, and

if it should appear upon another trial that the city has acquired it either by dedication, grant, or condemnation, it will be necessary to determine whether the plaintiff has an easement in said street to the extent that it shall be used only for street purposes, and whether her rights are "property rights," which cannot be impaired or destroyed except under the exercise of the right of eminent domain. Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes; and in the case of land acquired for the purposes of a street there is something in the nature of a contract, under which two coexistent and inviolable rights are created,—one belonging to the public to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that in estimating the amount to be paid the value of the benefits above mentioned were likewise considered. In such cases, says Mr. Lewis, (Em. Dom. § 114:) "To make the right a part consideration of the grant, and then allow the public to invade or destroy it at pleasure, would be a fraud, which the law will neither impute nor allow. Therefore, in the case of such a grant there arises by operation of law a private right to use the street in connection with the lot of the proprietor, which is as inviolable as any other right of property." So, if the city acquire the land by condemnation, such advantages or benefits to the adjoining property are usually assessed at a fixed value, and deducted from the estimated damages; and it would, says the above author, be "the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid, or of an assessment of benefits, unless those advantages are secured to him by a clear title. * * *

The existence of these private rights and easements is strictly independent of the

mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street."

The true principles applicable to this question have been declared by the court of appeals of New York in *Story v. Railroad Co.*, 90 N. Y. 122, and *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. 528. These cases have been followed by subsequent decisions of other states, and their doctrine has been approved by the most prominent writers upon the subject. The opinions are very elaborate, and we cannot do better than to adopt Judge Dillon's summary of some of the principles enunciated: "These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public,—that is, to the paramount rights of the public for street uses proper,—or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, subject, of course, to legislative and municipal regulations; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. * * * If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, those rights are in the nature of equitable easements in fee,—the soil of the street being the servient, the abutting owner's lot being the dominant, tenement. Among the most important of such rights or easements is the abutter's right to access, to light, and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz. on condition of making compensation to the abutting owner for the damage which his property actually sustained." "The result of the author's reflections upon this subject is that the views of the court of appeals are sound and just,—sound, because they recognize the paramount nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special proprietary rights or easements in their nature which he is not called upon unequally to sacrifice without compensation for the public use. In effect, the court says the just and true doctrine is, 'Take, but pay.'" 1 Hare, Const. Law, 370, 375; Lewis Em. Dom. §§ 114, 115; Booth, St. Ry. Law, § 81; Barney v. Keokuk, supra; Railroad Co. v. Schurmeir, 7 Wall. 272; 1 Ror. R. R. 324; *Story v. Railroad Co.*, supra; *Haynes*

v. Thomas, 7 Ind. 38; *Railroad Co. v. Steiner*, 44 Ga. 546; *Theobald v. Railroad Co.*, supra. The contrary view, laid down in *Wood's Railway Law*, (volume 2, p. 727,) seems to be based upon the restricted interpretation of the word "taken;" it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character, and *damnum absque injuria*. The learned author admits that such would not be the case if the words used were "taken or damaged," but by a reference to the opinion in *Staton v. Railroad Co.*, 111 N. C. 278, 16 S. E. 181, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision. *Lewis, Em. Dom. 58*; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Eaton v. Railroad Co.*, 51 N. H. 504.

The result of the numerous authorities is that in either view of the case—that is, whether the fee is in the plaintiff or in the city—the plaintiff has certain proprietary rights, of which she cannot be deprived, even under the authority of the legislature, without compensation. If her property is in any way injured by the use of the street for legitimate purposes, she cannot complain. But if the enjoyment of her private rights in the street is interrupted by a perversion of the street to uses for which it was not intended, and which the public right does not justify, and her property is thereby injured, and its value impaired, she may maintain an action, and recover such damages as she may have sustained. These proprietary rights in the use of the street for proper public purposes are practically, as we have seen, the same irrespective of the ownership of the soil, and are not confined to the mere right of access, since this may not be disturbed although the street may be reduced in width to 10 or 15 feet. This view is well sustained in the leading case of *Adams v. Railroad Co.*, (Minn.) 39 N. W. 629, in which the court said: "Take a case in one of the states where the fee of the street is in the state or municipality, and of a street 60 feet wide. The abutting lot owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to the width of 10 or 15 feet, would it be an answer to objection by lot owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer." The interest of the abutting owner in the entire width of the

street, subject to the proper uses of the public, upon the authority of the above decision, has been declared by this court in *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, and cannot be regarded as an open question. See, also, *Haynes v. Thomas*, supra. If, then, the value of the property is lessened by reducing the width of the street, or if such damage is caused by excavations rendering it unsafe and dangerous, as stated in the complaint, the plaintiff is entitled to recover. It will be observed that the defendant did not introduce its charter, or show that it had condemned any part of the street or the rights or easement of the abutting proprietor. It justifies its conduct solely upon the mere license of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded as unlawful. If this be so, the plaintiff may maintain a common-law action for damages to be assessed up to the time of the trial; or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street. Had the defendant entered under some statutory authority, it would be important to consider whether the plaintiff would not be confined to the statutory remedy; but, as it does not appear to have entered under any other authority than the bare unauthorized license of the city, and as the ruling of the court is based expressly upon the validity of such license, we must conclude that the plaintiff has a right to maintain the present action, and that the issue as to the damages actually sustained should have been submitted to the jury. As the facts were not fully developed on the trial, we do not deem it proper to further pursue the discussion. New trial.

ZIMMERMAN v. ZIMMERMAN.

(Supreme Court of North Carolina. Dec. 5, 1893.)

DIVORCE — ALIMONY PENDENTE LITE — NOTICE — FAILURE TO ANSWER — FINDINGS BY COURT — CONTEMPT.

1. Under Code, § 1291, providing, as a condition to the allowance of alimony pendente lite, that five days' notice be given the husband, the fact that the notice does not specify the time and place of the hearing does not invalidate the order, it having been rendered in the divorce suit at the term of court at which the suit stood regularly for trial.

2. Under the provision of Code, § 1291, allowing the husband to controvert the allegations of the wife for alimony pendente lite, and authorizing the court to make an allowance if he shall find her allegations to be true and to entitle her to relief, it is sufficient that he find that no answer was filed, and adjudged that alimony be paid, the provision of section 1288 that allegations of the complaint are deemed denied applying only to the trial on the merits.

3. A sentence of 30 days imposed on the husband for contempt in not obeying the order to pay alimony will be affirmed where he did not appeal from the order, failed to get it set aside, though applying to three different judges, and allowed 18 months to elapse without payment, though acknowledging that he had sufficient unincumbered personal property therefor.

Appeal from superior court, Caldwell county; James D. McIver, Judge.

Action by L. W. Zimmerman against H. Zimmerman for divorce. From a sentence of 30 days for contempt, for failure to obey an order granting plaintiff alimony pendente lite, defendant appeals. Affirmed.

S. J. Ervin, for appellant.

CLARK, J. Prior to the act of 1883, c. 67, which is now incorporated in section 1291 of the Code, the allegations of the complaint and petition were taken as true, for the purposes of the motion for alimony. The only question reviewable on appeal was the sufficiency of plaintiff's allegations. *Morris v. Morris*, 89 N. C. 109. But, by the amendatory act of 1883, the husband, upon a motion for alimony, was permitted to deny the allegations of the complaint by answer or affidavit, and the judge was required to find such of the plaintiff's allegations to be true as would entitle her to the order, before granting the same. *Lassiter v. Lassiter*, 92 N. C. 134. Then, on appeal, the sufficiency of the facts found, and not of the plaintiff's complaint, were to be considered.

The order for alimony may be made in or out of term, but the defendant must have five days' notice thereof. In the present case the summons was issued and served in July, 1891, returnable to the superior court of Caldwell county. The complaint, duly verified, was filed at September term, 1891. On March 1, 1892, the plaintiff filed in said court her petition for alimony, and caused the clerk of the court to issue notice to the defendant that she had filed said petition in the cause pending in that court, asking the court to make such order. This was duly served on March 3d. At the term of the court which was held three or four weeks thereafter, the court entered an order reciting, "This cause coming on to be heard, and being heard, and no answer having been filed to the petition filed by the plaintiff," and directing the payment by defendant, as alimony, of \$50 in cash, and \$5 at the end of each month, till the next term of the court. The defendant neither appealed from said order, nor obeyed it. He contends that it is void and of no effect (1) because the notice did not specify a time and place for its hearing; and (2) because the judge did not find the allegations of the complaint to be true.

If, upon such notice, the hearing had been at any other time and place than the regular term of court at which the action was pending, there would be some ground of objection to the order. It would, at least, have been irregular, and should have been set aside on

motion. But, when the order was made in the cause, and at the term of court, and especially at the term at which the cause stood regularly for trial, the defendant is fixed with notice thereof. *Hemphill v. Moore*, 104 N. C. 379, 10 S. E. 313; *Erwin v. Lowry*, 64 N. C. 321; *Clark's Code*, (2d Ed.) 651. Notice is required to be given only when the application is heard out of term time. *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089. Application for alimony can be made by a motion in the cause. *Reeves v. Reeves*, 82 N. C. 348.

The requirement that the judge should find such allegations of the complaint to be true as would entitle the plaintiff to the order was brought into the statute by the amendatory act of 1883, *supra*, which gave the defendant the right to controvert the allegations of the complaint and petition, and it would seem to apply only when such allegations are controverted. But here they were not denied, and the judge does, substantially, find them "true and sufficient to entitle plaintiff to alimony," by reciting that no answer was filed, and adjudging that the defendant pay the alimony decreed. It will be noted that the provision of section 1288, that the allegations of the complaint "are deemed denied," applies only to the trial upon the merits, since that section adds that the facts "must be found by a jury." As to the motion for alimony, the facts are found by the judge. Section 1291, Code.

The defendant did not see fit to controvert the allegations of fact by a reply under oath, and he cannot be allowed to deny them collaterally by simply refusing to obey the order of the court. There is no hardship in this instance, certainly, since such orders can be "modified or vacated at any time on the application of either party." At any rate, the order was not void. If erroneous, the defendant should have appealed; and, if irregular, his remedy was to have it set aside. But until declared irregular, and set aside, it was his duty to obey it. The defendant's excuse that he paid no attention to the notice because he thought it concerned the divorce only, which he was willing the plaintiff should obtain, deserves no consideration at the hands of any court.

The defendant also avers that he made a motion to set aside the order, but that, owing to other engagements of his counsel, and the forgetfulness of one judge, six months elapsed, and that he lost another six months because the next judge was engaged the whole term of the court in that county upon the trial of jury cases. It does not appear whether the judge was in fact applied to at that term. But the statute provides that the order may be "modified or vacated at any time," and therefore, of course, such motions, upon notice, may be heard at any place in the district. *Parker v. McPhail*, 112 N. C. 503, 16 S. E. 848. Besides want of diligence in pressing such motion, the defendant, pre-

sumably, has small ground to have the order set aside, since the third judge before whom it has come has failed to grant his motion, and there is no exception or appeal. Indeed, his honor, in effect, renewed the order by granting the defendant 10 days longer to pay the sum theretofore decreed, and in default thereof sentenced him to imprisonment for contempt. It was not requisite to find the facts as to the contempt, because, as his honor properly held, the answer to the rule, taking it to be true, was insufficient, and it being admitted therein that the defendant owned unincumbered personal property more than sufficient to pay said alimony, the court rightly adjudged him in contempt. *Smith v. Smith*, 92 N. C. 304. The value of the defendant's earnings were not considered, but if there had been a deficiency of property, it should have been negatived to satisfactorily account for his failure to obey the order of the court. The defendant neither answered the petition for alimony, though served with notice by the sheriff, nor appealed from the order made thereon, and has not pressed, with any diligence whatever, his motion to set aside the order. Till set aside or modified, it was his duty to obey it. Having failed to do so, he was guilty of a palpable contempt. It did not rest in the good pleasure of the defendant whether he should obey the order of a court of justice or not. If he chose to treat it as a nullity, he did so at his peril, if it should prove, as it has, that it was his opinion, and not the judgment of the court, that was at fault. In the nature of alimony, the order is urgent, and exacts prompt observance. The defendant has delayed 18 months, and, though he has applied to three different judges, the order has not been set aside, yet he still has not obeyed it. The sentence of 30 days' imprisonment for willful disobedience of the order of the court is affirmed.

ALSTON v. MORPHEW.

(Supreme Court of North Carolina. Dec. 5, 1893.)

EXECUTION SALE—PERSONAL PROPERTY—PRES- ENCE OF PROPERTY.

Personal property sold by a sheriff or constable under execution should be present at the sale, so that it may be seen, and in the officer's possession, so that immediate delivery may be given the purchaser; and, where a piano is left in a private room 250 yards from the place of sale, the sale thereof will be invalid, though an adjournment of a half hour for viewing the piano was taken, of which 3 of the 50 persons present availed themselves.

Appeal from superior court, McDowell county; E. T. Boykin, Judge.

Action by C. J. Alston against M. F. Morphew for recovery of a piano. Judgment for plaintiff. Defendant appeals. Affirmed.

A jury trial was waived, and the following facts were agreed upon: "That on the 29th day of October, 1892, one J. A. McDonald,

J. P., in McDowell county, rendered judgment in favor of the defendant in this case—the plaintiff in that—against C. J. Alston, the plaintiff in this case, who was defendant in that, for the sum of \$139. On said judgment, execution was issued, and levied by A. L. Finley, a constable for Marion township, said county of McDowell, on the piano described in the complaint in this action, and after advertisement was sold at the courthouse door in the town of Marion, N. C. That said piano was levied upon in, and left in, a private room in the Hotel Thomas, about two hundred and fifty yards from the courthouse door. It was left in charge of an agent of the constable, who held the key to said room. That, at the time of the sale at the courthouse door as aforesaid, the said piano was in the said room where levied on. That when the piano was offered for sale, and during the crying of the sale by the officer, he announced the whereabouts of the piano, and stated that bidders would be given half an hour to examine same, and that during the half hour as many as three persons went and examined said piano. That there were about fifty persons at the sale. That no actual delivery of the piano was made by the officer to the purchaser at the time of the sale, but the purchaser obtained the same by claim and delivery against the proprietor of the hotel, who held the same under a claim of storage charges from the officer. The piano was an upright piano of average size.”

Upon the facts as agreed, the court was asked to proceed to judgment, and judgment was thereupon rendered in favor of the plaintiff. The judgment of the court is as follows: “This cause coming on to be heard before his honor, E. T. Boykin, judge presiding and holding the courts of the tenth district of North Carolina, and a jury trial having been waived, and the facts agreed upon by the parties, and the court being of opinion that upon the facts agreed the plaintiff is entitled to recover of the defendant the piano described in the complaint, it is now, on motion of G. G. Eaves and Carter & Craig, attorneys for the plaintiff, considered, ordered, and adjudged that the plaintiff have and recover of the defendant the piano described in the complaint. It is further adjudged that the plaintiff recover of the defendant his reasonable costs in this case incurred, to be taxed by the clerk of this court.” The defendant excepts to the rendition of this judgment in favor of the plaintiff, and prays an appeal to the supreme court.

Justice & Justice, for appellant. Lock Craig, for appellee.

MacRAE, J. The uniform current of decisions in this state, from *Blount v. Mitchell*, 1 N. C. 80, is to the effect that upon sales by sheriffs or constables, of personal prop-

erty under execution, the property should be present at the sale, and in the possession of the officer, so that immediate delivery may be made to the purchaser. These requirements are fulfilled, however, if it is in plain view, or so near that it may be personally inspected by all present at the sale who may choose to examine it. The sale “must be conducted in such manner that every person who may come up before the articles are knocked down by the auctioneer may see and examine them, so as to enable him to become a bidder, if he choose. To hold otherwise would be to give some of the persons present an advantage over others, and thus prevent that fair and open competition which the law so much desires in sales of this kind.” *McNeely v. Hart*, 8 Ired. 492. The reason of the rule is clearly stated in *Ainsworth v. Greenlee*, 3 Murph. 470: “The constable’s authority to sell these goods was derived under a fieri facias, the execution of which the law requires to be done in such a manner as that by the sale the property is most likely to command the highest price in ready money. It is evident that for this purpose the bidder ought to have an opportunity of inspecting the goods, and forming an estimate of their value, without which it is not to be expected that a fair equivalent will be bid. The presence of the goods, too, in the possession of the officer, to which possession the levy gives him a right, assures the bidders that a delivery will be made to the highest bidder forthwith, and that so far the object of the purchase will be attained without litigation.”

The present case is an apt illustration of the justice of the rule. The piano was left in a private room in an hotel about 250 yards from the place of sale. There were about 50 persons at the sale. An adjournment was had for half an hour in order to give all present an opportunity to visit the hotel, and examine the piano. As many as three availed themselves of the invitation. It is alleged in the complaint, and not denied in the answer, that the property sold for \$32.50,—the said sum being a small part of its actual value,—although it is denied in the answer that the smallness of the sum bid was occasioned by the absence from the place of sale of the article sold; and it further appears that the purchaser did not obtain possession from the sheriff, but by means of a proceeding in claim and delivery. Who can tell that the apprehension of trouble in obtaining possession did not deter persons present from bidding at the sale? The law so firmly established by repeated adjudications is in no way weakened by the case of *Wormell v. Nason*, 83 N. C. 82, where printing presses and stands,—property of a ponderous nature, and then in actual use and operation,—conveyed by mortgage with a general power of sale, unrestricted as to its place, were sold within 50 yards of the place where they were located and in use,

the same being accessible to all who might wish to inspect them, and the sale was held to pass title, which, if impeachable at all, could only be questioned by the mortgagor, and those claiming under him, in analogy to the rule in execution sales. Affirmed.

COZART et al. v. WEST OXFORD LAND CO. et al.

(Supreme Court of North Carolina. Dec. 12, 1893.)

APPEAL — OBJECTIONS WAIVED — STATUTE OF FRAUDS—TRIAL—ISSUES FOR JURY.

1. Where, during the pendency of an action by a vendor for specific performance of a contract for the sale of land, the land is sold by consent of parties under a mortgage thereon, and plaintiff then demands damages for breach of contract, and the action is tried on that theory, defendant cannot object for the first time on appeal that the complaint fails to state a cause of action because the land had been sold, and specific performance is no longer possible.

2. A defendant in an action for breach of a land contract, who desires to avail himself of the defense that the contract is not in writing, as required by the statute of frauds, (Code, § 653,) must plead the statute; and he cannot object for the first time on appeal that the evidence fails to show that the contract is in writing.

3. In an action by a vendor for the breach of a contract to purchase land, where the pleadings on both sides admit that the vendor agreed to discharge all incumbrances on the land in excess of \$23,000, and that the vendee agreed to take title subject thereto, and the issue is as to whether the vendor performed his agreement, it is proper for the court to refuse to submit to the jury the question whether or not the vendor fraudulently represented to the vendee that the liens did not exceed \$23,000.

4. In such an action, where the vendee alleges that it incurred expenses on the faith of the vendor's promise to execute a deed on the date fixed in the contract, and that its scheme to resell the land at public auction miscarried owing to such default by the vendor, it is error not to submit to the jury the question whether the time fixed for the delivery of the deed was of the essence of the contract.

Appeal from superior court, Granville county; Henry R. Bryan, Judge.

Action by B. H. Cozart and others against the West Oxford Land Company, R. N. Lassiter, D. C. Hunt, and H. C. Herndon, for the specific performance of a contract for the sale of land. From a judgment for plaintiffs, defendants appeal. Reversed.

John W. Graham and A. W. Graham, for appellants. T. T. Hicks, for appellees.

MACRAE, J. The primary object of this action was to compel specific performance of an alleged contract between plaintiff B. H. Cozart and the defendant company for the purchase by defendant of plaintiff's land, the discharge by defendant of certain liens or incumbrances upon said land, and the issue by defendant to said plaintiff of 20 shares of stock in defendant company, and, as ancillary relief, to enjoin

the other defendants from selling said land under their mortgages or trust deeds pending this litigation. A restraining order was made. It appears by the complaint that upon an intimation of the judge that he would dissolve the restraining order it was agreed between the parties that the defendants Herndon and Cooper, mortgagees, might sell the land under their deeds; that they did sell the land, and the same was bought by defendant Herndon, and the sale was confirmed by an order of court reciting the consent of parties thereto. Upon these changed conditions, the plaintiff B. H. Cozart demands damages of defendant company for failure to comply with its contract. The pleadings are extremely voluminous, the complaint having been used as an affidavit to obtain the restraining order, and much of it is directed to that question. The complaint has been twice amended, and there are several exhibits attached. The defendant company admits that there were negotiations between plaintiff and defendant in relation to the purchase of the land described, but denies that plaintiff complied with the agreement to relieve the land of all incumbrances over \$23,000, or that plaintiff ever conveyed said land to defendant clear of all liens above said sum. It admits the tender of a deed, but denies that it was according to contract. Defendant further alleges that, relying upon plaintiff's promises to reduce the liens upon the land to \$23,000 by a certain day, it paid off incumbrances to the amount of \$3,000, that it had said land laid off and surveyed, that it advertised sales to be made upon the day last above referred to, and that, by reason of the failure of plaintiff to reduce the liens upon said land to \$23,000 on compliance with his agreement, the defendant has been damaged to the amount of \$5,000. Defendant further claims the right to be subrogated to the rights of the holders of the incumbrances paid off by it, which were prior liens to the Herndon and Cooper mortgages, and demands further judgment against plaintiff for \$3,000, the amount so alleged to have been paid by the defendant; and the defendant charges that it was induced to enter into the contract or agreement with plaintiff by the false representations of plaintiff that the incumbrances upon the land did not amount to more than \$19,000. To the answer there was a reply, reiterating the allegations of the complaint, and denying all false representations. The pleadings on both sides abound in the statement of evidential facts and matters only pertinent upon the question as to the right of plaintiff to the restraining order. In this court the defendants move to dismiss the action upon the ground that the complaint does not state facts sufficient to constitute a cause of action, as it appears that the land in contro-

versy has been sold by consent of the plaintiffs under the Herndon mortgage, and the sale has been confirmed, and that the plaintiffs cannot execute title to the defendant land company, as they are no longer the owners of said land, and as it is admitted in the complaint that the liens are in excess of \$23,000, and have not been reduced to that sum; and also that there is no contract in writing shown between defendant corporation and plaintiff. The motion is denied because—First, the action is now for damages for an alleged breach of contract, and not to compel specific performance; second, if defendant had desired to avail himself of the defense of the statute, (section 683 of the Code,) he should have specially pleaded it. *Curtis v. Mining Co.*, 109 N. C. 401, 13 S. E. 944.

The defendant tendered the following issues: (1) Was the agreement of the defendant the West Oxford Land Company to purchase the land of the plaintiff B. H. Cozart founded upon the representation made by the said B. H. Cozart that the judgments, liens, and incumbrances on said land did not exceed \$23,000? (2) Was said representation false? After a careful perusal of the answer we do not find it alleged that the plaintiff B. H. Cozart represented that the judgments, liens, and incumbrances on said land did not exceed \$23,000. The answer charges that said Cozart repeatedly assured the defendant that the incumbrances on the said land would not exceed the sum of \$18,000 or \$19,000, and that, if the defendant would assume the payment of said incumbrances, he (the said Cozart) would sell said land at the price of \$25,000, \$2,000 of which he would take in the capital stock of said company at par, and the difference between the amount of said incumbrances and \$23,000 in cash; that, relying upon the representations of plaintiff, defendant agreed to take said land at the price stated, upon condition that plaintiff would execute and deliver a deed in fee simple to said land on or before the 26th day of March, 1891. The defendant goes on at great length to detail the assertion of plaintiff that the incumbrances did not amount to more than \$19,000; the reliance of defendant upon said statement, and the consequent payment by defendant of debts of plaintiff to the amount of more than \$3,000; the discovery that said incumbrances amounted to over \$26,000; the new promise of plaintiff that, if defendant would take the land at the price stated, he (plaintiff) would relieve it of all incumbrances in excess of \$23,000 on or before the 26th of March, 1891; the acceptance of this offer by defendant, if plaintiff would comply with his agreement on or before the time stated; the failure of plaintiff to so comply, and his tender of a deed to defendant, and refusal to accept the same by defendant, because the land had not been relieved of all incumbran-

ces over \$23,000; the execution of a deed for said land to Gregory, trustee, and the failure of defendant and Gregory, or either of them, to tender to defendant a deed in accordance with the agreement, and the great damage sustained by defendant in consequence of such failure. The reply denies all false representations, and avers the readiness and willingness of plaintiffs, and their offer, to deliver to defendant a good deed for said land free from all incumbrances over and above the sum of \$23,000, and the refusal of defendant to comply with its contract. The reply further alleges that the deed above referred to was made to Gregory for the use of defendant and as its agent, and sets forth an agreement made by Gregory with plaintiff, for himself and his associates, to pay off all incumbrances on said land to the amount of \$23,000, and to pay to said Cozart the sum of \$2,000 in stock of defendant company at par, and alleges in substance that this agreement made with Gregory was with him as agent of defendant company. If we have thus far extracted from the pleadings the true matter at issue between the parties, there seems to be no great difference between them as to the terms of the contract except in one particular, and, as no issue was tendered on either side as to its terms, it seems to be conceded that the plaintiff and defendant company entered into an agreement or contract that the plaintiff B. H. Cozart would make to said defendant a deed in fee simple for the land named, relieved of all incumbrances over and above the sum of \$23,000, the other plaintiffs undertaking to discharge all liens or incumbrances in excess of said sum, and the defendant company undertook, in consideration for such deed and conveyance, to discharge the liens upon said land, which were debts of said B. H. Cozart, to the amount of \$23,000, and to issue to him 20 shares of stock in said company at its par value, \$2,000, and, if the said liens should not amount to \$23,000, to pay to said plaintiff the difference in cash. The contention of the plaintiffs is that they have always since the making of the contract been ready and willing, and have repeatedly offered, to convey said land to defendant company free from all incumbrances in excess of \$23,000, and that defendant company has failed and refused to comply with its contract; but, the land having been sold under some of the liens which were upon it, the original demand for specific performance has been abandoned, and the plaintiffs now demand damages for breach of contract by defendant company. The defendant, on the other hand, contends that the plaintiffs have never tendered to it a deed for said land freed from all incumbrances in excess of \$23,000. It contends, further, that by the terms of the contract said deed was to have been delivered to it on or before a day certain,—the 10th day of

March, 1891,—and that the time of the delivery of said deed was of the essence of the contract; that upon the faith of plaintiff's agreement defendant sold stock, and advertised a sale and distribution of the land to be made upon the 19th day of August, 1891, and incurred expenses of preparing the land for said sale, and paid off a part of the liens upon said land; and that by the failure and refusal of plaintiffs to comply with their contract the defendant has been damaged to the amount of \$5,000 for the failure of its enterprise, and in the sum of \$3,000, money paid by it in discharge of liens upon said property. Defendant also asks that for the last-named sum it be subrogated to the rights of the parties whose liens have been so paid off. Defendant also alleges that it was induced to enter into the contract by reason of the false and fraudulent representations of plaintiff B. H. Cozart that the sum of the incumbrances upon said land did not amount to more than \$18,000 or \$19,000. The last charge seems to lose its force by reason of the defendant's further allegations of the agreement as to the satisfaction of all liens over \$23,000, and that upon plaintiffs' carrying out their agreement the defendant would take the land upon the terms above set forth. We can see, therefore, no necessity for the two issues first tendered by defendant. The terms of the contract not being seriously controverted by either side, except in one particular, which we will reach directly, there was no necessity for the first and second additional issues presented by defendant, especially as the said issues involved the finding of a special verdict by the jury.

There was, however, a sharp contention between the parties as to the question whether the performance of the contract was limited as to time, and we think that the third of the additional issues arose upon the pleadings, was material, and has not been presented in any other form to the jury: "Was the sale of lots and distribution of same on 19th of August, 1891, prevented by the failure of plaintiffs to discharge the liens in excess of \$23,000, or from failure of plaintiffs to comply with the agreement to take stock in the West Oxford Land Company?" And this issue we think ought to have been submitted to the jury, as upon a response to it might have depended the findings upon others which were submitted.

As the case must go down for a new trial, it will be unnecessary to examine the numerous and interesting questions further presented, but we suggest that the matters in dispute between the parties are greatly and unnecessarily complicated by the prolixity of the pleadings, much of which matter bearing upon the question of the restraining order, as well as much statement of evidentiary facts, might be profitably eliminated upon a repleader before another trial. New trial.

DONNELLY et al. v. WILCOX.

(Supreme Court of North Carolina. Dec. 5, 1893.)

RES JUDICATA—CONSENT JUDGMENT.

A decree by consent in proceedings before a competent tribunal, if not impeached, is a bar to an action between the same parties involving the same question.

Appeal from superior court, Ashe county; Jos. D. McIver, Judge.

Action by G. M. Donnelly and others against Joseph O. Wilcox for an accounting as guardian. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

R. A. Doughton and E. O. Smith, for appellee.

OLARK, J. The clerk of the superior court had jurisdiction of the proceeding against the guardian for a settlement. Code, § 1619; Rowland v. Thompson, 64 N. C. 715, 65 N. C. 110; Sudderth v. McCombs, Id. 186, (which also holds that the superior court, at term, would not have original jurisdiction of such action;) McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265. The judgment rendered by the clerk in the former proceeding was between the same parties, and upon the same question now litigated, and is an estoppel to the present action, (Williams v. Clouse, 91 N. C. 322; Collins v. Smith, 109 N. C. 468, 14 S. E. 88,) unless impeached for fraud by a direct proceeding. It can make no difference that the decree was rendered by consent. It seems to have been regular and formal. That action was instituted to procure a settlement from defendant of the balance due by him as guardian, and the notice therein was issued at the instance of the plaintiffs. The pleadings in this action do not impeach and attack said judgment as fraudulent, but assail and impeach a receipt given by plaintiffs to defendant for the balance found by the decree to be due, and directed to be paid. The amount admitted by the complaint to have been paid was the exact amount of the judgment. His honor properly held the judgment could not be attacked collaterally, and that it had not been impeached by the pleadings. We are not advised why the plaintiffs did not thereupon ask an amendment, which lay in the discretion of the court, (Code, § 273,) so as to assail the judgment itself for fraud. The judgment of nonsuit must be affirmed.

WALKER v. MOSES.

(Supreme Court of North Carolina. Dec. 5, 1893.)

DEED—DESCRIPTION—ADVERSE POSSESSION—COLOR OF TITLE.

1. The description in a deed of land as the tract "left me by P.," and as "adjoining the

lands of H. S. and others, containing 180 acres, more or less," is not void for uncertainty.

2. Where title to land has been divested out of the state by adverse possession, one who thereafter holds under sheriff's deed for the statutory period for possession under color of title has good title against one thereafter obtaining a grant from the state.

Appeal from superior court, Burke county; Boykin, Judge.

Action by A. E. Walker against Moulton Moses for recovery of land. Judgment for defendant. Plaintiff appeals. Affirmed.

S. J. Ervin and J. T. Perkins, for appellant. Isaac Avery, for appellee.

EVERY, J. The description of the land conveyed in a deed as the tract "left me by my late grandfather, Michael Pearson," and as "adjoining the lands of Andrew Hemphill, H. B. Satterwhite, and others, containing 180 acres, more or less," suggests upon its face the possibility of identifying it by extrinsic proof of the fact that the ancestor named had left it, and that it adjoined lands of the persons mentioned, and possibly the additional circumstance that it corresponded in size. *Massey v. Belisle*, 2 Ired. 170; *Blow v. Vaughan*, 105 N. C. 204, 10 S. E. 891. The description is not, therefore, void for uncertainty; and the exception to the ruling that the boundaries could be located by parol proof is not well taken.

The only remaining exception was to the instruction that the deed executed by Michael Pearson to Satterwhite in 1841 was color of title, and that a continuous adverse possession under it, if shown, divested the title out of the state. There being no exception to the sufficiency or competency of testimony offered to fit the description to the locus in quo, we must assume that the necessary extrinsic proof was offered to locate the boundaries of that tract so as to include the land in controversy. The undisputed testimony tended to show that the land covered by that deed (there being no question raised as to its actual identification by the evidence offered, if parol proof was competent for that purpose) had been in the possession of the grantee, Satterwhite, and his heirs, for more than 21 years from its execution, in 1841, till John H. Pearson took possession, in 1854. There was no error in instructing the jury that such a possession would divest the title of the state, and vest it in the heirs of Satterwhite. *Mobley v. Griffin*, 104 N. C. 115, 10 S. E. 142; *Malloy v. Bruden*, 86 N. C. 251. The state is deemed to have surrendered its right, where it permits such an occupation without interruption for 21 years, and a title vests in the occupant, which can only be divested by a subsequent adverse possession by another, till his right, in turn, ripens in the same way. *Christenbury v. King*, 85 N. C. 229; *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991. The first duty incumbent on one who essays to show title good against the

world is to prove that the state, under whom all claimants hold, has conveyed the land in controversy to some person, or that by reason of continuous occupation by such claimant, or those through whom he derails title for the statutory period, "the state will not sue" for trespass, or prefer any claim to the profits. Code, § 139. If the defendant failed to connect himself with the possession of Satterwhite or his heirs, it was nevertheless admitted that he had shown a connected chain of title and continuous possession in himself, and those through whom he claimed, from January 26, 1870, the date of the sheriff's deed to John Pearson, to the 3d day of August, 1891. Having shown that the interest of the state had passed to the heirs of Satterwhite, it was then sufficient, as against them, to prove a subsequent adverse possession for seven years, under color of title, in those under whom the defendant claims, in order, in turn, to divest the right of said heirs, and transfer it to the defendant. Therefore, by the occupation of Pearson and his devisees under the sheriff's deed and his will, an indefeasible title passed to them at the end of seven years from the 26th of January, 1870, which it was admitted was transmitted to the landlord of the defendant. The issuance of a grant by the state in 1884 for any portion of the land covered by the sheriff's deed could not impair the title of those under whom the defendant claims, which had ripened so as to include all of the land within the limits of the deed to Pearson. *McLean v. Smith*, 106 N. C. 177, 11 S. E. 184. There was no evidence of an occupation by the plaintiff under his grant, except that by his tenant, Satterwhite, which continued only for a short time after the date of the deed (June, 1884) till the spring of 1885, when it was abandoned, and that was insufficient to impair the title acquired under the sheriff's deed.

The plaintiff had no cause to complain of the instruction that the issuing of the grant was such an interruption as arrested the running of the statute (Code, § 139, subd. 2) in favor of the defendant by virtue of the possession under the sheriff's deed and subsequent conveyances.

It is needless to discuss the question whether the sheriff's deed related back from its date, in 1870, to the sale, in 1854, so as to make the possession of Pearson, the purchaser, which began immediately after the sale, adverse to the claim of the heirs of Satterwhite, the grantee in the former deed, who surrendered the possession to Pearson, and would have been estopped from denying his title, had he caused the sheriff's deed to be executed immediately after the sale. If Pearson entered under the Satterwhite heirs, his possession from 1854 to 1870 was but a prolongation of theirs, by which they had already acquired title. If he held adversely, he thereby extended the benefit of his own

occupation backward, without benefit to himself, since, by holding for seven years under color after January 26, 1870, he acquired the title theretofore vested in the Satterwhite heirs, even though he had held under, not adversely to, them, till the execution of the sheriff's deed. For the reasons given, the judgment must be affirmed.

CRINKLEY et al. v. EGERTON et al.
(Supreme Court of North Carolina. Nov. 14, 1893.)

JURISDICTION OF SUPERIOR COURT—MORTGAGE OF CROPS—DESCRIPTION—VALIDITY—INSERTION OF POWER OF SALE.

1. The superior court has jurisdiction of an action not founded on contract, though the value of the property sued for is less than \$50; Code, § 887, providing that justices shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed \$50.

2. Where an action is brought, not only for the recovery of crops, but for the value of a portion alleged to have been wrongfully converted by defendant, the court properly denied a motion to dismiss on the ground that, the landlord being entitled to possession, no action would lie against him; it being a controverted point whether or not defendant was landlord.

3. The motion was properly denied for the further reason that defendant, though he were landlord, would be liable to account to plaintiffs for the value of the crops in excess of his lien.

4. A mortgage on crops to be raised on lands described in the mortgage, and on "any other lands" that the mortgagor may cultivate "during the present year 1891," is good as to crops on the land described, though void, for uncertainty, as to those raised on "any other lands." *Gwathney v. Etheridge*, 6 S. E. Rep. 411, 99 N. C. 571, followed.

5. The insertion in such mortgage of a power of sale upon default does not invalidate it as an agricultural lien.

Appeal from superior court, Warren county; W. A. Hoke, Judge.

Action by A. Crinkley and another against B. I. Egerton and others to recover for crops alleged to have been wrongfully converted by defendants. There was judgment for plaintiffs, and defendants appeal. Modified.

Batchelor & Devereux, for appellants. T. T. Hicks, for respondents.

CLARK, J. Exception 1: The action is not based on contract, and is for the recovery of property which, it is averred in the complaint, exceeds \$50 in value. The court rightly held that the superior court had jurisdiction. Even had the value of the property been less than \$50, the superior court had concurrent jurisdiction. Code, § 887.¹

Exception 2: The action being not only for the recovery of the crops, but for the value of part of the same, alleged to have been

wrongfully converted by the defendants, the court properly refused the motion to dismiss the action, made on the ground that, the landlord being entitled to possession of the crops, no action would lie against him. Whether he was landlord or not, was a controverted point; and, if landlord, he was liable to account to plaintiffs for value of crops in excess of his lien.

Exception 3: The court properly held that the paper writings put in evidence by plaintiffs "sufficiently described the land upon which the crops were to be raised, and were a sufficient compliance with the statute creating an agricultural lien, though prescribing a different remedy from that allowed by statute, (Code, § 1800.)" On the first point, the mortgage upon the crops to be raised on the farm described, and "on any other lands he may cultivate during the present year 1891," was held effective in *Woodlief v. Harris*, 93 N. C. 211, as to the crops on the land described, (which is the case here,) though void as to those raised on the "any other lands." *Gwathney v. Etheridge*, 99 N. C. 571, 6 S. E. Rep. 411. As to the second point, the insertion of a power of sale upon default made did not invalidate the instrument as an agricultural lien. As to the Pleasants & Sons' lien, assigned to Egerton, the jury, in response to the issue, find that nothing was advanced thereunder. No error.

LOCKHART et al. v. BALLARD et al.
NATIONAL EXCH. BANK OF DALLAS et al. v. SAME.

(Supreme Court of North Carolina. Nov. 21, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITORS—PREFERENCES—PROCEDURE.

Creditors of an assignor for benefit of creditors sued the trustees, and alleged facts entitling them to preference as creditors of the tenth class under the terms of the assignment. The answer first specifically denied the allegations of the complaint, but in a subsequent clause admitted them, (probably inadvertently.) Creditors belonging to class 14 also sued such trustees to restrain them from paying plaintiffs in the first action under class 10, and expressly denied that the latter were within such class. These two actions were consolidated. Held, that the contest was really between the plaintiffs in the two actions, and the facts entitling plaintiffs in the first suit to payment under class 10 were not established by admissions in the pleadings.

Appeal from superior court, Durham county; H. R. Bryan, Judge.

Two actions consolidated and tried together: One by John S. Lockhart and others against V. Ballard and W. S. Halliburton, trustees under a deed of assignment for benefit of creditors of W. T. Blackwell, to compel defendants to prefer and pay plaintiffs as creditors of the tenth class under the terms of the deed of assignment; the other by the National Exchange Bank of Dallas, Tex., and others, against the same defend-

¹ Code, § 887, providing that justices shall have "concurrent" jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed \$50.

ants, to restrain the latter from paying plaintiffs in the first action as creditors of the tenth class, and claiming that they and such plaintiffs are creditors of the fourteenth class. From a judgment entered on the pleadings admitting plaintiffs in the first action into the tenth class, the National Exchange Bank of Dallas, Tex., and other creditors of the fourteenth class, appeal. Reversed.

J. S. Manning and Busbee & Busbee, for appellants. W. A. Guthrie and Boone & Parker, for appellees.

CLARK, J. The tenth class into which the judgment admits the appellee creditors is thus described in the deed of assignment: "To J. S. Lockhart, or the holders thereof, the amount of all notes and drafts on which J. S. Lockhart is bound as surety or acceptor or indorser for W. T. Blackwell, all the same amounting to about thirty-five thousand dollars, and having been done for the benefit and accommodation of W. T. Blackwell." On none of the paper set out in the judgment does J. S. Lockhart appear as "surety or acceptor or indorser for W. T. Blackwell," nor does it appear that they were executed "for the benefit and accommodation of W. T. Blackwell." Parol evidence was competent to have shown that, notwithstanding the apparent relation of the parties upon the face of the notes and drafts, the relation of J. S. Lockhart in regard to them was in fact either that of "surety, indorser, or acceptor for W. T. Blackwell, or that they were executed for his benefit." But no evidence was introduced, and it was error to hold that this was established by admissions in the pleadings. There were two suits,—one by creditors claiming to come under class 10, and the other by creditors belonging to class 14, seeking to restrain the defendants, assignees of Blackwell, from paying out to the plaintiffs in the first suit under class 10. These two suits were consolidated without objection, and the plaintiffs in the two separate actions are in effect the real litigants, the nominal defendants being mere stakeholders. The answer to the complaint filed in the suit first brought denies specifically the allegation of the appellee creditors, plaintiffs in that suit. The following section of the answer, however, admits (by inadvertence probably) the ninth allegation of the complaint. Whatever question might have arisen upon this conflicting pleading was obviated by the consolidation of the two actions and the express denial in the pleadings in the latter case that the appellee creditors are in any wise entitled to come within class 10. As always in creditors' bills, one creditor can plead a defense to the claim of another creditor, since its exclusion enlarges the fund in which he himself is to share. *Oates v. Lilly*, 84 N. C. 643. The

notes and drafts sued on by those claiming under class 10 aggregate within a few thousands of the \$35,000 specified in that clause. This fact, however, cannot supply by itself evidence to show that Lockhart was "surety, indorser, or acceptor" on the notes and drafts set out in the pleadings. While the judgment is erroneous in holding that, upon admissions in the answer, the appellees were entitled to share in class 10, it may be that, when the case goes back, evidence can be found to prove that, notwithstanding in form J. S. Lockhart was not "surety, indorser, or acceptor for W. T. Blackwell," yet in fact that was the true relation he occupied as to the notes and drafts in controversy. *Southerland v. Fremont*, 107 N. C. 565, 12 S. E. Rep. 237. If so, it would be decreed that the holders thereof should participate in said estate under class 10. If this is not shown, those claimants would come in under section 14, and share pro rata with the other creditors named in that class. Error.

BURWELL, J., did not sit.

STATE v. MOORE.

(Supreme Court of North Carolina. Nov. 21, 1893.)

CONSTITUTIONAL LAW — UNIFORM TAXATION — POLICE REGULATION — REASONABLENESS OF LICENSE FEE.

1. Acts 1891, c. 75, defining an "emigrant agent" "to mean any person engaged in hiring laborers in the state to be employed beyond the limits of the same," and providing that emigrant agents shall pay the state treasurer a license fee of \$1,000 before they can hire laborers in certain counties of the state to be employed beyond the limits of the state, is, if considered as an exercise of the taxing power of the legislature, in contravention of Const. art. 5, § 3, authorizing the legislature to tax "trades, professions, franchises," etc., and is void for want of uniformity.

2. Since the act does not prescribe any regulation as to how the business shall be carried on, nor any police supervision, and since it exacts a very large license fee, it is restrictive and prohibitory of the business mentioned therein, and, if considered as an exercise of police power, is void for that reason.

3. There being no regulation of such occupation, and therefore no expense in supervising it, or any expense whatever beyond the amount necessary to defray the cost of issuing the license, the act, if considered an exercise of police power, is also void, for the unreasonableness of the license fee.

Appeal from criminal court, New Hanover county; Meares, Judge.

T. L. Moore was tried for a violation of Acts 1891, c. 75, (Emigrant Agent Act,) and, from a verdict of acquittal, the state appeals. Affirmed.

The Attorney General, for the State. Junius Davis, for appellee.

SHEPHERD, C. J. This is an indictment for the violation of chapter 75, Acts 1891;

and it is found in the special verdict that the defendant, "without having first procured a license therefor from the treasurer of the state of North Carolina, did hire six laborers in the county of New Hanover, in the state aforesaid, to be employed beyond the limits of the said state, and did solicit other laborers in said county to hire themselves to be so employed, and that the said defendant on the day aforesaid, and in the county aforesaid, was engaged in the business of hiring in the said county laborers to be employed beyond the limits of said state, and that the said county of New Hanover is east of the line, as at present established, and as so established on the 6th day of February, 1891, for the receiving of patients by the North Carolina Insane Asylum." The act referred to excludes, in express terms, from its operation, any of the counties in the state which are west of the said line, except a few, which are therein specifically named; and thus it appears that the same occupation may be lawfully and freely pursued in many of the counties of North Carolina, while in others a license fee of \$1,000 is required to be paid into the state treasury, and its pursuit without such a license is denounced as a criminal offense and punishable by a fine of "not less than five hundred dollars and not more than five thousand dollars," or by imprisonment in the county jail "not less than four months, or confinement in the state prison at hard labor not exceeding two years for each and every offense, within the discretion of the court." It must be manifest from these provisions that the principle of uniformity is entirely disregarded, and that, if the act is to be considered as an exercise of the taxing power of the legislature, it must, under the repeated decisions of this court, be declared unconstitutional and void. Const. art. 5, § 3, authorizes the legislature to tax "trades, professions, franchises," etc.; and, although it is not expressly provided that such taxes shall be uniform, "yet," says Rodman, J., speaking for the court in *Gatlin v. Tarboro*, 78 N. C. 119, "a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the constitution above cited, that it may be admitted that the collection of such a tax would be restricted as unconstitutional." In *Worth v. Railroad Co.*, 89 N. C. 291, the principle just stated was distinctly recognized, and declared to be within the spirit and meaning of the fundamental law. Smith, C. J., in delivering the opinion of the court, said: "We should be reluctant to hold, if there were no question of constitutional right involved, that this method of levying taxes was sanctioned by our own constitution, and consistent with the equality and uniformity which it contemplates. The 'uniform rule' to be observed in the exercise of the taxing power seems so far applicable to the taxes imposed on trades, professions, etc., as to require that no dis-

criminating tax be imposed upon persons pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds." Again, in *Pulitt v. Commissioners*, 94 N. C. 709, it was said: "The principle of uniformity pervades the fundamental law; and while not, in the constitution, applied, in express terms, to the tax on trades, professions, etc., necessarily underlies the power of imposing such a tax." In this last case the court adopted the words of Miller, J., in the *Railroad Tax Cases*, 92 U. S. 575, "that while one tax may be imposed upon innkeepers, another upon ferries, and a still different tax on railroads, the taxation must be the same on each class; that is, the same tax upon all innkeepers, upon all ferries, and upon all railroads, in their respective classes, as taxable subjects." And again, in *State v. Powell*, 100 N. C. 525, 6 S. E. Rep. 424, the same language was accepted as a correct definition of "uniformity," and it was repeated "that uniformity, in its legal and proper sense, is inseparably incident to the power of taxation." The act under consideration, if intended to impose a tax, in the legal signification of the term, very plainly falls within the inhibition of the organic law, as interpreted so often by this court, for it cannot, with the least show of reason, be contended that the principle of uniformity is not violated when the same occupation is heavily taxed in one county, while in an adjoining county it is entirely free and untrammelled. It is too plain for argument that if the legislature had passed an act imposing a tax upon merchants doing business in the counties of New Hanover, Pender, and Bladen, while like merchants in the counties of Brunswick, Robeson, and Richmond were not required to pay such tax, the act would be void; and yet such a discrimination in taxation would be no greater than that which is attempted to be made under the statute in question. It is not very unusual in this country for the state, either directly, or through its various municipal corporations, to require the payment of a certain amount for the privilege of prosecuting one's profession or calling; and this is required, indiscriminately, of all kinds of occupations, whatever be their character,—whether harmful or innocent; whether the license is necessary to the protection of the public, or not. "While the courts are not uniform in the presentation of the grounds upon which the general requirement of a license for all kinds of employments may be justified, on one ground or another, the right to impose the license has been very generally recognized. Whatever refinements of reasoning may be indulged in, there are but two substantial phases to the imposition of a license tax on professions and occupations: It is either a license, strictly so called, imposed in the exercise of the ordinary police power of the state, or it is a tax laid in the exercise of the power of taxation." *Tied. Lim.* 101; *Cooley, Tax'n*, 403.

We have seen that under the latter view the law under consideration cannot be sustained, for the want of the uniformity required by the constitution; and this brings us to the other branch of the inquiry,—whether it can be upheld as a regulation under the police power of the state.

2. "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks, not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. 704. "The power is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society. Its exercise, in extreme cases, is frequently justified by the maxim, '*salus populi suprema lex est.*' It is used to regulate the use of property by enforcing the maxim, '*sic utere tuo ut alienum non laedas;*' and under it, the conduct of an individual, and the use of property, may be regulated so as to interfere to some extent with the freedom of the one, and the enjoyment of the other." In re Jacobs, 98 N. Y. 98; Tied. Lim. 1. This power, under our federal system of government, has been left with the states; and "the only limits to its exercise in the enactment of laws by their legislatures is that they shall not prove repugnant to the fundamental law, the state constitution, and the federal constitution, with the laws made under its delegated powers." State v. Moore, 104 N. C. 714, 10 S. E. Rep. 148; Cooley, Const. Lim. 574. In its fair and reasonable exercise, the legislature, by reason of the very nature of the power, is not restricted by constitutional provisions in reference to uniformity, as, says Judge Cooley, "the circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another. These discriminations are made constantly, and the fact that the laws are of local or special operation, only, is not supposed to render them obnoxious in principle." Cooley, Const. Lim. 480. This principle has been fully recognized in this state, and is illustrated by many decisions. In Intendant, etc., v. Sorrell, 1 Jones, (N. C.) 49, an ordinance of the city of Raleigh requiring, under penalty, oats to be weighed by the public weighmaster, before being offered for sale, was sustained as a valid police regulation. So, an ordinance forbidding the sale of fresh meat in the town of Durham, except at the market house, (State v. Pendergrass, 106 N. C. 664, 10 S. E. Rep. 1002,) and an act regulating the sale of seed cotton in certain counties

of the state, were held to be a proper exercise of the police power. So, also, it may be stated, as a general principle, that all callings and professions which, by reason of their peculiar character, may directly or indirectly do harm to the public, are subject to police regulations, and a license may be required for their prosecution. On this principle, says Tiedman, (Lim. 101,) "attorneys, physicians, druggists, engineers, and other skilled workmen, may be required to procure a license which would certify to their fitness to pursue their respective callings, in which professional skill is most necessary, and in which the ignorance of the practitioner is likely to be productive of great harm to the public, and to individuals coming into business relations with them. So, also, the licensing of dramshops, greengroceries, hackmen, and the like, is justifiable, in order that these callings may be effectually brought within the police supervision, which is necessary to prevent the occupation becoming harmful to the public." It must not be understood, however, that the exercise of the police power is without limit. On the contrary, it is settled by abundant authority that, while it is for the legislature to determine what regulations are needed to protect the public health, and secure public comfort and safety, and its measures calculated and intended to accomplish these ends are generally within its discretion, and not the subject of judicial review, it is nevertheless true that this extensive authority must be exercised in subordination to those great principles of fundamental law which are designed for the protection of the liberty and the property of the citizen. "Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation." In re Jacobs, supra; People v. Gillson, 109 N. Y. 389, 17 N. E. Rep. 343. In Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 746, 4 Sup. Ct. Rep. 632, Mr. Justice Field said "that among the inalienable rights, as proclaimed in the declaration of independence, is the right of men to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others. * * * The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birth-right." In the same case, Mr. Justice Bradley said: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen, of which he cannot be deprived,

without invading his right to liberty, within the meaning of the constitution." In *Bertholf v. O'Reilly*, 74 N. Y. 509, Andrews, J., remarked that a man's right to liberty includes "the right to exercise his faculties, and to follow a lawful vocation for the support of life." Judge Cooley says: "The general rule, undoubtedly, is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them." These authorities are referred to for the purpose of showing that, under the mere guise of a police regulation, a person cannot be unduly restricted, or substantially prohibited, from pursuing a lawful occupation. In order to justify such legislation, the business must itself be of such a nature that its prosecution will do damage to the public, whatever may be the character and qualification of those who engage in it. Mr. Tiedman, in his very reliable work, (*Lim.* 290,) remarks: "In order to prohibit the prosecution of a trade altogether, the injury to the public, which furnishes the justification for such a law, must proceed from the inherent character of the business. * * * But, if the business is not inherently harmful, the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would be 'deprived of his liberty' without due process of law." It is on the ground of their inherently harmful and dangerous character that the keeping of gaming tables or the selling of intoxicating liquor, or other things of a demoralizing nature, may be absolutely prohibited. *Mugler v. State of Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273; *State v. Joyner*, 81 N. C. 534. This may be, and is often, directly accomplished by legislation, which, in its terms, is expressly prohibitory, instead of the circuitous method of imposing a burden in the nature of a license as a police regulation, which is difficult or impossible to be borne, and which, in the end, may make the occupation unprofitable. Cooley, *Tax'n*, 404.

It must be apparent from an examination of the statute in question that the occupation of an "emigrant agent," as defined therein, does not belong to that class which is so inherently harmful or dangerous to the public that it may, either directly or indirectly, be restricted or prohibited. The statute defines the said occupation "to mean any person engaged in hiring laborers in this state to be employed beyond the limits of the same." It cannot be seriously contended that a laborer, under our system of government, as indicated by the unquestionable authorities to which we have referred, does not possess the right of hiring his services

to any one, either within or without the state; and, if he may do this, we are unable to see, as we have just remarked, how an agent or other person engaged in hiring him to be employed without the state can be considered as following an occupation which, in itself, is inherently dangerous or harmful, in the sense above mentioned. Indeed, this position is fully conceded by the attorney general, and we will now consider whether the license imposed by the act is restrictive or prohibitory in its character.

While the probable harm and inconvenience of immigration, to the public, may not be averted by such legislation, it is of the greatest importance to all of the citizens of the state that the inexperienced and artless laborer may not be imposed upon by the false representations and other fraudulent practices of an emigrant agent; and it is one of the highest duties imposed upon the lawmakers to prevent such abuses by prescribing rigid and appropriate regulations, under which the said occupation can alone be followed. Regulations of this nature may be made in a variety of ways, but that which is most commonly adopted is the requirement of a license fee, which is exacted for the purpose of defraying the probable expenses of ascertaining the moral and other qualifications of the proposed licensee, and the proper inspection or other necessary police supervision under which the particular business is to be conducted. While the means adopted must have a relation to the accomplishment of these ends, it is not absolutely necessary, in all cases, that the law or ordinance imposing the license should prescribe any specific regulation, and it is sufficient if the court can see that the fee exacted is a reasonable proportion of the necessary expenses incident to the general police supervision. The entire absence, however, of any regulation or of any police supervision whatever is a powerful aid (and especially where the amount exacted is very large) in determining whether the license is not really a disguised species of taxation, or an indirect method of unduly restricting or prohibiting the business altogether. In this case, however, we have no hesitation in reaching the conclusion that the act in question is not, and was not intended as, a mere regulation, but its object was either to tax or to restrict or prohibit the particular occupation mentioned therein. This is evident from the fact that it does not contain any of the features of a police regulation, nor is it connected in any way with any police supervision. No provision whatever is made for the ascertainment of the moral character or other qualities of the applicant. The statute provides that "any person shall be entitled to a license" upon the payment of the prescribed fee, and therefore the vilest impostor may demand a license, and the treasurer has no discretion to withhold it. Neither are there any regulations as to the

manner in which the business is to be carried on, and the licensee is left entirely unrestrained, except so far as he may be amenable to the general law. Even if there were such regulations, there is an utter absence of any provision for an inspector, or other officer whose duty it is to enforce them. The general scope and tendency of the act, in connection with the exaction of the very large license fee, induce us to believe that, viewed as a police regulation, it is so far restrictive and prohibitory as to contravene those fundamental principles we have enunciated, and which are intended to protect the citizen in the pursuit of an occupation not inherently dangerous or harmful to the public. It may be regulated, but it cannot be indirectly prohibited, by an exercise of the police power. Whatever doubt, however, that may possibly remain as to the validity of the act as a police regulation may be dissipated when we consider the reasonableness of the amount required for the license. We have already adverted to this principle, and will refer to some of the many authorities upon the subject. In *Cooley on Taxation*, (page 408,) it is said: "Where the grant is not made for revenue, but for regulation, a much narrower construction is to be applied. A fee for the license may be exacted, but it must be such a fee, only, as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license, and of inspecting and regulating the business which it covers." In *Tied. Lim.* 274, it is said that, "in the regulation of occupations, it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expenses of issuing the license, and maintaining the police supervision." The principle has been emphatically recognized by this court in *State v. Bean*, 91 N. C. 554. In that case it appeared that the town of Salisbury, had under its charter, the authority to regulate the manner in which provisions might be sold in its "streets and markets," and to enforce such regulations by appropriate penalties, etc. The ordinance provided that "no butcher or other person shall cut up and expose to sale any fresh meats within the limits of Salisbury without first obtaining a license from the commissioners of the town, which license shall authorize the person or persons to sell meat at a certain stand, shop or stall specified in said license, to be used as a market, and for which license said person shall pay the sum of \$3.00 per month payable in advance." The court held that as the subjects of taxation were enumerated in the charter, and as the occupation of selling meat by butchers was not included therein, the town had no right to impose a tax upon that particular occupation; and, when it was urged that the license fee could be sustained as a regulation under the police power, it was held that it was not a police regulation, but a tax. The opinion was

based upon the unreasonableness of the amount required for the license. The court (Ashe, J.) said: "There are authorities to be found to the effect that, under the police power, license may be granted for the exercise of particular avocations and employments, but in all such cases it is held that the fee or price exacted for the privilege must not be with a view to revenue; and in such cases it is competent and proper for the courts, where the effect and purpose of an ordinance are brought to be reviewed by them, to see that the fee or price paid for the privilege of exercising the franchise is reasonable, and not for the purpose of raising revenue. *Desty, Tax'n*, 306. And to the like effect is *State v. Mayor, etc., of Hoboken*, 33 N. J. Law, 280." The court then proceeded to quote *Dill. Mun. Corp.* 357, to the effect that, in the case of a license under the police power, only "a reasonable fee for the license, and the labor attending its issue, may be charged." Several cases were cited to show that, because of the unreasonable amount exacted for a license, its imposition was considered as an exercise of the taxing, and not of the police, power. The authorities are abundant in support of the proposition, but its correctness is so fully established that it is hardly necessary to reproduce them in this opinion. We will refer, however, by way of further illustration, to the instructive case of *St. Paul v. Traeger*, 25 Minn. 248. The city of St. Paul had, by ordinance, required a license fee of \$25 for every huckster of vegetables who plied his trade in the streets of the city. In determining whether this was a license or a tax, the court, in the course of the discussion, said: "It cannot be claimed that it was enacted in the exercise of any police power, for sanitary purposes, or for the preservation of good order, peace, or quiet of the city, because, neither upon its face, nor upon any evidence before us, does it appear that any provision is made for inspection, etc. * * * The annual sum exacted for the license is manifestly much in excess of what is necessary or reasonable to cover expenses incident to its issue. * * * No regulations being prescribed in reference to its prosecution under the license, there could be little, if any, occasion for the exercise of any police authority in supervising the business, or enforcing the ordinance, and no cause for any considerable expense on that account." The court held that the ordinance was not a police regulation. Inasmuch as a license fee must be prescribed in advance, and in many instances it cannot be determined with accuracy what the expenses incident to the regulation may be, the courts are not inclined to be too exact in placing an estimate upon them, so long as the sum demanded is not altogether unreasonable. But we have no difficulty in holding, in the present case, that the amount of \$1,000, to be paid in each county in which the occupation

is pursued, is enormously in excess of the probable expenses incident to the regulation. We have seen that in fact there is no regulation at all, and therefore no expense, except the insignificant amount necessary to defray the cost of simply issuing a license. If a license fee of \$3 per month was held excessive in *State v. Bean*, supra, where very many of the elements of a police regulation were present, what shall we say of the license fee of \$1,000 in this case, in which there is virtually no expense, and where there is not a single feature which indicates any police regulation whatever?

As the questions discussed are of much importance, and especially because they involve the constitutionality of an act of the legislature, we have been somewhat elaborate in the expression of our views. Entirely mindful of that most salutary principle that no court should declare an act of the legislature unconstitutional, unless it is plainly so, and deeply conscious, as we are, of the profound responsibility imposed upon those whose province it is to exercise so delicate a duty, we cannot hesitate in deciding that the act under examination is incapable of being sustained, in any point of view. Considered as a tax, (and this, we think, is its true character,) it is void for want of uniformity; and, considered as an exercise of the police power, it is likewise void, because of its restrictive or prohibitory character, as well as the unreasonable amount exacted as a license fee. **Affirmed.**

SULLIVAN et al. v. PARKER et ux.

(Supreme Court of North Carolina. Nov. 21, 1893.)

WILL—CONSTRUCTION—DEVISEES—ILLEGITIMATE CHILDREN.

Testatrix devised property to her daughter, "free from the control * * * of her husband, * * * for and during her life, and at her death to all the children of her body, share and share alike." At the time the will was made, the daughter had two children living, by a deceased husband, and was living with a man who had an undivorced wife living, but to whom she was married, and by whom she then had four children. Testatrix also lived with her daughter. *Held*, that the word "children," in said will, included the daughter's illegitimate children, born both before and after the will was made, by the man with whom she was living as his wife when the will was made.

Appeal from superior court, Duplin county; H. R. Bryan, Judge.

Action of partition by Ollin Sullivan and others against H. E. Parker and wife. From a judgment for plaintiffs, defendants appeal. **Affirmed.**

The parties to this proceeding agree upon the following statement of facts: "(1) That Ann Garvey, at the time of her death, was seized in fee simple, and in possession, of the following described tract or parcel of land in North Carolina, Duplin county, and Kenansville township, lying on the west side of the

Northeast river, and on Horse branch, adjoining the Dobson lands, the lands of Josephine Farrior and others, bounded as follows: Beginning," etc., — "containing 135 acres, more or less, which said land passed under the third item of the will of Ann Garvey, and which said will was executed on the 2d day of August, 1872, and duly probated and recorded on the 7th day of September, 1872, and which said will, marked 'A.' is hereto attached, and made a part of this statement of facts. (2) That said Ann Garvey died between the 2d day of August, 1872, and the 7th day of September, 1872; that, at the time of the execution of her will, she was living in a house on the said lands with her daughter, Martha J. Bostick, who was living there with one Samuel T. Bostick, under the relations hereinafter set out. (3) That at the time of the execution of the said will the defendant Charity C. Bostick, (now Parker,) and her brother H. T. Bostick, and all the plaintiffs except Dorothy W. Bostick and Marshall E. Bostick, were born and alive; that the plaintiffs, excepting O. L. Sullivan, the husband of one, are the offspring of the said Martha J. Bostick by the said S. T. Bostick. (4) That about the year 1854 the said S. T. Bostick duly intermarried in the county of Duplin with one Barbara Merritt, with whom he lived for about a year, when she left him, and resided in the county of New Hanover the greater part of the time till 1885, but resided part of the time in Charleston, S. C.; that S. T. Bostick never saw the said Barbara after she left him, but all the while had information that she was residing sometimes in New Hanover county, and sometimes in Charleston, S. C.; that about the year 1885 or 1886 the said Barbara came back to the county of Duplin, and died here about the year 1889 or 1890, in the poorhouse; that no divorce was ever granted between the said S. T. Bostick and Barbara Bostick, so far as the records of this county show. (5) That about the year 1859 the said Martha Jane (Garvey) duly intermarried in Duplin county with one Joseph Bostick, by whom she had two children, the defendant Charity C. Parker and one H. T. Bostick, now living in the state of Georgia; that said Joseph Bostick died in the Confederate army about the year 1862. (6) That in March, 1866, in the county of Duplin, a justice of the peace, having a license for the purpose, went through the legal form of solemnizing a marriage between the said S. T. Bostick and the said Martha J. Bostick. (8) That the said S. T. Bostick and Martha J. Bostick lived together under these relations until the death of Martha J. Bostick, in November, 1891; that about the year 1868 the said S. T. Bostick was convicted of fornication and adultery in living with the said Martha Jane Bostick."

A. D. Ward and W. R. Allen for appellants. H. R. Kornegay, for appellees.

BURWELL, J. The third item of the will of Ann Garvey is as follows: "I will and devise all the balance of the estate of which I may die seised and possessed, or to which I am lawful owner, unto my daughter, Martha Jane Bostick, for and during her natural life, to have, hold, and enjoy the same free from the control, management, or contracts of her husband, or any other person, for and during her life, and at her death to all the children of her body, share and share alike, and their heirs, forever." In *Howell v. Tyler*, 91 N. C. 207, Chief Justice Smith, discussing the case of *Thompson v. McDonald*, 2 Dev. & B. Eq. 463, says: "It is not necessary to question the correctness of this rigid rule of testamentary interpretation, which seems to ignore to some extent the inquiry as to what the testator intended in using the word, since there was nothing in that case to explain the sense of the testator, or to qualify the legal principle that such children have no parent, and cannot be designated by a relation they do not sustain." The "rigid rule" of which he was there speaking was that where there was a bequest to two sisters, (naming them,) with a limitation over if either "should die without a child or children living at her death," the word "children" was to be understood to mean legitimate children. And he proceeds to say that "a more general and fundamental rule, underlying all others, is to look at the whole instrument in the light of the surrounding circumstances when it is made, and see, if we can, in what sense the testator used the word, for his intent must prevail over any legal mode of construing it, where there is no antagonism." Apply this fundamental rule to the will now before us. The words used are themselves significant,—“all the children of her body.” At the time these words were written to express the intention of the testatrix, there had been born of the body of her daughter two children by a former marriage, who are the defendants and appellants, and four children, who are plaintiffs, and who were the result of that cohabitation between her and S. T. Bostick, the illegality of which is set out in the agreed facts. The testatrix, at the time she executed the will, was living in the house with her daughter and this man, towards whom that daughter stood in the relation of a wife in fact, if not in law. An officer of the law, under a duly-issued license, had solemnized a marriage between them. She speaks in the will of the husband of her daughter, evidently meaning this man, to whom she no doubt considered her daughter lawfully united. Considered in the light of the surrounding circumstances when it was made, we must conclude that there should not be applied to the interpretation of this will that rigid rule, of the correctness of which Chief Justice Smith seems to intimate a doubt; having in mind, perhaps,

what had been said by Judge Battle in *Fairly v. Priest*, 56 N. C. 383, in relation to the effect of the act (Rev. Code, c. 64, § 5) to legitimate a child, as to its mother, and to make offspring, that at common law was cruelly called nobody's child, the heir, and in law, as well as in fact, the child of the mother that bore it. Or, to speak perhaps more accurately, the rule itself does not establish the defendants' contention, for under it the word "children," *prima facie*, means only legitimate issue. *Kirkpatrick v. Rogers*, 41 N. C. 130. And here we have, in the will itself, considered in connection with all the circumstances that we are allowed to call to our aid, or in our search for that all-important fact, (the intent of the testatrix,) more than enough to rebut this *prima facie* case against these plaintiffs who were born before the death of the testatrix. Having concluded, for the reasons stated above, that those four of the plaintiffs who were in esse at the death of the testatrix are entitled, notwithstanding their illegitimacy, to be considered as included in the words, "all the children of her body," we think there can be found no good cause to stop short of the further conclusion that those children, the other two plaintiffs, who, after the death of the testatrix, were born of that cohabitation which has been spoken of, should also be so included. The words are comprehensive.—“all the children of her body.” This interpretation does, then, no violence, and is consonant with reason and justice. It effectuates what we believe to have been the true intent of the testatrix. Affirmed.

JONES v. RICE.

(Supreme Court of Georgia. June 26, 1893.)

CHARGES ON WIFE'S SEPARATE ESTATE.

1. On the presumption that the common law prevails in North Carolina, unaltered by statute, as to the rights and powers of a married woman to charge her separate estate, a mortgage upon her land, executed by her to secure the payment of a debt created for the benefit of her husband, would be valid, it not appearing that there was any restriction upon her power of disposition imposed by the terms of any settlement, or other conveyance under which her property was held. If, while her land was incumbered with such mortgage, she, desiring to exchange the same for other land, in order to facilitate this object procured a stranger to advance money or property in part discharge of the mortgage lien, and gave to him her promissory note for the amount, this note being executed and delivered in North Carolina, and afterwards she removed to the state of Georgia, and here executed other promissory notes in renewal of the one so given in North Carolina, the renewal notes are not without consideration moving to her, but are valid and binding upon her separate estate here, their real consideration being the benefit which she derived from the advance made by the payee to disincumber her land in North Carolina.

2. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Towns county; C. J. Wellborn, Judge.

Action by J. M. Rice against M. A. Jones to recover on promissory notes. Plaintiff had judgment, and a new trial was denied. Defendant brings error. Affirmed.

A. F. Underwood & Son and J. J. Kimsey, for plaintiff in error. W. S. Pickrell, M. G. Blackwell, and Howard Thompson, for defendant in error.

BLECKLEY, C. J. 1. Nothing appearing to the contrary, we may presume that the common law prevails in the state of North Carolina, unaltered by statute, as to the rights and powers of a married woman to charge her separate estate. The common law disabled her to charge herself personally by any contract for the payment of money. No judgment against her could be recovered on such a contract, but she had capacity to charge her separate estate by her contract, whether that estate received the benefit or consideration of the debt with which she incumbered it or not. In order to charge it for anything which was not directly beneficial to it, it was necessary that she should manifest her intention so to do, and mortgaging or pledging her separate estate for the payment of the debt of another was a sufficient manifestation of such intention. That law did not disable her from binding her separate estate for the payment of her husband's debt. Prior to the adoption of the Code she could in this state, if unrestrained by the instrument creating her separate estate, secure her husband's debt in this manner. *Carmichael v. Walters*, 33 Ga. 316. It was the Code that attached this new disability to her former disabilities. No similar legislation by the state of North Carolina was proved on the trial of this case. We take it, therefore, that in that state a mortgage by a married woman to secure the debt of her husband would be valid and enforceable. In this case the jury could find from the evidence that Mrs. Jones had incumbered her land situate in North Carolina with such a mortgage, and, desiring to exchange the same for other land situated in this state, she procured Rice, the plaintiff below, to advance a promissory note which he held upon McLeod, the owner of the incumbrance, for that purpose, she giving Rice her promissory note for the amount so advanced; that she afterwards removed to this state, and here executed other promissory notes in renewal of the first. If this was so, these renewal notes were not given for the debt of her husband, the real consideration of them being the benefit which she derived from the advance made by Rice to disincumber her land in North Carolina. This consideration moved to her, and not to her husband. Of course, if it was lawful in North Carolina for her to incumber her property as

security for her husband's debt, it was lawful for her to pay that debt, and, if her separate estate was relieved from the incumbrance by the money or property which Rice advanced in North Carolina, that estate was benefited by the advance; and though the original note given in North Carolina might not have bound Mrs. Jones personally, yet the notes given here in renewal of that would bind her personally, for in the present state of our law a married woman may bind herself personally by promissory notes, the consideration of which is a benefit to herself or to her separate estate. These notes were executed in November, 1890, and are the basis of the present action. The request on which Rice acted in advancing the McLeod note upon the mortgage was made by Jones, and not directly by Mrs. Jones; but the jury could infer that her husband preferred the request for her interest and at her instance, inasmuch as she shortly thereafter gave to Rice her promissory note for the amount, and in that note, as Rice testified, bound the Georgia land for its payment, and agreed that, if this mode of binding it was not sufficient, she would give a mortgage or any other kind of paper to accomplish the purpose. Rice parted with the McLeod note by surrendering it to McLeod according to the arrangement; and though it is contended that the amount of that note was not in fact deducted from McLeod's claim against Jones, but that that claim, with others embraced in the incumbrance, was paid off chiefly by another Jones, the brother of Mrs. Jones' husband, yet there are circumstances from which the jury might have inferred the contrary; and inasmuch as Rice advanced the McLeod note as he was requested to do, and Mrs. Jones recognized this advancement by giving her note for the amount, the jury might have concluded that it was her business to see to the application of the McLeod note, and not the business of Rice. Moreover, they could conclude from her executing, after coming to Georgia, the notes in suit in renewal of her first note, that this was an admission on her part that she had obtained the benefit of Rice's advance. Some of the instructions complained of in the charge of the court are not accurate, but they were not calculated to mislead the jury, as against Mrs. Jones, on the real merits of the case. One or two of them may have been misleading as against Rice, the plaintiff.

2. The evidence was in some respects directly conflicting, and the verdict ought to have depended on whether the jury gave full credit to the testimony of Rice, the plaintiff. Doubtless they did so, for they found in his favor. Taking his testimony as true, and looking to the circumstances tending to support his theory of the case, the verdict was correct, and there was no error in denying a new trial. Judgment affirmed.

PRITCHETT v. STATE.

(Supreme Court of Georgia. April 10, 1893.)

BURGLARY—EVIDENCE—POSSESSION OF STOLEN GOODS—FORCE—INSTRUCTIONS.

1. The fact that the door of a house was usually kept locked at night is some evidence that it was locked on a particular night, there being nothing tending to show that the usage was not observed on the night in question. Under such circumstances, the usage, together with proof that goods stored in the house disappeared therefrom, and were shortly afterwards found, some of them in the possession of the accused, and some in possession of a witness for the state against him, will be sufficient corroboration of the testimony of the witness, he testifying that the building was burglarized by himself and the accused in the night by unlocking the door, entering the house, and stealing the goods.

2. Where the pressure of the case was upon the credibility of an accomplice as compared with the credibility of two daughters of the accused, the accomplice testifying that the accused was a party to the burglary, and the daughters testifying that the stolen goods found in possession of the accused were purchased by him from the accomplice in their presence, a charge of the court to the jury that "ordinarily, when a burglary has been committed, when the evidence shows to the jury that a burglary has been committed, a house broken, the goods stolen therefrom, and shortly thereafter the defendant upon trial is found in possession of the stolen goods, that fact—the fact of possession—authorizes the jury to convict, provided the defendant does not satisfactorily explain his possession to the jury," though not verbally, and perhaps not substantially correct, since it is true in some cases only, yet the jury having, in effect, found by their verdict that the explanation set up by the accused was false, and the testimony of the accomplice being sufficiently corroborated, there was no cause for a new trial.

3. Though burglary cannot be committed without force in the legal sense, it is not error to charge the jury that force or violence in a popular sense would not be necessary. Such, in effect, though not in terms, was the charge of the court in the present case. The charge contrasted the breaking of a house by unlocking the door with a key and breaking it by force or violence of a different order and higher degree.

4. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Clark Pritchett was convicted of burglary, and from an order denying a new trial he brings error. Affirmed.

John R. Cooper, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

BLECKLEY, C. J. 1. Was the accomplice, Will Battle, sufficiently corroborated in that part of his testimony which implicated Pritchett in the burglary? We think he was. It appeared from the evidence of other witnesses that the door of the house was usually kept locked at night; that goods stored in the house disappeared therefrom on a particular night, and were shortly afterwards found, some of them in the possession of Pritchett, and some in the possession of Will Battle, the witness. The evidence tends strongly to show that the usage as to locking

the door was observed on the night in question, and there is no evidence having the slightest tendency to establish the contrary. The door was found the next morning closed, but unlocked. The accomplice testified that Pritchett had a bunch of keys, and that he and Pritchett opened the door, and went in; but did not say expressly whether a key was used in so doing or not. The jury could probably infer from his evidence that a key was used, and such seems to have been the understanding of counsel, for the witness was not pressed to be more specific on this point than he was. We infer this from reading his examination, which is set out in the record by questions and answers.

2. The charge of the court on the effect of possession of stolen goods in a trial for burglary was not accurate, but for the reason indicated in the second headnote we think the inaccuracy, as applied to this case, was not cause for a new trial.

3. Without using force—force as understood in a legal sense—no burglary can be committed, but force as understood in the popular sense is not necessary. Opening a door by unlocking it with a key is using force in the former sense, though not in the latter. In presenting this distinction to the jury the court's phraseology was not accurate, but the substance of the instruction as applied to the facts of the case was not misleading.

4. It was not error to deny a new trial. Judgment affirmed.

JOHNSTON v. PATTERSON.

(Supreme Court of Georgia. April 17, 1893.)

CONTINUANCE—DISTRESS FOR RENT—SET OFF.

1. On the special facts there was no error in refusing to postpone the trial to a later day or hour.

2. Where the rent contract between landlord and tenant embraces mutual stipulations as to divers particulars, and each party violates some of the stipulations, the damages resulting therefrom should, in a contest on a distress warrant and counter affidavit as to the amount of rent due, be set off, those on the one side against those on the other, and nothing should be allowed the tenant as a deduction from the amount of the distress warrant except the net balance of damage in his favor on squaring the damage account.

(Syllabus by the Court.)

Error from superior court, Bibb county; A. L. Miller, Judge.

Action by R. M. Patterson against John T. Johnston to recover rent by distress warrant. There was judgment for plaintiff, and defendant brings error. Affirmed.

For report on former appeal, see 13 S. E. 17.

Steed & Wimberly, Jas. A. Thomas, and C. & H. Estes, for plaintiff in error. R. W. Patterson and R. Hodges, for defendant in error.

BLECKLEY, C. J. 1. On the special and somewhat complicated state of facts upon

which the application for a postponement of the trial rested, there was no error in denying the application. It must be remembered that such matters are generally discretionary with the trial court, and, no abuse of the discretion appearing, the decision of that court will not be disturbed.

2. In a statutory contest between landlord and tenant as to the amount of rent due, there are no pleadings except the affidavit for a distress warrant and the warrant itself on the one side, and the counter affidavit on the other. Upon these pleadings alone the tenant may prove that the landlord has violated the rent contract, and reduce the rent by so much as the damages occasioned thereby amount to. *Johnston v. Patterson*, 86 Ga. 725, 13 S. E. 17. May not the landlord meet violation with violation, damages with damages, have a full instead of a partial reckoning as to damages, and uphold his warrant to the extent of the sum really due him for rent after a just settlement of the damage account? Here the rent contract embraced mutual stipulations, and involved divers particulars. The tenant undertook to do more than merely to pay the rent, and the landlord had more to do than to receive it. Each party defaulted, and occasioned damage to the other. The breaches, as well as the covenants, were mutual. Why should not the principle of recoupment be applied in favor of the landlord as well as against him? The net balance in favor of the tenant on squaring the damage account measured the credit to which he was entitled on the rent account. This, and no more, could properly be deducted from the amount of the distress warrant. Judgment affirmed.

BRYAN v. MAYOR, ETC., OF THE CITY OF MACON.

(Supreme Court of Georgia. April 17, 1893.)

INJURIES FROM DEFECTIVE STREETS—SUFFICIENCY OF DECLARATION.

The declaration sets forth a cause of action, the allegations being in substance that, in August, 1891, plaintiff was driving a mule hitched to a buggy in a street of the city of Macon. His mule becoming frightened, he jumped from the buggy; and while his attention was thus directed to his mule, plaintiff, without fault on his part, fell into a hole,—the mouth of a sewer in said street. The sewer was unprotected, and in a dangerous condition, and had been so for 10 days, and its condition was known to the city, to whose negligence it was due. That, in consequence of such fall, he was greatly injured, suffered from concussion of the spine, was unconscious for 24 hours after the injury, suffered great pain, which still continues, and is now totally unfitted for business, and has become liable for \$100 for medical attention. At the time of the injury he was 46 years of age, and was earning \$200 per month; to his damage \$15,000, etc.

(Syllabus by the Court.)

Error from city court of Macon; J. P. Ross, Judge.

Action by William Bryan against the city of Macon to recover for personal injuries alleged to have resulted from a defective street. There was judgment for defendant, dismissing the action on demurrer to the declaration. Plaintiff brings error. Reversed.

Hardeman & Nottingham, for plaintiff in error. R. W. Patterson, for defendant in error.

BLECKLEY, C. J. The court erred in dismissing the action on general demurrer to the declaration. Taking the facts, as alleged, to be true, the plaintiff sustained a serious personal injury, while free from fault on his part, by falling into the unprotected mouth of a sewer which opened into one of the public streets of the city, along which he was passing. The dangerous condition of the mouth of the sewer was caused by the negligence of the defendant, was known to it, and had existed for 10 days. The declaration explains how the plaintiff came to be near the mouth of the sewer, and why he did not see it, but fell into it unawares. He was driving along the street; his mule became frightened; he leaped from the buggy, and, while his attention was directed to the frightened mule, he fell into the mouth of the sewer. It is not alleged precisely how the sewer was connected with the street relatively to the position of the opening, but it is alleged that the danger it occasioned was due to the defendant's negligence. Can the defendant admit that the plaintiff was injured, that he was without fault, that the city was negligent, and that a dangerous hole, left open by its negligence, was the one into which he fell, and yet avoid liability? Clearly not. The declaration may be defective in form by reason of not setting out with more particularity and distinctness the position of the hole, whether at the edge of the street or how far inside, etc., but it is good in substance; and to withstand a general demurrer nothing more is requisite. Judgment reversed.

McCRARY et al. v. GLOVER.

(Supreme Court of Georgia. April 17, 1893.)

REAL ACTION—NEW TRIAL.

This being the first grant of a new trial, and no abuse of discretion being clearly apparent, the judgment is affirmed.

(Syllabus by the Court.)

Error from superior court, Twiggs county; D. M. Roberts, Judge.

Action in ejectment by I. N. McCrary and others against George Z. Glover, guardian. There was a verdict for plaintiffs, and a new trial granted. Plaintiffs bring error. Affirmed.

The following is the official report:

Ejectment on the several demises of I. N. McCrary, as head of a family, Aaron Boynton, and V. A. Frasier, was defended by George Z. Glover, guardian for Rosa M. Peacock. The premises in dispute are described as eight acres of land, more or less, known as the "Tom Solomon New Ground," being that portion of the 350-acre tract formerly known as the "Lawson Place," and later as the "McCrary Place," which is included in the following metes and bounds: Bounded on three sides—on the northwest, northeast, and southeast—by a fence separating said new ground from woodland of I. N. McCrary, and on the southwest by the true land line separating said 350-acre tract from the Rosa Peacock land, said true land line commencing at a large locust tree on the west side of the Jeffersonville and Gordon public road; and extending thence north, 47 degrees west, between said 350-acre tract and lands belonging to Miss Rosa Peacock. The jury found for the plaintiffs the premises in dispute, and for rent one dollar per acre per annum. The court granted a new trial on defendant's motion, and the plaintiffs excepted. The grounds of the motion are that the verdict is contrary to law and evidence, and that it is contrary to the following charge of the court: "If the jury believe from the evidence that the premises in dispute are embraced in the body of land assigned to M. E. Lawson and Alice L. Taylor by the report of the commissioners who divided the lands of Sabra Durham, made by Fred D. Wimberly, William Beal, and J. S. Evans, commissioners, dated August 5, 1874, the plaintiff and defendant are tenants in common, and the plaintiff cannot recover. There is no ambiguity in this report except as to the location of the land assigned to Alice L. Taylor, and, if the testimony shows that the part assigned to her was embraced in the description given in this report, then they are tenants in common, and the plaintiff cannot recover. The report itself is the highest evidence of the division and the assignments thereunder. If plaintiff and defendant were tenants in common of the parcel of land of which the land in dispute is a part and parcel, the plaintiffs are not entitled to recover rents, unless the defendant was occupying more than her fair share or proportion of the land held between them as tenants in common. It is my duty to construe the report of the commissioners, and your duty to accept it, and I charge you that, if the description of the land assigned to Mrs. Taylor is embraced in the description of the land assigned to Mrs. Lawson, they and those holding under them were tenants in common, and you should find for the defendant."

The evidence for the plaintiffs was, in brief, as follows: A division of the lands of Sabra Durham, deceased, shown by the records of the court of ordinary of Twiggs

county; signed by Fred D. Wimberly, William Beal, and J. S. Evans, commissioners, dated August 5, 1874, the relevant portion of which is: "In the Sandy place we find 600 acres. We give all that part of the land lying on the left of the road leading from Jeffersonville to Durham's old mill place, starting from the corner at J. B. Peacock's quarter, immediately at corner of his fence on said public road, to the point where an old house was located near the old mill in corner of said land, to M. E. Lawson, and all the land lying on said line and west and north of the same we give to Alice L. Taylor. We therefore assign said several parts of land to said heirs as an equal distribution." A deed from Mary E. Lawson to Aaron Boynton, September 8, 1885, to "all that tract of land, including 350 acres of land, more or less, known as the 'Lawson Land,' on Big Sandy, bounded on the south by the Peacock place; on the west by the estate of S. P. Gragg; on the north by lands of Stokes and Floyd; on the east by R. M. Benford's and W. F. Cannon's land,—being in the 26th land district, Twiggs county." Order of the judge of the superior courts of the Macon circuit, December 8, 1888, appointing F. M. Jones trustee for I. N. McCrary and family, to sell his homestead property in Bibb county, and reinvest the proceeds in 350 acres of land, more or less, in Twiggs county. Deed from Aaron Boynton to F. M. Jones, trustee for I. N. McCrary and family December 18, 1888, to "all of that tract or parcel of land lying, being, and situated in the 26th land district of Twiggs county, Ga., number not known, but bounded by lands of Stokes & Floyd, east by lands of Benford and W. F. Cannon, west by the lands of the Peacock estate, and known as the 'Lawson Place,' and more fully described in deed from Mary E. Lawson to Aaron Boynton, dated Sept. 3, 1885, and containing 350 acres, more or less." Testimony by R. M. Benford: The land in dispute was always known by him as a part of the Lawson lands. Supposes there are 350 or 400 acres in the Lawson place. Knows nothing of the location of the Taylor lands. Always understood the Lawson land extended to the line between the Peacock lands and the Lawson place. The new ground in dispute is on the land he had always known as the "Lawson Place." The line shown in the diagram in evidence (a straight line) divides the Peacock lands and the Lawson lands. The Lawson lands belonged to the old "Durham Place," sometimes known also as the "Wimberly Place." By S. I. Denard to the same effect: He supposed the land in dispute to be worth about \$30 per year for rent, but not so much the first year it was cultivated. By W. B. Tarver: He heard Mrs. Alice Taylor say during her life that in the division of the Sabra Durham lands she drew land on the right-hand side of the public road leading from Jeffersonville

to Durham's old mill. He was brother-in-law of Mrs. Alice L. Taylor and Mrs. Mary E. Lawson, and his wife drew one of the shares in the division of the Durham place. He was familiar with the place and the division made of it, and knew what each heir recognized as the part falling to him or her in the division.

Evidence for the defendant: Alice L. Taylor (formerly Wimberly) was the wife of John L. Taylor. She died a few years after her marriage, leaving him and two children. One child died shortly after her; the other died at the age of two years. January 29, 1876, J. R. Taylor made a deed to S. E. Peacock and J. B. Peacock, natural guardian for H. C. Peacock and M. C. Peacock, to "all that one-half undivided interest in the lands, being three hundred acres, more or less, drawn by A. L. Taylor as distributee of the estate of Sabra Durham, deceased, the same lying on the left of the road leading from Jeffersonville to Durham's old mill, which one-half interest is the distributive share of estate of said A. L. Taylor, who is now deceased, belonging to said J. R. Taylor as heir of her estate, all lying in Twiggs county, Georgia, and bounded by lands of S. E. Peacock, T. J. Joyner, Mary E. Lawson, and W. H. Stokes." J. B. Peacock and S. E. Peacock died leaving only two children.—H. C. Peacock, now the wife of George Z. Glover, and Rosa M. Peacock. They were the only heirs at law. J. B. Peacock was the husband of S. E. Peacock. The minutes of the court of ordinary show the appointment and qualification of G. Z. Glover as guardian for Rosa M. Peacock, the defendant. From the records of that court appear a division of the lands of S. E. Peacock by M. E. Solomon, T. J. McCoy, and J. L. Harrell, commissioners, January 22, 1882, assigning to H. C. Glover all of the Radford and Wimberly places, the same being whole lot No. 9 in the twenty-sixth district, and 150 acres, more or less, of the Wimberly land in the twenty-sixth district, being 400 acres, more or less, as her share in said land; and to T. S. Jones, guardian for Rosa Maud Peacock, a house and lot and storehouse in Jeffersonville, and "two hundred acres of land, more or less, in the 26th district, said county, known as the 'Alligator Place,' and five hundred acres, more or less, lying in the 26th and 27th districts of said county, and known as the 'Taylor' and 'Murphy' places, aggregating seven hundred acres, more or less, as the full and complete share and interest of the said Rosa Maud Peacock, both as an heir at law of the said S. E. Peacock, deceased, and as a tenant in common with the said H. C. Glover." From the testimony of W. H. Stokes, Steven Jones, Fred D. Wimberly, and J. T. Horne, Peacock's Alligator place was never a part of the Durham lands. The lands lying on the north and west sides of the public road were a part of the Durham lands. In this body there are 600 acres;

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maybe more. The diagram in evidence represents the road from Jeffersonville to Durham's old mill place, and the lines around this body of land. The fence around the Peacock lands cornered at the point designated on the diagram as the "Locust Tree." There is an old hedgerow there. There was never any more land embraced in the Durham place, lying on the left and north and west of the public road leading from Jeffersonville to Durham's old mill, than this 600 acres as shown by the diagram, which is correct. Neither Wimberly nor either of the other commissioners who divided the Sabra Durham lands went upon the same to divide them. The division was mutually agreed upon between the heirs. The commissioners made the division as instructed by them, and reported the same to the court. Wimberly does not think they ever divided the land between Mrs. Lawson and Mrs. Taylor. The 600 acres were set apart for both of them; this was the agreement between them. They did not assign any land to Mrs. Taylor on the right of the road; all the land assigned to her lay on the left. The other two partitioners are dead.

Steed & Wimberly and L. D. Moore, for plaintiffs in error. L. D. Shannon and F. Chambers, for defendant in error.

PER CURIAM. Judgment affirmed.

PERKINS v. MORGAN.

(Supreme Court of Georgia. April 17, 1893.)

INTERPLEADER—SOURCE OF FUND—EVIDENCE.

Under the pleading and the evidence in the record, the finding that the fund in controversy was the produce of the timber, as distinguished from saw timber, was incorrect, there being no evidence to vary or contradict the inference arising from the so-called "bill of interpleader" to the effect that all the timber which produced the fund was 12 inches or more in diameter at the stump, and the interpleader being the basis of the special reference to the court, which was made by consent, in order that the whole case might be decided by the judge without a jury.

(Syllabus by the Court.)

Error from superior court, Pulaski county; D. M. Roberts, Judge.

Action by J. O. Perkins, administrator, against Thompson and others and W. A. Morgan. There was judgment for defendant Morgan, and a new trial denied. Plaintiff brings error. Reversed.

W. L. Grice, for plaintiff in error. Martin & Smith, for defendant in error.

BLECKLEY, C. J. The persons composing the firm of Thompson & Co. were sued individually by Morgan for trespass upon certain land and cutting and carrying away pine trees therefrom. Pending this suit an action was brought against them as a partnership by Perkins, administrator of Perkins, deceased.

ed, on an account for trees sold by the administrator to the defendants, and cut by them from the same land, being all the saw timber thereon measuring 12 inches and over in diameter. To the latter action the defendants filed an equitable plea setting up that they had bought from the agent of the administrator all of the timber on the lot measuring 12 inches and over, agreeing to pay for it \$225, and under the contract they proceeded to cut the timber, and while cutting it were notified by Morgan not to pay over the money to any one but him, as he claimed and owned the land and timber; that they were also notified by Perkins not to pay over the money to any one but him. They alleged that they were stakeholders, and ready at all times to pay over the money to the proper and lawful owner. They prayed that Morgan be made a party to this suit, that he be enjoined from proceeding with his action, and that he and Perkins be required to interplead. By consent of all parties, including Morgan, this plea was filed and allowed. Morgan was made a party, and enjoined, as prayed for. Perkins answered, setting forth his claim to the fund, and calling upon Morgan for discovery, propounding to him certain interrogatories, which Morgan answered. In order that the whole case might be heard by the presiding judge without a jury, it was referred to him by consent of parties, and he awarded the money in controversy, \$225, to Morgan. Perkins moved for a new trial, and the motion was overruled, the order overruling it indicating as a reason for the judgment that Thompson & Co. did not cut any mill timber off the lot of land in controversy, but did cut the tie timber belonging to Morgan. The basis of the special reference to the judge and of the trial thereon which followed was the bill of interpleader, so called, contained in the equitable answer of Thompson & Co. The irresistible inference arising from the language of this answer is that the fund touching which they invited Perkins and Morgan to interplead was produced wholly and exclusively from timber measuring 12 inches or more in diameter at the stump. No evidence to vary or contradict this inference appears in the record, although there is evidence that all the timber cut was tie timber. Its being tie timber did not prevent it from being mill timber also if it was 12 inches in diameter at the stump, for the written contract between Morgan and Perkins, deceased, embraced "all of the saw timber measuring twelve inches, and over, in diameter at the stump." No witness testified that any of the timber which produced the fund did not fulfill this description, or that any of it was not mill timber or saw timber. No doubt, it was adapted to use for cross-ties, and it may all have been cut and used for that purpose; but this would not negative its character as saw timber, the sort of timber which Morgan had sold to Perkins, deceased, and which the administrator of Perkins had

sold to Thompson & Co., and for the price of which the suit by the administrator against them was brought. If the fund in the hands of Thompson & Co. was not produced by that kind of timber, the interpleader was wholly unfounded. Why should the administrator and Morgan interplead touching the proceeds of any timber which was not saw timber, for the administrator had not claimed or sold any other sort or sued for its price? On the contrary, Morgan did claim that the sale of saw timber which he had made to Perkins, deceased, was not binding upon him as to any such timber as was not cut within a given time. This furnished a ground for interpleading with the administrator of Perkins, deceased, if the fund in the hands of Thompson & Co. was the proceeds of saw timber cut after that time; but, if it was the proceeds of such tie timber as was not also saw timber, it afforded no grounds of interpleading, no matter when the timber was cut. The real controversy between Morgan and the administrator seems to have been left untouched if the reason given by the court for denying a new trial was the reason on which the finding in favor of Morgan was based; and no doubt it was. Taking this view of the matter, the case should be remanded, in order that the real controversy may be met and determined. Judgment reversed.

HIRSCH v. OLIVER.

(Supreme Court of Georgia. April 17, 1893.)

ACTION ON NOTES—STRIKING OUT PLEA—DEFENSES—AGENCY.

1. The striking of a plea that the notes declared upon were without consideration is not cause for a new trial, when it affirmatively and clearly appears from the facts disclosed at the trial that there was a full and sufficient consideration for the notes.

2. To an action against the maker on his negotiable promissory notes, a plea that he executed them with the understanding that he was not to be bound, and for a purpose wholly at variance with their plain tenor and import, is no defense, there being no denial that the notes were made and delivered, and no suggestion in the plea that the understanding and purpose alleged were evidenced by any writing, or that they were omitted from the notes by fraud, accident, or mistake.

3. The notes being signed by the defendant in his own name with the addition of "& Co.," and it not appearing in the transcript of the record brought up what the declaration alleged, if anything, as to a partnership or firm, no error is apparent in the judgment sustaining the demurrer to a plea on that subject.

4. In an action upon promissory notes signed by the defendant with the addition "& Co.," where the defendant, instead of pleading the nonjoinder of a copartner, files a sworn plea of no partnership, a recovery may be had against him on a proper declaration if he executed the notes, whether in fact he had a copartner or not. In this case it does not appear that any person was sued except the defendant.

5. An agent to rent premises for the owner may, after the notes for the rent have been taken and a portion of the term expired, become an agent for the tenant to sublet the

premises to another tenant for the balance of the term. In such case the control of the premises by the agent while representing the tenant will have no effect on the rent notes.

6. Agency cannot be proved by the declaration of another agent of the same principal made to the witness, unless it appears that the latter agent was authorized by the principal to make the declaration, or that it was made as a part of the *res gestae* in the performance of some duty appertaining to his agency.

7. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by J. F. Oliver against A. Hirsch to recover on promissory notes. There was judgment for plaintiff, and a new trial denied. Defendant brings error. Affirmed.

Hinton & Cutts, for plaintiff in error. E. A. Hawkins, for defendant in error.

BLECKLEY, C. J. 1. The merits of this controversy were fully exposed at the trial. The parties introduced evidence pro and con, and all the facts touching consideration or want of consideration for the notes declared upon were brought out. From these it clearly appears that there was a full and sufficient consideration for the notes. This being so, the striking of the plea that the notes were without consideration is not cause for a new trial.

2. The plea which sought to contradict the notes by setting up an understanding that the maker was not to be bound; that the notes were executed for a purpose other than that of binding him to pay money,—a purpose wholly at variance with their plain tenor and import,—contained no suggestion that the understanding and purpose alleged were evidenced by any writing, or that anything was omitted from the notes by fraud, accident, or mistake. It contained no denial of the making and delivery of the notes, but simply sought to run over them and crush them by an alleged contemporaneous understanding or agreement in conflict both with their letter and their legal effect. This plea presented no valid defense to the action, and there was no error in striking it.

3. If there was any error in striking the plea on the subject of partnership, on demurrer to the same, it is not apparent to this court, for the transcript of the record does not show that the declaration alleged anything as to a partnership or firm; and, although the notes sued on were signed by the defendant in his own name, with the addition of "& Co." annexed thereto, we are unable to say whether the plea met any partnership element involved in the declaration or not. If the declaration did not allege that the notes were made by a partnership, or were the contracts of a partnership, a denial of the existence of that partnership would be idle and irrelevant. As the case stands here, there is no partnership element in it.

4. It does not appear that any person was sued except the defendant Hirsch, now the plaintiff in error. His plea of no partnership, if true, shows conclusively that no one else ought to have been sued. If he executed the notes, he ought to pay them, whether in fact he had a copartner or not, as he does not plead the nonjoinder of anybody. Surely the addition of "& Co." to his name in executing the notes would not protect him against being severally liable thereon if there was nobody to join with him as a defendant in the suit.

5. It seems that Horne, the agent who represented the plaintiff in renting the premises and taking the rent notes, became the agent of the defendant, the tenant, to sublet the premises to another tenant, and it is contended that he misbehaved himself in this second agency. Well, suppose he did. His principal in that agency was the defendant, and he must take the consequences. Surely the misbehavior of the defendant's agent cannot be imputed to the plaintiff, although the same person occupied both agencies.

6. Horne, the plaintiff's agent, told the defendant, Hirsch, that the plaintiff's son was her agent also. This was not competent evidence to prove the son's agency, and the court was right in excluding it. Horne's declaration to the defendant was not made pending any transaction in behalf of the plaintiff to which the declaration was pertinent, so as to be a part of the *res gestae* of the transaction. There was no error in denying a new trial. Judgment affirmed.

ESTES v. ODOM.

(Supreme Court of Georgia. April 24, 1893.)
VENDOR AND PURCHASER — DEFICIENCY IN QUANTITY — ESTOPPEL — DAMAGES.

1. In a conveyance of land not sold by the acre, but by the tract or entire body, the qualifying words "more or less" will cover any deficiency which does not justify a suspicion of willful deception, or mistake equivalent thereto. This is true whether there was willful deception in fact or not. By accepting such a conveyance the vendee waives not only any mistake, but any deception, as to quantity, unless (keeping in view the object of the purchase and all the attendant circumstances) some willful deception or gross mistake would, after ascertaining the true quantity, be suggested to the mind by a mere comparison of that quantity with the quantity named in the descriptive words.

2. The quantity mentioned in the deed being "40 acres, more or less," and the complaint being that the actual quantity was 7 acres less than 40, and the fraud alleged being that the defendant represented that the tract contained 41¼ acres, it was error to charge the jury thus: "The amount of acres stated in the deed must be the amount of acres that you will say was sold, taking the verbal testimony to throw light upon that, but not to alter it, because when a matter is in writing it cannot be substantially changed by verbal testimony." For this error a new trial is granted.

3. In order for the vendee to estop himself by waiver or acquiescence from seeking redress for the fraud by an action for damages, he would have to be fully informed of the facts

at the time of such waiver or acquiescence. If at that time he was aware of a deficiency in the quantity of land, but believed it to be much less than it really was, and did not ascertain the true extent of the deficiency till afterwards, he would not be estopped. On the facts in evidence it was not error to decline to charge the jury that "if, before he paid the purchase money, took a conveyance, and entered into possession, he complained of a deficiency, and the vendor offered to return him his notes and cancel the bargain, and he replied that he was satisfied and would raise no question of deficiency, and the vendor thereupon gave him possession and made him a conveyance, the vendee would be estopped from setting up the deficiency in the land."

4. Previous knowledge of the land or of its boundaries would not preclude the vendee from recovering for fraudulent misrepresentation of quantity, if without fault on his part he was actually deceived and defrauded by the misrepresentation, provided the deficiency was more than could be fairly covered in the given instance by the phrase "more or less."

5. It is no bar to an action for damages resulting from fraudulent misrepresentation of quantity that the land which the plaintiff got by the conveyance made to him by the defendant was worth more than the price he paid for it. The measure of damages in such a case is not less than the pro rata part of the purchase money which was paid for the deficiency, with interest thereon.

(Syllabus by the Court.)

Error from superior court, Clayton county; R. H. Clark, Judge.

Action by W. D. Odom against W. C. Estes to recover for an alleged deficit in land conveyed to him by defendant. Plaintiff had judgment, and defendant brings error. Reversed.

W. L. Watterson and Hall & Hammond, for plaintiff in error. Stewart & Wright, for defendant in error.

BLECKLEY, C. J. 1. The Code, § 2642, reads thus: "In a sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price. If the sale is by the tract or entire body, a deficiency in the quantity sold cannot be apportioned. If the quantity is specified as 'more or less,' this qualification will cover any deficiency not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud; in this event, the deficiency is apportionable; the purchaser may demand a rescission of the sale or an apportionment of the price according to relative value." Here the sale was by the tract or entire body, and the quantity was specified in the conveyance as "40 acres, more or less." According to the evidence of the vendee, the vendor represented the quantity to be 41½ acres. Let it be granted that this representation was willfully false, and that the tract contained less than 40 acres; would it necessarily follow that the vendee could recover for the deficiency, however small or inconsiderable that might be? We think not, for, according to the section of the Code just quoted, the qualifying words "more or less" covered any deficiency not so gross as to justify the suspicion of willful deception or

mistake amounting to fraud. By accepting such a conveyance, the vendee waived both mistake and deception, unless fraud either by one or the other would, after ascertaining the true quantity, be suggested to the mind by a comparison of that quantity with the quantity named in the descriptive words of the conveyance. If either direct fraud, or mistake so gross as to be equivalent thereto, would be suggested by such a comparison, then a recovery could be had, otherwise it could not, for "any deficiency not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud," is covered by the qualification "more or less." Such a suspicion could not arise or be justified unless some suggestion of fraud or gross mistake would occur to the mind as probable in consequence of the magnitude of the deficiency, in view of the object of the purchase and all the attendant circumstances. Where the vendor qualifies his conveyance with the terms "more or less," the vendee is put upon notice not to rely upon any representation of quantity as being exact. He is put upon notice that the true quantity may, on being ascertained, vary not only from that mentioned in the representation, but from that mentioned in the conveyance, by any difference whatever which is not suggestive of fraud either by deception or by gross mistake. Is it a question of law or a question of fact whether, in the given instance, there is a suspicion of willful deception or of mistake amounting to fraud? In ordinary cases, we think it is a question of fact, to be decided by the jury on all the circumstances of the particular case, including as one of the main considerations the object of the purchase, (if any, in particular,) as understood between the parties at the time of the transaction. Where the quantity was substantially material to the object, the suspicion would arise far more readily than where it was not. For instance, where a purchase of a large tract is made with a view to putting all of the land immediately in cultivation, a deficiency in quantity would count for more than would the same deficiency in a tract of the same size bought as a building site, or as a business stand for a country store. In the one instance, a somewhat small deficiency might well justify the suspicion, and in the other a much larger deficiency might afford no ground for it whatever. In the one instance there might be good reason for believing that the vendee relied upon a false representation, thinking it to be true; in the other, the jury might well believe that he fully realized the object of his purchase in the land as it actually was, and that he placed no reliance upon any representation, not caring whether it was true or false. Unless a suspicion of willful deception, or of mistake equivalent thereto, first arises, without ascertaining the actual fact whether there was or was not such deception or mistake, no final inquiry into the actual fact is in order. Until this prelim-

inary question is decided affirmatively, the additional and ultimate question is immaterial. Though all the evidence bearing on both questions must be submitted at the same time, or in the course of the same trial, the jury should be instructed to deal with the former question first, and not to deal with the latter at all in the event they should determine the former in the negative. We say the preliminary question is for the jury in ordinary cases. In such extraordinary and pronounced cases as would afford no room for difference of opinion, that question could doubtless be decided by the court hypothetically as one of law. The deficiency might be so slight and trivial, on the one hand, or so excessive, on the other, as either to present nothing whatever for trial by the jury beyond ascertaining the extent of the deficiency, or limit their functions to that and to the ultimate question, together with the assessment of damages. We deem the present case, under the facts in evidence, an ordinary, not an extraordinary, one, the deficiency being 7 acres, and the description in the deed being "40 acres, more or less." We cannot say, as matter of law, that the deficiency is so gross as to justify a suspicion of willful deception or of mistake equivalent to fraud, nor can we say, on the other hand, that it is not. For the sake of emphasizing an essential distinction, we repeat that the sufficiency of the words "more or less" to cover a given deficiency, when ascertained, does not depend upon the actual existence or nonexistence of fraud, either in the form of mistake or of willful deception, but solely upon whether the deficiency is such as to justify a suspicion of fraud. When the suspicion is thus justified, then, and then only, is the actual existence of fraud material. The suspicion may be rebutted, for the suspicion without the fraud will not warrant a recovery, nor will the fraud without the preliminary suspicion. The plaintiff must show a deficiency which is uncovered, and by this means make a *prima facie* case of fraud to the extent of raising a suspicion. The same facts which justify the suspicion may prove the fraud, *prima facie*. The suspicion, however, must be generated in a certain way. It must arise out of a comparison of quantities, and out of the magnitude of the resulting deficiency,—its magnitude either absolutely, or relatively to the object of the purchase, etc.; whereas, were the question only one of actual fraud, the fact of the fraud might be shown in various ways, none of them involving the magnitude of the deficiency. In raising a suspicion of fraud, what the vendor knew, said, or did in negotiating the sale need not be known. He may have acted in perfect good faith; but this will not be assumed, and therefore will not protect him from the suspicion which we are discussing. Good faith can be shown only to rebut the suspicion after it has arisen, and to negative the actual commission of fraud, notwith-

standing the apparently well-founded suspicion thereof.

2. We have examined carefully the charge of the court as brought up in the record. It nowhere submits to the jury the preliminary question of fact above specified, but proceeds upon the theory that, if there was willful deception, the vendor would be answerable at all events for the deficiency. In one of the paragraphs excepted to it says: "The amount of acres stated in the deed must be the amount of acres that you will say was sold, taking the verbal testimony to throw light upon that, but not to alter it, because when a matter is in writing it cannot be substantially changed by verbal testimony." Under the rule of the Code, where the qualifying words "more or less" are used, no number of acres whatever, according to the writing, is sold other than the number contained in the tract, and this number is subject to be ascertained by parol evidence, whatever number may be mentioned in the deed. The instruction just quoted, taken by itself, seems intended to bind both parties by the quantity stated in the deed; but this construction would be inconsistent with other parts of the charge, and is therefore not to be adopted. We cannot be sure of the precise idea which the court meant to express, but we are sure that the jury may have understood the court as meaning that they were to consider 40 acres as the quantity sold; and in view of the rest of the charge we reach the conclusion that the court designed the jury to understand that if the tract contained 7 acres less than 40, and if there was a false and fraudulent representation by the vendor that it contained $41\frac{1}{4}$ acres, they were to allow damages on account of the deficiency of 7 acres. Now, such a result would not be correct, as we have already seen, unless the words "more or less" would not cover the deficiency; and whether they would or not depends on whether that deficiency is so gross as to justify a suspicion of willful deception or of mistake amounting to fraud. We think the charge quoted was erroneous, and that a new trial should be had on account of that error.

3. In declining to charge as requested on the subject of estoppel the court did not err, for the reason suggested in the third head-note.

4. Assuming that the deficiency was more than the indefinite words in the deed would fairly cover, previous knowledge by the vendee of the boundaries of the tract would not hinder a recovery for the fraud, if he was actually deceived by a false representation made willfully by the vendor. Knowledge of boundaries need not involve knowledge of acreage or superficial area, and was not, in itself, notice of what the tract contained.

5. The theory that the vendee must be satisfied if he got in land the worth of his money is altogether wrong. He was entitled to have what he bought and paid for, and if

the fraud of the other party deprived him of a part of the same so considerable that the fraud is manifested *prima facie*, or fairly suggested as probable, by the grossness of the deficiency, the minimum recovery should be the amount paid for the deficiency, with interest thereon from the time of payment. If the true tract, as it proved to be, was, on account of being so small, worth less than it would have been as part of a larger tract which the vendee supposed he was getting and had a right to expect, this difference would be recoverable, no matter how valuable the true tract was. *Smith v. Kirkpatrick*, 79 Ga. 410, 7 S. E. 258. Judgment reversed.

EAST TENNESSEE, V. & G. RY. CO. v. HARBUCK.

(Supreme Court of Georgia. April 24, 1893.)

RAILROAD COMPANIES—ACCIDENTS TO PERSONS ON TRACK—NEGLIGENCE—EVIDENCE.

1. According to the evidence of those witnesses who must have been best acquainted with the actual facts, the railway company made it appear that its agents exercised all ordinary and reasonable care and diligence, and that the killing of plaintiff's husband took place in spite of such observance. The acts of diligence comprehended blowing the whistle, sounding the alarm, applying brakes, and, so soon as it was discovered that the signals given were not having their natural and ordinary effect, making an effort to stop the train. Any and all material conflict with adverse witnesses may be reconciled upon the theory that the plaintiff's witnesses erroneously attributed all the whistling which they heard to the locomotives which happened to be near by upon the track of the Western & Atlantic Railroad. These witnesses could have been mistaken in thinking that the whistling which they heard all came from locomotives on the latter road, but the defendant's witnesses could not possibly have been mistaken in this respect. They knew whether sounds were made by the locomotive of the train of the East Tennessee, Virginia & Georgia Railway on which they were traveling, and consequently, without unnecessarily imputing perjury to them, their testimony on that subject could not be disbelieved. The number of witnesses who coincided substantially in their testimony on this material point would forbid the adoption of any reasonable theory of collusion by which to account for their evidence; and, without either ignorance or collusion on their part, the facts must have been in accordance with their testimony.

2. The verdict was contrary to the evidence, and the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Mrs. John L. Harbuck against the East Tennessee, Virginia & Georgia Railway Company to recover damages for the death of plaintiff's husband. Plaintiff had judgment, and defendant brings error. Reversed.

Dorsey, Brewster & Howell, for plaintiff in error. Glenn & Slaton, for defendant in error.

BLECKLEY, C. J. For a long time after the argument this case was held up, considered, and reconsidered. After studying the facts maturely and with the utmost solicitude to reach a right result, the members of the court arrived at the unanimous conclusion that the verdict was contrary to the evidence, and that for this reason alone the trial court erred in refusing to grant a new trial. The line of thought which led to this conclusion is indicated in the first headnote. Judgment reversed.

MERCANTILE TRUST CO. v. KISER et al.
(Supreme Court of Georgia. May 2, 1893.)

GUARANTY—BY CORPORATION—VALIDITY.

Where it is essential to the successful prosecution of its business by an immense sawmill corporation that a short line of railway, penetrating the country from which its supply of timber is to be drawn, should be constructed and operated, and this enterprise is undertaken by a railway corporation which issues bonds for the purpose of raising funds by which to construct the railway, the interest on these bonds, accruing semiannually for a part of the period during which they are running to maturity, may, before they are negotiated, be guaranteed by the sawmill corporation with the express consent and authority of its stockholders and its board of directors; a sufficient consideration for the guaranty being furnished by the advantage to the sawmill corporation which it derives from the construction and operation of a railway bearing this essential and special relation to the great sawmill establishment. More especially is this true where most of the stock in both corporations is owned by the same natural persons, and where the management and operations of both companies are under boards composed chiefly of the same directors, and where it was manifestly contemplated from the beginning that in conducting the business, after the completion of the railway, the sawmill corporation was to dominate the whole, and treat the railway as a mere adjunct to the sawmill business, though the line of the railway extended beyond the timber region, and was used in carrying for the general public as well as for the mill.

(Syllabus by the Court.)

Error from superior court, Dodge county; D. M. Roberts, Judge.

Action by the Mercantile Trust Company, trustee, against the Empire Lumber Company and others, to recover interest on certain bonds for which defendant lumber company was sought to be held liable as guarantor. The court held that the lumber company was not liable, and plaintiff brings error. Reversed.

Estes & Estes, for plaintiff in error. De Lacy & Bishop, J. E. Wooten, Smith & Clements, P. L. Mynatt & Son, John L. Hopkins, and Hill, Harris & Birch, for defendants in error.

BLECKLEY, C. J. Most of the stock in both corporations was owned by the same persons, and the management and operations of both companies were under boards composed chiefly of the same directors. Mani-

festly, it was contemplated from the beginning that, in conducting the business after the completion of the railway, the sawmill corporation was to have the supreme dominion, and the railway was to be treated and used as a mere adjunct to the sawmill business. The line of railway was a short one. It penetrated the country from which the supply of timber for the mill was to be drawn, and it was essential to the successful prosecution of the business contemplated and afterwards done by the great sawmill establishment. That the railway extended beyond the timber region, and was used in carrying for the general public, as well as for the mill, did not prevent it from being, as it really was, a substitute for a great number of carriages and teams which, without the railroad, the mill company would probably have had to maintain and use in order to procure its supply of timber. It is no strain upon the charter of a sawmill corporation to construe it as authorizing the expenditure of money or the creation of debts to procure any means reasonable and appropriate to obtain and keep up a supply of timber needful for carrying on the business and keeping the mill in operation. The guaranty of the semi-annual interest accruing on the railroad bonds for a part of the time those bonds were running to maturity was made with the express consent and authority of the stockholders and directors of the sawmill corporation. No doubt, this consent and authority were given because without the guaranty the money requisite for constructing the railroad could not be obtained, and, unless the railroad was constructed, the stockholders and directors would have to make other arrangements for transporting a supply of timber, which would have been either more expensive or less efficient than would be afforded by the railway. If it was good business, or if there was good reason to think that it would be good business, on the part of the sawmill corporation, to aid in raising means to construct a railway for use as a timber carrier, rather than get its timber carried in some other way, what ground is there for holding that the guaranty of interest on these bonds was ultra vires? We see none. A sufficient consideration for the guaranty was furnished by the advantage to the sawmill corporation which was expected to be derived, and doubtless was derived, from the construction and operation of a railway which, by reason of penetrating the country from which the supply of timber was to be drawn and was drawn, bore an essential and special relation to this particular sawmill establishment. The primary enterprise was the sawmill, and connected with it was the railway as a minor and subsidiary enterprise, without which, as the evidence indicates, the former could not have hoped to flourish and prove successful. That the sawmill interest really dominated and controlled the railway and its operations is manifest from the evi-

dence in the record. The one was the parent; the other, the child. The one was the master; the other, the servant. The court below erred in holding that the guaranty was not obligatory. Judgment reversed.

FILER & STOWELL CO. v. EMPIRE LUMBER CO. et al.

(Supreme Court of Georgia. May 2, 1893.)

MECHANICS' LIENS—MILL MACHINERY—NOTICE OF CLAIM.

The lien on sawmills and their products, given by section 1985 of the Code to persons furnishing timber, logs, provisions, or any other thing necessary to carry on the work of sawmills, is not available in behalf of a machinist who furnishes or puts up any steam mill or other machinery, or who may repair the same. The furnishing of machinery for a steam sawmill, to improve or enlarge the mill or to keep it efficient, entitles the machinist to a lien under section 1979 of the Code, provided he claims a lien and records the claim within three months after the machinery is furnished. Compliance with this condition is indispensable. Code, § 1980. A failure to claim and record is not excused by the fact that the premises and mill on which the lien would have attached were put into the hands of a receiver by judicial proceedings at the instance of other creditors before the time for recording had expired.

(Syllabus by the Court.)

Error from superior court, Dodge county; D. M. Roberts, Judge.

Action by the Filer & Stowell Company against the Empire Lumber Company and others to establish and enforce a mechanic's lien. From an adverse judgment, plaintiff brings error.

De Lacy & Bishop, for plaintiff in error. Claude Estés, John L. Hopkins & Sons, and Hill, Harris & Birch, for defendants in error.

BLECKLEY, C. J. A part of section 1979 of the Code reads as follows: "All mechanics of every sort, who have taken no personal security therefor, shall, for work done and material furnished in building, repairing or improving any real estate of their employers; all contractors, material men, and persons furnishing material for the improvement of real estate; all contractors for building factories, furnishing material for the same, or furnishing machinery for the same, and all machinists and manufacturers of machinery, including corporations engaged in such business, who may furnish or put up in any county of this state, any steam mill or other machinery, or who may repair the same; and all contractors to build railroads, shall each have a special lien on such real estate, factories and railroads." And section 1985 reads thus: "All persons furnishing sawmills with timber, logs, provisions, or any other thing necessary to carry on the work of sawmills, shall have liens on said mills and their products, which shall, as between themselves, rank according to date, and the date of

each shall be from the time when the debt was created, and such liens shall be superior to all liens but liens for taxes, liens for labor, as provided for in sections 1974, 1975 and 1984, and to all general liens of which they have actual notice before their debt was created, to which excepted liens they shall be inferior." The court below held that the lien claimed in this case, the same being in favor of a machinist for furnishing machinery for a steam sawmill, to improve or enlarge the mill and keep it efficient, does not fall within the latter section, but could exist under the former section only. With this opinion we agree. The former section treats the mill as realty; the latter treats it as personalty. Liens arising under the former must be recorded. Such is the express requirement of section 1980. Liens arising under the latter need not be recorded, and may be foreclosed under section 1991 against the mill as personalty. The lien claimed in this case, not having been recorded within the time prescribed, is not good under section 1979. Failure to claim and record it could not be excused by the fact that the premises and mill on which the lien would have attached were put into the hands of a receiver by judicial proceedings before the time for recording had expired. The custody of the property by a receiver would be no impediment to claiming and recording the lien, and is wholly irrelevant as a reason for not doing so. The Code is express that to make good the liens specified in section 1979 they must be created and declared in accordance with certain provisions, one of which is the recording of the claim of lien within thirty days (now three months by the act of 1889) after the completion of the work, or after such material or machinery is furnished. Code, § 1980, as amended by Acts 1889, p. 106. For a construction of the phrase "any other thing necessary to carry on the work of saw-mills," as contained in section 1985, see the case of *Balkcom v. Lumber Co.*, 17 S. E. 1020, (decided this term.) That case was a part of the same general litigation out of which the present arose, and the two cases were considered and decided at the same time. Judgment affirmed.

MAY et al. v. SMITH.

(Supreme Court of Georgia. May 15, 1893.)

INJURIES TO EMPLOYE—DANGEROUS MACHINERY—
DUTY OF MASTER TO WARN SERVANT.

1. The rule that an inexperienced servant who is employed to work about dangerous machinery is entitled to warning of any special danger incident to the work is not confined to the case of young children, but applies as well to a youth 17 years of age, who is inexperienced in dealing with a machine like that by which he is injured, and is unacquainted with the details of its construction and mode of operation. That the machinery is not defective or out of repair, but is in perfect order, will not dispense with

warning where the danger is not open and obvious. Whether the master, at the time of engaging the servant or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury.

2. Although the evidence was conflicting, it warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action for personal injuries by Wesley Smith against George S. May & Co. Plaintiff had judgment, and a new trial was denied. Defendants bring error. Affirmed.

C. W. Smith and Well & Goodwin, for plaintiffs in error. Westmoreland & Austin and J. E. Warren, for defendant in error.

BLECKLEY, C. J. 1. There was evidence from which the jury could infer that the machine by which the plaintiff below was injured was dangerous to an inexperienced person, and that the danger was not sufficiently obvious to be apparent to such a person without proper explanation and warning. That the plaintiff was not a child, but was 17 years of age, would not deprive him of the right to be warned if, as a question of fact, the employers, or the man representing them, ought, under all the circumstances, to have inquired of him as to his experience, or taken notice of the probability that he was so inexperienced as to render it proper to give him warning. That his age alone did not deprive him of the right of being warned is established by many authorities. *Walsh v. Valve Co.*, 110 Mass. 23; *O'Connor v. Adams*, 120 Mass. 427; *Wheeler v. Manufacturing Co.*, 135 Mass. 294; *Atkins v. Thread Co.*, 142 Mass. 431, 8 N. E. 241; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Parkhurst v. Johnson*, 50 Mich. 70, 15 N. W. 107; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Jones v. Mining Co.*, 68 Wis. 268, 28 N. W. 207; *Railway Co. v. Watts*, 64 Tex. 568; *Railway Co. v. Callbreath*, 66 Tex. 526, 1 S. W. 622; *Baxter v. Roberts*, 44 Cal. 187; *McGowan v. Smelting Co.*, 9 Fed. 861. And see *Wood, Mast. & Serv. § 352*; *Perry v. Marsh*, 25 Ala. 650; *Coombs v. Cordage Co.*, 102 Mass. 572.

2. The evidence was conflicting, but taking it most favorably for the plaintiff, as the jury probably did, it was sufficient to warrant the verdict, and there was no error in denying a new trial. Judgment affirmed.

RICHMOND & D. R. CO. v. LEATHERS.

(Supreme Court of Georgia. May 15, 1893.)

APPEAL — RULINGS ON EVIDENCE — ACTION FOR
PERSONAL INJURIES—INSTRUCTIONS.

1. It not affirmatively appearing that the objections made to the execution of the inter-

interrogatories were presented to the court in due time, or at what time, no error is apparent in refusing to exclude the answers as evidence. *Galceran v. Noble*, 66 Ga. 367; *Roberts v. Crowley*, 81 Ga. 429, 7 S. E. 740.

2. Construing the charge of the court fairly, and taking all its terms together, the jury were sufficiently informed that in order to recover the plaintiff would have to prove that he was injured as alleged in his declaration; and there was no assumption by the court that any injury was in fact sustained.

3. The evidence warranted the verdict, both as to the right to recover and amount.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by S. E. Leathers against the Richmond & Danville Railroad Company to recover for personal injuries. Plaintiff had judgment, and a new trial was denied. Defendant brings error. Affirmed.

Jackson, Leftwich & Black and E. Womack, for plaintiff in error. Thos. W. Latham, for defendant in error.

BLECKLEY, C. J. 1. It is not affirmatively stated in the bill of exceptions, in the motion for a new trial, or elsewhere, that the written objections made to the execution of the interrogatories were presented to the court before the trial, or during the trial, or at what time, or what the objections were. It may be that the attention of the court was not called to the written objections at all, or it may have been done too late. See *Galceran v. Noble*, 66 Ga. 367; *Roberts v. Crowley*, 81 Ga. 429, 7 S. E. 740. As to the ground in the motion for a new trial which complains that "the court erred in not ruling out interrogatories of plaintiff that were shown by plaintiff's own testimony to have been executed at plaintiff's residence, in presence of plaintiff's family and of each other," it nowhere appears that the court was requested to rule out these interrogatories, and neither the motion nor the bill of exceptions states or recites what the plaintiff's testimony touching their execution was.

2. As the action was based on an alleged personal injury, and nothing else, the jury could not have failed to understand that if he was wholly uninjured he could not recover. Surely it was not necessary for the court to tell them so expressly, in order to prevent the jury from awarding damages to the plaintiff for being injured if he had received no injury whatever. From the charge of the court as given, taking it as a whole and construing it fairly, it would be a most remarkable jury that would not be sufficiently informed by it that the plaintiff would have to prove he was injured as alleged in his declaration in order to recover. There was no assumption by the court that any injury was in fact sustained.

3. Both as to the right and the amount, the evidence warranted the verdict. Judgment affirmed.

RICHMOND & D. R. CO. v. WORLEY.

(Supreme Court of Georgia. May 22, 1893.)

STRIKING OUT PLEADINGS—INJURIES TO EMPLOYEE—ASSUMPTION OF RISK—EVIDENCE OF NEGLIGENCE.

1. According to the practice in this state, the failure of the plaintiff to support some of the allegations in his declaration by evidence is no reason why the allegations should be stricken out on motion of counsel for the defendant.

2. The inexperience and consequent incompetency of a fireman to properly handle and run a locomotive will not subject the railroad company to an action for a personal injury resulting therefrom to another employee who, knowing of the inexperience of the fireman, made no objection to serve with him in passing over a switch and entering a siding for the purpose of connecting the locomotive with cars standing thereon. As the plaintiff admitted in his testimony on the stand that he knew of the fireman's inexperience, this put that ground of the action out of the case, and the court should not have submitted it to the jury as a possible basis of recovery.

3. There was not enough evidence that the locomotive was out of safe order, or that its condition caused or contributed to the injury, to warrant the court in submitting that issue to the jury as a basis of recovery. The case should have turned alone upon the questions whether the fireman was or was not negligent in working the locomotive, whether that negligence occasioned the injury, and whether the plaintiff was in the exercise of due care for his own safety.

(Syllabus by the court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action for personal injuries by F. W. Worley against the Richmond & Danville Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

Jackson, Leftwich & Black, for plaintiff in error. Glenn & Slaton, for defendant in error.

BLECKLEY, C. J. 1. The motion to strike from the declaration the allegations touching incompetency of the agent of the company who was in charge of the locomotive, and allegations touching the bad condition of the locomotive itself, was a novelty in Georgia practice, though such a practice may prevail elsewhere. Had these allegations been the only charges of negligence, a motion for a nonsuit would have been in order; but as other negligence was alleged, and there was evidence touching that for consideration by the jury, there was no cause for a nonsuit, even had the motion been for a nonsuit instead of calling for purging the declaration.

2. According to the testimony of the plaintiff himself, the inexperience of the fireman who had charge of the locomotive was known to him at the time he (the plaintiff) commenced serving with the fireman in passing over a switch and entering a siding for the purpose of connecting the locomotive with cars standing thereon. The incompetency of the fireman to properly handle and run the locomotive is attributed to his inexperience, and this inexperience being known

to the plaintiff was certainly a better reason then for declining to serve with him than it would be now for making the company pay damages for an injury to the plaintiff traceable to that inexperience as its cause. If the plaintiff intended to exact of the company more experience at the throttle of the locomotive than he found there on this occasion, why did he not make the exaction then, either positively, if there was opportunity, or, if there was none, negatively, by declining to unite with this inexperienced person in attempting to perform the particular act of service in the performance of which the injury was sustained? If an employe, knowing that his coemploye is a "green hand," nevertheless co-operates with him without objection, what ground has he for complaining that his fellow servant was a green hand? Under such circumstances, the negligence of the company in furnishing such a fellow servant is waived, but the waiver does not extend to any negligence of which the fellow servant himself may be guilty. If he falls in any respect to come up to the measure of diligence which, under the circumstances, he ought to exercise, consent to serve with him would not cut off the right to recover for any injury occasioned by that negligence.

3. We have examined the evidence with great thoroughness and minuteness. It fails to show that the locomotive was not in safe order for the purpose for which it was being used, or that its condition caused or contributed to the plaintiff's injury. Such slight evidence on this subject as the record contains could not possibly uphold a verdict against the company for damages. This being so, it was error to submit to the jury any question whatever on that subject as a basis of recovery. The whole merits of the case, so far as the right to recover is concerned, are involved in three questions: Was the fireman negligent in working the locomotive? Did that negligence occasion the injury? If so, did the plaintiff exercise due care for his own safety? The determination of these questions would be decisive of the real merits of the controversy in respect to the liability of the company. The court erred in not granting a new trial. Judgment reversed.

TRIMBLE v. MIMS.

(Supreme Court of Georgia. May 22, 1893.)

COMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENTS — ACTION ON NOTE — STATUTE OF LIMITATIONS.

In an action upon a promissory note against the maker by the payee's personal representative, in which action the statute of limitations is sought to be avoided by the plaintiff

on the ground that at the time the note was made the defendant resided in this state, and subsequently removed therefrom, the defendant is not an incompetent witness, by reason of the death of the payee, to prove in his own behalf where he was domiciled at that time. His domicile or place of residence was no part of any transaction or communication with the deceased payee of the note. Acts 1889, p. 85.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action on a promissory note by Kitty Trimble, administratrix, against J. T. Mims. Defendant had judgment, and plaintiff brings error. Affirmed.

Thos. W. Latham, for plaintiff in error. Rigby, Reed & Berry, for defendant in error.

BLECKLEY, C. J. If, when the note sued upon was executed, the maker resided out of this state, the statute of limitations would run in his favor from the maturity of the note, with no suspension on account of his nonresidence within the state; but if he resided here when the note was executed, and afterwards removed, his removal would suspend the statute until his return. This being the state of the law, it was a vital fact in the case as to where his residence was at the date of the note. Was the maker himself—the payee being dead, and the action being brought by his personal representative—a competent witness on this question? He certainly was. The evidence act of 1889 (Acts 1889, p. 85) disqualifies him only as to transactions or communications with a deceased person. No such transaction or communication was involved in the fact of his residence, or in what was testified concerning it. None such was mentioned by the witness, or referred to by him, as having any tendency to fix or determine his residence, or to aid in identifying it. The fact of a man's residence at a particular place at a given time is one of such an open and public nature as to render it likely that the means of replying to any testimony he may give on the subject will generally be accessible to the opposite party to the suit, whether the party to the contract sued upon be living or dead. At all events, the testimony now in question is not embraced in the letter of the act of 1889, and that itself is made, by the express terms of the act, a conclusive reason in favor of the competency of the witness. As a distinction is sometimes made between "residence" and "domicile," it may be proper to add that there is no reason to think any such distinction was in sight in the present case in the mind of the witness, the counsel, or the court. We think it clear that "domicile" was used in the sense of "residence," and not otherwise. Judgment affirmed.

KELLY et al. v. KAUFFMAN MILLING CO.

(Supreme Court of Georgia. May 22, 1893.)

APPEAL—RULINGS ON EVIDENCE—SAL—ACTION FOR PRICE—HARMLESS ERROR.

1. An objection that a document offered in evidence was not admissible, because the execution of the same was not proved as required by law, being overruled, the presumption is that the execution was duly proved, unless the contrary affirmatively appears, either by an authentic statement that there was no evidence of execution, or by setting out such evidence on that subject as was adduced to the presiding judge. Mere preliminary evidence on such a question is not for insertion in the brief of evidence requisite to support a motion for a new trial. Consequently, its absence from the brief does not warrant the conclusion that the overruled objection should have been sustained.

2. It being manifest from the facts of the case, considered altogether, that there was a genuine bill of lading which had been surrendered up to the carrier, and that the pressure of the litigation was not upon its existence or contents, but upon the legal consequences of indorsing and turning the same over to a third person, it is no cause for a new trial that the court may have erroneously admitted secondary evidence of the contents of that document, without the omission to discover and produce the original having been legally and fully accounted for.

3. When a contract for the sale of goods has been made through a broker, the goods consigned by the seller to the purchaser, and the bill of lading sent by mail directly to the latter, the broker, under his general powers as such, has no authority to rescind the contract of sale, receive from the purchaser the bill of lading indorsed by him, and thus obtain possession of the goods from the carrier, or cause their delivery to a stranger to whom he transfers the bill of lading. The purchaser, in an action by the seller against him for the price, cannot avoid payment by reason of these facts, and no local custom or usage recognizing and upholding such dealings between purchaser and broker will affect the seller unless the custom or usage be at least known to him, so that his assent thereto could reasonably be inferred.

4. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by the Kauffman Milling Company against C. H. Kelly & Bro. to recover the price of a shipment of flour from plaintiff to defendants. Plaintiff had judgment, and a new trial was denied. Defendants bring error. Affirmed.

Bigby, Reed & Berry and Hutcheson & Key, for plaintiffs in error. Glenn & Slaton, for defendant in error.

BLECKLEY, C. J. 1. The bill of lading offered and received in evidence was a duplicate, and so purported to be on its face. The motion for a new trial complains that its execution was not proved as required by law. We cannot tell whether it was or not, for it is not stated that there was no evidence tending to prove it, nor is any evidence on the subject set out. Its absence from the brief of evidence is of no significance, because the office of the brief is only

to show such evidence as was submitted to the jury, and the jury have no concern with preliminary evidence adduced to the court as a basis for introducing a document to be read as evidence in the case. Here there is no authentic statement that there was no evidence of execution, and any evidence which there may have been is not brought up. There is nothing to guide us, therefore, but the presumption of law that the court, before admitting the duplicate bill of lading, became satisfied by proper means that it was a genuine document, duly executed.

2. From the duplicate and the other facts in evidence it is manifest that there was a genuine, original bill of lading covering the consignment involved in this case, and that this original, indorsed by the consignees, Kelly & Bro., was turned over to Boozer, the broker, and by him to Morris, Ewing & Co., to whom he sold the car load of flour, and that they surrendered it to the railway company upon receiving the flour. The pressure of the litigation was not upon the existence or contents of the bill of lading, but upon the legal consequences of indorsing it and turning it over to the broker, thereby enabling him to dispose of the consignment and appropriate the proceeds to his own use, to the prejudice of the Kauffman Milling Company, the consignor, the plaintiff in this action. Grant, therefore, that it was error for the court to admit secondary evidence of the contents of the document without the omission to discover and produce the original having been fully and legally accounted for, this is no cause for a new trial. The evidence—as well that in behalf of the defendants as that in behalf of the plaintiff—could have no proper subject-matter without the assumption or concession that there was in fact a shipment of the flour, and a genuine bill of lading therefor, with contents such as appear in the duplicate bill introduced in evidence. It would be child's play, rather than serious judicial work, to send the case back for another trial in order that this original bill might either be produced, or its nonproduction more satisfactorily accounted for.

3. The contract of sale from the milling company to Kelly & Bro. was negotiated through Boozer, a broker in Atlanta. The flour was consigned from a point in the state of Illinois to Kelly & Bro. at Atlanta, Ga., and the railroad receipt or bill of lading was sent by mail by the former to the latter. This action is brought for the price, and the defense is that Kelly & Bro. did not receive the flour, but that the broker took charge of it and sold it. To this defense it is replied that the broker had no authority so to do, and could not have assumed and exercised such authority to the injury of the milling company without the co-operation of Kelly & Bro., who indorsed the bill of lading which had been sent to them, and turned it over to the broker. We think the broker, being a mere middleman to negotiate the sale, and

having no express authority to do more, could not rescind the contract, or receive the flour, and bind the milling company by his conduct. It was sought to enlarge his authority under the general law by local custom or usage prevailing in Atlanta, under which brokers were recognized as representing the persons who had employed them to sell in afterwards canceling the sales and taking charge of the goods. But the evidence fails to show any knowledge of this local custom or usage by the milling company, or any dealing by it with reference thereto. There is no ground for inferring its assent to such a custom.

4. The evidence was sufficient, and there was no error in denying a new trial. Judgment affirmed.

ANDERSON, Sheriff, v. BANKS et al.

(Supreme Court of Georgia. May 29, 1893.)

FORTHCOMING BOND—ACTION ON.

This case is controlled by *Aycock v. Austin*, 87 Ga. 566, 13 S. E. 582.

(Syllabus by the Court.)

Error from superior court, Newton county; R. H. Clark, Judge.

Action on a bond by one Anderson, sheriff, for the use of Heard, White & Thompson, against Green Banks and others. There was judgment for defendants, and plaintiff brings error. Reversed.

Capers Dickson, for plaintiff in error. E. F. Edwards, for defendants in error.

BLECKLEY, C. J. The action was upon a forthcoming bond taken in a claim case, the property levied upon and claimed being cotton, and the claim having been afterwards withdrawn. The evidence shows that the surety on the claim bond got possession of the cotton when the bond was given, and that after the withdrawal of the claim he admitted that the cotton could not be produced, because he had shipped and disposed of it. For this reason the sheriff did not readvertise it for sale, but brought this action on the forthcoming bond to recover its value, and the value was proved. The ground on which the court granted a nonsuit was that the cotton was not subject to the execution which had been levied upon it. This question was not in the case. It was the very question which was raised by the claim, and the trial of it was waived on the part of the claimant, both for himself and his surety, by withdrawing the claim, and not afterwards renewing it. If it be said that he had no opportunity of renewing because the property was not readvertised for sale, the answer is that it did not have to be readvertised, for it was disposed of either by the claimant or his surety so that they could not produce it. Advertising it would be a useless ceremony, and needlessly expensive, if the proposed sale would be im-

possible in consequence of the property having been put out of reach and beyond the control of the makers of the bond. Had it been desired to interpose a second claim, the property should have been kept under their control until they had so done. It is not allowable for a claimant to defeat a sale by interposing a claim, and then appropriate the property to his own use, or suffer it to be appropriated by his surety on the claim bond, and then contest, not in the claim case,—the very case appointed by law for the purpose,—but in a suit on the bond, the right of the plaintiff in execution to sell the property. To allow this would be to overlook and disregard the object of the claim laws; that object being to facilitate the trial of the rights of property seized under execution by a sort of intervention on the part of strangers to the execution, instead of leaving them to assert their rights in some separate and independent action. If claims are used merely to get or retain possession of property, and not for the trial of rights to it, they cease to be substitutes for other actions, and only give ground or occasion for some other action, which is the very thing the claim laws are designed to prevent. It would be a perversion of these laws not to hold the claimant and his surety estopped by dismissing the claim, the present action being for a breach of a bond to produce the property, and the question of breach not in any way involving the title, but only the forthcoming of the property at the time and place of sale. Inability to produce it when clearly established is regarded by our law as equivalent to a failure to produce it. This has been ruled several times, and the case of *Aycock v. Austin*, 87 Ga. 566, 13 S. E. 582, really rules the present case on the main question which we have discussed. Judgment reversed.

PULLMAN'S PALACE-CAR CO. v. MARTIN.

(Supreme Court of Georgia. June 5, 1893.)

SLEEPING-CAR COMPANY—LOSS OF PASSENGER'S EFFECTS—PLEADINGS.

Whatever diligence a sleeping-car company may owe a passenger in guarding and protecting her while she is asleep in the berth assigned to her, with her money and personal jewelry in her satchel, she having the satchel beside her in the berth, between herself and the wall of the car, if the company so negligently and carelessly guard and protect her while so sleeping that through its negligence the money and jewelry are stolen from her, and thereby wholly lost, she has a cause of action. Although the declaration in the present case is defective in not setting forth any particular act or omission constituting negligence, yet as there was no special demurrer on that ground, and as the declaration is good in substance, there was no error in overruling the demurrer to the declaration upon which the court adjudicated.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action by Elise C. Martin against Pullman's Palace-Car Company to recover for property stolen from plaintiff while occupying a berth in defendant's sleeping car. A demurrer to the declaration was overruled, and defendant brings error. Affirmed.

Jackson & Jackson and Pope Barrow, for plaintiff in error. Harden, West & McLaws, for defendant in error.

BLECKLEY, C. J. The declaration is defective in not setting forth any particular act or omission constituting negligence in the defendant company; but there was no demurrer on that ground, and consequently no error in overruling the demurrers upon which the court adjudicated. The points taken in the demurrer were as follows: (1) "The declaration is not sufficient in law." This is a mere general demurrer. (2) "It appears upon the face of the declaration that the plaintiff, by her own carelessness, so far contributed to the injury that but for her carelessness it would not have been sustained." We see nothing in the declaration on which to rest the ground of the demurrer. The plaintiff seems to have been quite careful, and there is no disclosure or intimation to the contrary. (3) "Defendant is held to answer as a carrier in the declaration, and no breach of the contract of carriage is alleged, nor did defendant sustain to plaintiff the relation of carrier." The declaration alleges that the plaintiff was a passenger for hire, paid by her to the defendant, on the sleeping car "America" of the said defendant, from Chattanooga to Macon, by which contract of hiring the defendant undertook to use reasonable and proper diligence in guarding and protecting her from loss by theft while she slept during the usual hours of sleep in the berth assigned to her, by the defendant, on the car. The defendant is not mentioned or described as a carrier, and there is no contract of carriage alleged. The fair import of the allegations is that there was a contract for sleeping-car accommodations, and for care and diligence by the company while the plaintiff occupied the berth assigned to her. Calling herself a passenger was only conforming to the general use of language applicable to one traveling by railway in a sleeping car. We are only replying to this ground of demurrer, and not deciding whether a sleeping-car company is a carrier, and liable as such, or not. (4) "Defendant is not liable in law as an innkeeper is liable, and there is no allegation showing any want of ordinary care on the part of defendant towards plaintiff." It is not essential to a recovery that the defendant should be held liable as an innkeeper is liable, and there is an allegation that the defendant was negligent, and by its negligence caused the plaintiff's loss. There could be no negligence without the absence of that degree of care,

whatever it was, which it was the duty of the defendant to exercise; and the declaration alleges an undertaking by the defendant substantially as recited above, and that it so negligently and carelessly guarded and protected the plaintiff that through its negligence her money and jewelry were stolen from her, and thereby wholly lost. We hold that the declaration is good in substance, the test of this being whether the defendant could admit all that is alleged, and escape liability. To what measure of diligence the company must conform will be for determination at the trial; but if, as the declaration alleges, it undertook for hire to use reasonable and proper diligence, and yet was negligent, and that negligence occasioned the loss, we see not why there is any want of a substantial cause of action. The negligence alleged should be understood, we think, as the opposite of that degree of diligence which the company was bound to exercise, for nothing but a failure in that degree would constitute negligence at all, since whoever comes up to the degree of diligence required of him stands acquitted of any negligence whatever relatively to the matter in issue. The court committed no error in overruling the demurrer. Judgment affirmed.

CUNNINGHAM et al. v. ELLIOTT.

(Supreme Court of Georgia. June 5, 1893.)

CERTIORARI—WHO MAY BRING—ACTION TO ABATE OBSTRUCTION TO PRIVATE WAY—BY WHOM MAINTAINABLE—PLEADINGS.

1. Where the right to a certiorari is given by statute to either party, each may have the writ in his own favor in the same cause, and the pendency of the first writ sued out is no ground for dismissing the second.

2. Where the claim of right to a private way is founded upon an uninterrupted use of the way for more than seven years by the owners of a certain plantation, their agents, servants, and tenants, the right is not in the agents or servants themselves, but in the owners, who alone are the persons injured by an unlawful obstruction of the way, as against agents and servants, in violation of the right. While their agent, by virtue of section 2207 of the Code, may commence and carry on a proceeding in their names to remove such obstruction, under section 738 of the Code, he cannot institute and carry on a proceeding for that purpose in his own name, either individually or as agent.

3. When, in a petition to remove an obstruction, from a private way, the petitioner alleges that he is the duly-authorized agent of the owners of a certain plantation, naming it; that he has been in the habit of using the private way, describing it; and that the said owners, their agents, servants, and tenants, had been in constant and uninterrupted use of the way for more than seven years before the erection of the obstruction complained of,—the petition is properly construed as being brought by the petitioner, not in his individual right, for he sets out none, but as agent for the owners and in their behalf. This being so, the petition was fatally defective, the petitioner showing no right to maintain the proceeding; and it was error in the ordinary not to dismiss the petition on demurrer.

4. The superior court erred in not sustaining the certiorari brought by the defendant in

the proceeding before the ordinary, and, as that proceeding was fatally defective *ab initio*, this reversal operates to reverse the judgment of the superior court in so far as it sustained the certiorari brought by the plaintiff in said proceeding.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action was brought before the ordinary by Arthur B. Elliott, agent, against T. M. Cunningham and others, to remove an obstruction to a private way. To review the judgment of the ordinary both parties brought certiorari in the superior court. The latter court dismissed the writ brought by defendants, and sustained that brought by plaintiff. Defendants bring error. Reversed.

T. M. Cunningham, Jr., for plaintiffs in error. Edward S. Elliott, for defendant in error.

BLECKLEY, C. J. 1. Under section 4052 of the Code either party may have a writ of certiorari. One may complain that he got too little; the other that the prevailing party was entitled to nothing, or to less than he did get. There seems to be no reason why complaint by the one should prevent the other from complaining also, or why, if both apply in time, the slower one should fail because the faster had been more expeditious than himself. In this case the pendency of the first writ sued out was no ground for dismissing the second. In *Shope v. Flite*, (Ga.) 16 S. E. Rep. 990, the prevailing party got all he claimed, and nevertheless sought to review by certiorari an error which worked no injury to him on the trial, and which remained open to correction upon the appeal taken by the opposite party. In that case there was no necessity for a certiorari, and therefore it could not be brought.

2. The right to a private way was founded in this proceeding upon an uninterrupted use of the way for more than seven years by the owners of the plantation known as "Prairie Plantation," their agents, servants, and tenants. The claim is evidently of a right of way appendant to the plantation, and not one in gross as to all, any, or each of the persons referred to as persons or individuals. A right of way appendant to certain premises is in the owners of the premises. They are the persons injured by an unlawful obstruction of the way, as against their agents and servants, in violation of the right. Their agent, by virtue of section 2207 of the Code, may commence and carry on a proceeding in their names to remove such obstruction under section 738 of the Code, but he cannot institute and carry on a proceeding for that purpose in his own name, either individually or as agent; not individually, because he has no right; and not as agent, because, as a gen-

eral rule, (and this case is not within any exception,) the rights of principals must be enforced in their own names, as well where an agent conducts a proceeding in their behalf as where they conduct it in person.

3. The petition in this case is properly construed as being brought by Mr. Elliott, the petitioner, not in his individual right, for he sets out none, but as agent for the owners of the plantation, and in their behalf. He had no right to maintain the proceeding as it was brought, and the ordinary erred in not dismissing the petition on demurrer.

4. For the error indicated, the superior court ought to have sustained the certiorari brought by the Cunninghams, the defendants in the proceeding before the ordinary. That proceeding was fatally defective *ab initio*, and, as it was the basis of the whole litigation, this reversal here operates to reverse the judgment of the superior court in so far as it sustained the certiorari brought by Elliott, agent, the plaintiff in the proceeding before the ordinary. Judgment reversed.

AKERS v. KIRK et al.

(Supreme Court of Georgia. April 24, 1893.)

PRINCIPAL AND AGENT—SCOPE OF AGENCY—EVIDENCE—ADMISSIONS—HARMLESS ERROR.

1. It was competent for the plaintiff to testify why it was that in the first instance he charged the account sued upon to the defendant's husband.

2. An agency to borrow money for the purpose of clearing off liens from defendant's property does not comprehend an agency to confer with the holder or claimant of one of the liens, and make to him declarations touching the agency, the payment of the debt, the agent's hopes or arrangements as to borrowing money, or the purpose for which it was wanted, no application for any loan being made to such holder or claimant.

3. A conversation between the parties shortly before the trial, in which the defendant made certain admissions, was not rendered inadmissible as evidence by being brought about by the plaintiff through a proposition of settlement, it not appearing that the defendant's admissions were made with any view to a compromise, nor that any terms of settlement were mentioned or discussed.

4. There being evidence tending to show that the defendant's father had authority from her to borrow money for the discharge of the debt sued for in this action, his declarations to persons to whom he applied for loans, as to the purpose for which the money was wanted, were admissible in evidence, the purpose so declared being within the scope and object of the authority, so far as the debt now in controversy is concerned.

5. There being no contest as to the ownership of the premises, it was immaterial who furnished the money to pay for them.

6. Recovery may be had upon evidence that the party sought to be charged was the concealed principal of a person who acted in his own name without disclosing his agency, though this fact be not alleged in the pleadings. If the objection was a good one to the evidence, it should have been presented and insisted upon when the evidence was offered, so that the declaration could be amended and made specific as to the

mode in which the contract between the plaintiff and the defendant was created.

7. Where the verdict undoubtedly represents the natural equity and sound justice of the case, and there is enough legal evidence to support it, the admission of some illegal evidence in behalf of the prevailing party will not render a new trial indispensable. Both the trial court and the reviewing court being satisfied, the verdict must stand.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Thomas Kirk & Co. against Ella Akers. There was a verdict for plaintiffs, and a new trial denied. Defendant brings error. Affirmed.

The following is the official report:

Kirk & Co. sued Mrs. Akers upon an account, and also to foreclose a lien as contractors and material men for work done on and material furnished for the repairing and building of a certain house belonging to Mrs. Akers. The petition alleged that the lien was filed within 30 days after the work was completed and the material furnished; and that the suit was brought within less than 12 months from the time the work was done and material furnished, and also within 12 months from the time the debt became due. The account attached to the declaration ran from July 23d to November 10th, but the year was not stated. The lien was recorded December 28, 1889. Defendant pleaded "not indebted;" that she made no contract with plaintiffs; that they did not file their lien within the time allowed by law and alleged in the declaration; and that they took personal security for their debt. Plaintiffs obtained a verdict, and defendant's motion for a new trial was overruled, to which she excepts. Her motion contained the general grounds that the verdict was contrary to law, evidence, etc.; also that the court refused to nonsuit plaintiffs on motion of defendant; that no case was made out against her, but against her husband, G. W. Akers, for which she was not shown to be responsible, which refusal to nonsuit was error. Error in allowing plaintiff, over defendant's objection, to testify: "We charged the account to G. W. Akers, because we supposed he owned the house, and the house was good for it." Defendant objected, because the lot was not responsible for the improvements, unless the owner procured the improvements, or subsequently ratified them. Because the court permitted plaintiff to testify: "I have had a conversation with her (Mrs. Akers) father since the work was done, in reference to Mrs. Akers paying the debt." Defendant objected on grounds of irrelevancy, and that her father could not bind her. Also because the court permitted plaintiff to testify: "Her father, as near as I can remember, came into my store a month or two after the lien was filed, and he stated to me that he hoped to settle this account in a very short time. He was making arrangements, I think, with Mrs.

Healy to borrow money; and he hoped it would be all satisfactory, and in a very short time he would pay the account." Defendant objected because the court permitted plaintiff to testify: "He [T. J. Shepherd, defendant's father] wanted it [the money he was trying to borrow] to pay us for the work done on the house." Defendant objected on the ground that the testimony was irrelevant, and, further, that the promise, if any, on Mrs. Akers' part to pay G. W. Akers' debt should be in writing. Because on cross-examination of plaintiff he testified: "This morning Mrs. Akers and her father were sitting together, and he went out, and I went in and took a seat by her, and said 'could not this in some way be settled,—this case be settled,—and then this other conversation occurred,' meaning her admission testified to previously by plaintiffs, to wit, 'Mrs. Akers said that her father was trying to borrow the money to pay the debt off.'" When plaintiff so testified, defendant moved to exclude the conversation already testified to by plaintiff, and set out above, on the ground that whatever occurred or was admitted in said conversation could not be received against defendant on this trial as it (the conversation) was looking to a compromise. Because the court admitted the recorded lien. Defendant objected on the grounds that the lien offered was recorded about 60 days after the last item sued on, and the petition set up that the lien claimed was recorded within 30 days of the last item, and that the allegata and probata did not agree; that the substantial part of the material sued for, to wit, the bills of August 13th and July 23d, was furnished over 90 days prior to the record of the lien offered; and that no connection was shown between the items of August 13th and July 23d, and the remaining material or items. Because the court permitted a witness, J. A. Scott, to testify: "I think he [T. J. Shepherd] wanted to pay certain debts with it. He wanted to borrow it for his daughter." Defendant objected on the grounds that there was nothing binding on Mrs. Akers in this testimony and that it was irrelevant. Because the court permitted Scott to testify: "Mr. Shepherd stated that he wanted to remove the liens that were on the property; that was what he wanted with the money." Defendant objected on the grounds that no connection was shown with Mrs. Akers, and that it was irrelevant. Because the court refused to permit defendant to show who furnished the consideration for the lot sought to be subjected to the lien of plaintiffs. As plaintiffs set up that Mrs. Akers and Mr. Akers were concealing an agency, this evidence was proper. Because the court permitted plaintiffs, in rebuttal, to prove by a number of witnesses the length of time Mrs. Akers was around the improvements, and the extent to which she exercised supervision. The error alleged was that plaintiffs

had gone into all this kind of evidence in making out their case, and it was not legally or properly in rebuttal. Because petitioner alleged a contract and debt with Mrs. Akers, but the evidence only tended to establish a concealed principal, which was not alleged. Because the allegations of the petition and the evidence introduced thereunder do not agree.

So far as material, the evidence for plaintiff was: The materials mentioned in the account went into the house, which belonged to Mrs. Akers. At the time plaintiffs were making the improvements they thought the house belonged to Akers. Akers came to them, and got them to do the work, and they charged the account to him, because they supposed he owned the house, and the house was good for it. They completed the job, and have never been paid for it. Since the work was done, plaintiff Kirk had a conversation with Mrs. Akers' father, Shepherd, in reference to Mrs. Akers paying the debt. This was a month or so after the lien was filed. Her father came into the store, and stated that he hoped to settle the account in a very short time. He was making arrangements, Kirk thought, with Mrs. Healy to borrow money, and hoped it would be all satisfactory, and in a very short time he would pay the account. Kirk did not think he stated whom he was trying to borrow the money for, only that he wanted to pay off the debt. Did not think he mentioned his daughter's name. He said he wanted it to pay plaintiffs for the work done on the house. Kirk had a conversation with Mrs. Akers in reference to that conversation with her father, and she said that her father was trying to borrow the money for her to pay off what she owed plaintiffs. When the goods were sold, Akers belonged to a firm which stood well, and plaintiffs were perfectly willing to sell goods to Akers, and never asked Mrs. Akers whether he owned the lot or not, nor inquired of any person in whom was the title to the lot, supposing, of course, that the house would be good for the improvements. They gave the credit to Akers and the lot and house combined, supposing he owned the house, and that the house was good for it. Did not see Mrs. Akers at all in the transaction. There are one or two articles in the account charged to Mrs. Akers,—part of a gas fixture, one or two of the small articles she might have purchased. The goods were not sold on the credit of Mrs. Akers, and she did not enter into the computation at all. Plaintiffs afterwards claimed the money from her, because they found out she owned the lot and house. The last item of the account went on the house. The morning of the trial Mrs. Akers and her father were sitting together, and he went out, and Kirk took a seat by her, and said in some way this case can be settled, and then the conversation with her occurred. Kirk thought if they could ar-

range it without going to a trial he preferred to do so,—meant it should not go to trial if she could pay up, and not have a trial. He did not know, of course, whether she would or not. Had no idea of compromise at all. She told him that her father had been trying to borrow the money to pay this debt, but she did not know why he did not succeed. There was no written contract to furnish the material, nor was there a contract with anybody, except a verbal one of Akers. Mr. Akers came and made the trade to get a stove from plaintiffs, and Mrs. Akers paid for it the following June. Akers left Georgia some time in December, 1889, or January, 1890. Kirk thought he saw Mrs. Akers down at the house, and that she might have been down in the store, but was not certain that she was in the store. Scott testified that Shepherd wanted to borrow some money on the property from Healy for Shepherd's daughter to pay certain debts with it, saying he wanted to remove the liens that were on the property; and Shepherd put into Scott's hands deeds to the lot in question for examination. Shepherd also tried to borrow of Wellhouse money on the property, to pay off the balance due on it, and left a deed at Wellhouse's. Shepherd stated to Wellhouse that he wanted to borrow the money for his daughter. The daughter herself never applied to Wellhouse for a loan. There was evidence also that Mrs. Akers was at the house during part of the time that the work was being done; saw it done, and directed some changes to be made.

For the defendant there was testimony that she was absent from Atlanta during the time the improvements were being made, and when she returned it was all complete, and she directed no changes. She did not agree with anybody to make the improvements, and knew nothing about them. She did not make anybody her agents to have the improvements made. Her husband was not her agent, and she never had any conversation with him in which he said he was going to act as her agent, or anything of that kind. She had no notice of any purchases to be made, knew nothing about building houses, did not employ any workmen to assist in the work, and bought no material. First saw Kirk the morning of the trial, and did not remember ever purchasing anything from him. Did not buy the stove, but did pay for it; but never gave any promise to pay for any other part of the debt. In the conversation with Kirk the morning of the trial he asked her if there was any way the matter could be settled. She told him she did not know, as she knew nothing of it in any way, having been absent from the city. She could not tell anything about it. She told him she believed she had heard something of it, but did not know anything about it, and could not tell him anything more. She did not say anything about her father. His name was not

mentioned. Her father was never appointed by her as her agent in any capacity, and she had no knowledge of any transactions he may have had. She has one or two gentlemen in Atlanta who attend to the rents of the place. Her father looks after the business sometimes. Work had just begun on the house before she went away. She did not know they were going to rebuild the house and enlarge it. She had not talked it over with her husband. Some time afterwards,—a good while,—she heard him speak of it, but did not know for certain it was going to be done. Did not know they were going to improve the house. Knew they had commenced it before she left, but did not know it was going to be done. Did not talk to her husband in reference to what was going to be done to the house. Asked no questions as to what was going to be done. Has had her deed to the land in her hands a long time,—longer than six months. Does not remember when she gave it to her father, nor how long it was after the suit was brought. Her father attended to some of that business of borrowing money for her. He was in Atlanta, looking after her business for her. "In this matter, sometimes,—I suppose so— As I was not here, I don't know anything about it. I don't remember whether I turned over my deed to my father, and told him to do the best he could with it, or not." Defendant is using the property since the improvements have been put upon it, and her husband has nothing to do with it, having left Georgia some time ago. "I don't know what I gave father the deed for. I guess he— Nothing." "Don't know whether I let him have it to come to Atlanta and negotiate a loan to pay off this indebtedness on my property or not. Father sorter oversees my property sometimes. Since my husband left, some of the time father has been in charge of my affairs, and I suppose he is here now looking after this suit." "There has been several thousand dollars of improvements put upon the house, and I have not paid one dollar for it." Shepherd testified that Akers, in a letter, told him he (Akers) owed some parties for material furnished and labor done in repairing or remodeling the house, and would like to have Shepherd assist Mrs. Akers in trying to get some money to pay off the indebtedness, suggesting that he thought Shepherd could get some money from Healy, Wellhouse, or others; that he thought, with Shepherd's assistance, he could borrow the money. Shepherd came to Atlanta for that purpose, and saw several parties with a view of getting the money, but was informed that the claims against the property amounted to so much that "we" abandoned the idea. Mrs. Akers did not do anything. Witness talked with her, advised with her. She

did not want to incur the property with a mortgage, and no agreement was ever reached from her to mortgage, that witness ever knew of. They were considering the propriety of the thing when witness went to try to get the money to relieve the house of a debt which he believed Akers owed. Witness did not recognize that Mrs. Akers owed anything. The debts were against Akers. Mrs. Akers never constituted witness as her agent to negotiate. They advised together in reference to borrowing this money, and witness attempted to borrow it,—was attempting to borrow it upon her property; that is what they were considering. The object was to take the liens off the property. Witness does not know what facts constitute an agency. Mrs. Akers wanted the parties paid for the work done on the building, but is not herself able to do it. She owns the property, with a 27-room house upon it, etc.

Mayson & Hill, for plaintiff in error. W. J. Albert, for defendants in error.

BLECKLEY, C. J. The headnotes, together with the official report of the facts, will render the rulings made in this case sufficiently intelligible. There can be no doubt that the verdict of the jury represents the natural equity and sound justice of the case. The legal ground on which the verdict rests is that Mrs. Akers was the concealed principal of her husband; and that, although the credit was originally given to the latter by Kirk & Co., this was done in ignorance of the agency and of the true ownership of the property. There was enough legal evidence that such was the real truth of the case to uphold the verdict. That some illegal evidence was admitted does not render a new trial indispensable. To every lover of justice the verdict already found is more satisfactory than would be one of an opposite nature. It is impossible not to feel that, as Mrs. Akers, not her husband, obtained the benefit, she or her property ought to answer for it, rather than Kirk & Co. should lose their money. Where all the consideration of a debt reaches a wife as an accession to her separate estate, and she retains and enjoys it, only slight evidence of the husband's agency in contracting the debt is required to charge her. We have examined many adjudications upon somewhat similar cases, but it is needless to cite them; for, while some of them would make for us, they are balanced by others of an opposite tendency. We prefer to rest the case on principle and its own facts. Both the trial court and the reviewing court are content with the verdict. This being so, we decline to order a new trial for slight errors immaterial to the result on the actual merits of the controversy. Judgment affirmed.

JOHNSON et al. v. ARNOLD.

(Supreme Court of Georgia. May 8, 1893.)

CONSTRUCTION OF DEED—RIGHTS CONVEYED—
TRESPASS—DAMAGES.

1. Where one owning in fee a tract east of and extending up to the lands of an adjacent proprietor on the west, conveyed in fee a part of his tract, describing in the deed the boundary of the parcel conveyed as running to and then with a certain road on the east side of the adjacent proprietor's lands, (meaning thereby that the road was, or was to be, on and along the west margin of the tract,) and there was in fact no such road, and never had been, the vendee took the fee in so much of the contemplated road as, according to the deed, bounds the parcel conveyed, and the vendor retained nothing but the right to construct, maintain, and use a road at the place designated. A like right would exist in the vendee also, the right being mutual in both parties, and not exclusive in either. Under a similar state of facts similar consequences resulted from a subsequent conveyance by the same vendor of another parcel of his original tract north of and adjoining the parcel formerly conveyed, the deed last made describing the boundary as commencing at a stone corner in the edge of "the road," and running thence around three sides of the parcel, then back to the so-called "road," and thence with said road to the starting point.

2. In the present case the vendor was not the owner of the stone quarried, after the conveyances were made, from the contemplated site of the so-called "road," and had no right to recover the value of the stone, or to recover for any damage done to the freehold. His interest being confined to a mere right of way, with rights incidental thereto, he could recover only for damage, if any, done to his easement, or some of its incidents.

3. Where a private way is used by a trespasser without impeding or interfering with the owner's free and full use of it during the same period, the ordinary measure of damages is the injury done to the way or to the land by the wrongful use, including any increase occasioned thereby in the cost of repairs, the way not being a turnpike or other road kept for tolls or let for profit.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Action by W. H. Arnold against George W. Johnson & Co. for an injunction and other relief. Plaintiff had a verdict, and a new trial was denied. Defendants bring error. Reversed.

The following is the official report:

Arnold sued Johnson & Co., alleging: He is the owner of a strip of land, part of land lot 168 in the sixteenth district of De Kalb county, the strip being 20 feet wide, bounded on the west by lands of the Georgia Railroad & Banking Company, south by a public road, east by lands of Georgia A. and Sarah V. Kinney, north by lands of petitioner. Johnson & Co., since July 24, 1890, have been quarrying and getting paving blocks on this land without his consent, and after he had notified them to stop, and are appropriating the stone to their own use, and wholly destroying the land or rock for the use of a road; and are driving over and using his lands in hauling stone and other material over and across his land, over his protest.

He asked for damages and for injunction. Defendants claimed under deeds from plaintiff to Georgia and S. V. Kinney and from Georgia A. Kinney to Almand & George. There was a verdict for plaintiff for \$200, and, defendants' motion for new trial being overruled, they except. The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also because the verdict was contrary to the following charge: "If Arnold deeded to the Kinneys land to a road, and in fact there was no road there, then the Kinneys' title was good to the land of the Georgia Railroad and Banking Company, and Arnold would not be entitled to recover." Also because the verdict was contrary to the charge of the court on the measure of damages, movants claiming that the evidence was clear that movants acted under a claim of right; having leased from Almand & George and the Kinneys the land in dispute, and claiming that the evidence clearly showed that the value of the stone taken from the ground claimed by Arnold was only about \$31 when taken out. Also because the court charged: "Now, in reference to the road, it is not necessary that every road should be a public road; it is not necessary that every road should be a private way, as it is understood in the law. A man may have a road over his land, and, if there was a road there, and the boundaries in the deed to Mrs. Kinney were to that road, it would go to that road, and go no further; it would not go even to the middle of the road, because it is neither a public road nor a private way established by the law." This was alleged to be error, because there was no evidence that the road was there, the deeds introduced showing no certain boundaries of any road, and all the evidence showing no road or semblance of the same; and because the charge did not state the law correctly. There were two deeds made by plaintiff to Georgia and Sarah V. Kinney. One of them, dated November 13, 1883, conveyed 10 acres, part of land lot 168, bounded as follows: Commencing at stone corner in edge of road dividing lands of Georgia Railroad Company and Sarah V. and Georgia Kinney; thence east alongside of the land of said Kinneys to Arnold's fence; thence north with said fence to a certain stone corner on Arnold's line; thence west along Arnold's line to said road as above mentioned; thence with said road to starting point. The second was dated April 30, 1883, and conveyed 25 acres of land lot 168, with the following boundaries: Beginning at a stone corner on Arnold's land in the edge of a certain road on west side of J. T. Brand's land; thence west to a certain road on east side of lands of Georgia Railroad; thence south with said road to public road from Lithonia to Conyers; thence east with said road to road on west side of J. T. Brand's land; thence south to starting point. The strip of land in dispute was between the land claimed by plaintiff to be the land he

deeded to the Kinneys and the land of the Georgia Railroad. The deed of Georgia Ann Kinney to Almand & George, under which deed defendants claim their rights, conveyed to the land of the Georgia Railroad. Also because the court charged that if defendants acted in good faith the measure of damages would be whatever the blocks were worth at that time, less the expense of the labor of turning the rock into blocks. This was alleged to be error, because the amount so found would include the profit of the contractor and value of superintendence and skill, and was confusing to the jury, and in opposition to the further charge of the court when stating that the royalty value was the true measure of damages; and because the charge did not state the law correctly. Because the court charged that, if the use of roads was a commodity, plaintiff would be entitled to recover whatever the use of the road that lay over his land was worth to defendants. This was alleged to be error, because in a suit for damages to land the true measure of damages is not what it is worth to the party using, but how much the use by defendants damages plaintiff; and there was no evidence going to show bad faith in use, and there was evidence showing permission by plaintiff; and because the charge incorrectly states the law. Because the court charged that the jury could find the value of the blocks at the time of conversion, the evidence being that defendants, in quarrying the rough stone, acted under a claim of right, and that at the time of conversion the stone was worth only about \$31. It was alleged that the charge stated the law incorrectly. Because the court refused to charge, upon the written request of defendants: "The measure of damages in this case is the actual injury which the value of plaintiff's land has suffered by reason of the entry upon the land and actions thereon." Also the court refused to charge, upon the written request of defendants, that possession under color of title of land for seven years, peaceable, open, and uninterrupted, gives title. Also because the court refused to charge, upon the written request of defendant: "Where land is conveyed as bounded by a road, the grantee takes title to the middle of the road, if there is no express provision to the contrary in the deed." Another ground of the motion was because plaintiff was permitted to testify, over defendants' objection, that he thought when he was selling the land he was selling it to Kinney, and as to an understanding between him and Kinney as to strip reserved. The objection was on the ground that Kinney was not a party to the deed; that it was not shown that Mrs. or Miss Kinney knew anything about this understanding; that the deed was the best evidence as to the intention of the parties to it, and as to what was conveyed by it; and that Almand & George, who owned a half undivided interest in this land, could not be bound by an understand-

ing with Mr. Kinney. Also because the court allowed Arnold to testify as to actions of himself and Kinney at the time of the sale of the land as to putting up stakes 20 feet from the line of the Georgia Railroad. The objection was that this was an effort to go outside of the deed made and drawn by Arnold to show title to this strip; that the deed was the best evidence; and that what was done in the absence of Mrs. and Miss Kinney, between Arnold and Kinney, could not bind them, nor Almand & George, who held under Mrs. Kinney. As to the last two grounds the brief of evidence discloses that Arnold was permitted to testify: "When I sold to the Kinneys I thought I was selling to Mr. Kinney. When the deeds were to be made out I found that they were to be made to his wife and minor daughter. I wrote both the deeds. It was understood between Kinney and myself that this twenty-foot strip was to be reserved by me for road purposes. We put up a stake at each end of the land, showing where it extended. These stakes were put twenty feet east of Georgia Railroad land, at the end next to Conyers road. The line between my land and Georgia Railroad land was original land line. This land sold to Kinneys was intended to go to a point twenty feet from Georgia Railroad line. Several years after I sold land to Kinneys,—I think in December, 1886,—I found that a fence had been put up along the Georgia Railroad line. I went to Mrs. Kinney, and told her that if she would have this fence moved off she could have the rails. She claimed that she had bought the land from me. I got her the deeds to her, and she agreed to have the fence moved. I think this was after stock law went into effect," etc. Also, because the court permitted Arnold to testify as to the amount of the Belgian blocks the quantity of stone claimed to have been taken by defendants would have made, and the value of said Belgian blocks. This testimony was objected to on the ground that if Arnold was entitled to recover in this suit he would only recover the actual value of the stone, the royalty value, and not what it was worth as Belgian blocks, nor for anything else. But what was stone worth? How much was land damaged by taking stone from quarry? Further, because the court admitted in evidence two written notices, over objection that the evidence showed that work had been done before the date of either of the said notices; and because the notices were otherwise irrelevant to the issue, and tended to improperly influence the minds of the jury. One of these notices was dated July 25, 1890, directed to defendants, and signed by plaintiff, and stated that defendants were then quarrying stone on plaintiff's land, 20 feet of land east of Georgia Railroad, etc., the title to which plaintiff held, and defendants were notified to desist from further use and trespass on the land, and from further use or trespass on the

stone on the land, without first making agreement with plaintiff about the use of the property. The other notice was dated July 24, 1890, signed by plaintiff, and directed to defendants, and stated that the rock upon which defendants were working was plaintiff's rock, bought and paid for by him, and the deed had never passed out of him; that he therefore asked them not to work upon his rock; that, if this request was complied with, they would show their regard for him and his property, otherwise he would search for his legal remedy. Arnold testified: "I went to Johnson & Co. when they were working on the rock at the corner of this strip. They had the holes drilled in the rock, but they had not moved any of the rock off at that time, and none of it was made into blocks. I told them the strip of land was mine, and they told me they had rented it from Almand & George and Kinney, and that Almand & George were good and were behind them. I gave them notice, and served a written notice on them to quit." Johnson, one of the defendants, testified as to the notices: "When Arnold gave notice, I was sick in bed. I afterwards saw two notices. Mr. Arnold gave me no notice to quit. I was sick at home at the time. It was an advantage to us to go down hill, as we might better work the quarry we had leased from the Georgia Railroad. This land line is an original land line, and I say this to show that we were over this strip when Arnold gave us notice." Coffee, another of defendants, testified: "When Arnold brought me notice I told him we had leased from Almand & George and Kinney, that they were responsible, and for him to see them. At the time we had crossed the strip claimed by him as road." Another witness testified corroborating Coffee as to having crossed the strip and gotten to the Georgia Railroad land before Arnold gave notice. There was other testimony to the same effect.

Candler & Lee, for plaintiffs in error. Geo. W. Gleaton, for defendant in error.

BLECKLEY, C. J. 1. The main question involved in this case is one of much interest and some difficulty. It is novel in the jurisprudence of this state, and we rule it by principle and sound legal analogy, and not upon any direct authority. Various decisions, both English and American, bearing upon it in some degree, have been examined. They are not uniform, but point in different directions. Upon principle, and as best subserving public policy, we prefer the trend and tendency of those cases which treat a tract of land having upon its margin a road, either public or private, and either actual or only contemplated, as embracing the fee in the road itself when the tract is conveyed and is described in the deed as bounded by the road, the maker of the deed being at the time of its execution owner of the fee in the

road, and the deed purporting to convey the fee in the tract thus bounded. Perhaps the strongest reason in favor of this construction of such conveyances is that there ought to be some general and settled rule applicable alike to all conveyances which bound the premises by a marginal road, and the best general rule in behalf of public policy, and the one most likely to conform to the real intention of the parties in most instances, is that which we have just indicated. It is favorable to the general public interest that the fee in all roads should be vested either exclusively in the owner of the adjacent land on one side of the road, or in him as to one-half of the road, and as to the other half in the proprietor of the land on the opposite side of the road. This is much better than that the fee in long and narrow strips or gores of land scattered all over the country and occupied or intended to be occupied with roads, should belong to persons other than the adjacent owners. In the main, the fee in such property under such detached ownership would be and forever continue unproductive and valueless. True it is that the fee in a road or in one-half of the breadth of land occupied by a road is generally not of much value to an adjacent proprietor, but it goes to enlarge his holding, and probably enhances somewhat the value of his estate, when a detached ownership would usually leave it of no value whatever. At all events, this much may be asserted confidently: that, as the fee in roads has to reside somewhere, it is more desirable that it should be in the owners of the adjacent lands than elsewhere; and, detached ownership being less desirable, or not desirable at all, any actual intention to establish it in a particular instance, or in the great mass of instances, is less likely to exist than is an opposite intention. When, therefore, the owner of a whole fee in a tract conveys the tract, bounding it by a road, he, not owning the land on the opposite side of the road, and not expressly declaring in the conveyance whether he retains the fee in the road or not, may very well be understood as intending to convey the whole tract with the exception of the road as a road merely; that is, as a way public or private, as the case may be. According to the better authorities, the bounding of a tract by the edge or margin of a road will pass the fee to the middle line of the road when the vendor owns the fee on both sides. Upon the like reason, if he owns the fee on one side only, and the whole road is upon the margin of his tract, the proprietor on the opposite side not having any interest in its ownership, a conveyance of the tract as bounded by the margin of the road should, and we think would, pass the fee in the whole road; and, as we have already stated, we think it makes no difference in this respect whether the road spoken of in the deed is already in existence as a way in actual use, or is unopened, and only a road

in contemplation. To bound land by a road in describing a tract is to say either that a road is already at the location indicated, or that there may be one there hereafter at the pleasure of the vendor or of the vendee, either or both. When a road is mentioned as a boundary, it should generally be understood that the boundary intended is a road as a road or way, and not as embracing the physical substance of the soil in and under the road all the way down to the center of the earth. In other words, a road as a boundary is the road as an easement, together with such land, or interest in land, as is necessary to full enjoyment of the easement, but no more. To such enjoyment the mere surface of the earth is always essential, and frequently the right to establish and maintain a new artificial surface by excavating in some places and embanking in others. To discuss the present case in detail, and pass under review all its facts, seems needless. What we have already said, read in the light of the official report and of the first headnote, will suffice in respect to the matter of that note.

2. As a necessary consequence of the construction which we have placed upon the two deeds made by Arnold, it results that he was not the owner of the stone quarried from the site of the contemplated road, and that he could recover for no damage done to the freehold as mere land, but only for such as may have been done to his easement or some of its proper and necessary adjuncts as an easement for present or future enjoyment. For instance, it would be some injury to his property in the easement to render it more expensive to open the road, now or hereafter, than it was when he conveyed, if this was occasioned by mining and removing the stone.

3. The action was in part for the wrongful and unauthorized use of a private way elsewhere situated, which belonged to Arnold. What the court charged in relation to the measure of damages for this trespass was not correct. We have indicated our own views on this point in the third headnote. The verdict was not what it should have been, and the court erred in denying a new trial. Judgment reversed.

DAVIS v. WAYNE COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Nov. 25, 1893.)

TAXATION — POWERS OF COUNTY COURT — NOTICE OF TO CONTRACTOR FOR COUNTY WORK.

1. Section 8, art. 10, of the constitution, prohibits the contraction of any indebtedness by a county court which cannot be paid out of the funds on hand or the levy for the current fiscal year, without complying with the other requirements of this section.

2. A county court cannot bind the levies of future years under sections 25, 26, c. 194, Acts 1872-73, to pay for improvements made on roads and bridges, without first submitting all ques-

tions in relation thereto to a vote of the people, as required by section 8, art. 10, of the constitution.

3. A contractor or laborer dealing with the county court is charged with notice of the constitutional limitation of its powers, and if he performs labor or does work for it under an unauthorized contract of payment out of the levies of future years, and not out of the funds on hand or the levy for the current fiscal year, he cannot recover for the same in an action of assumpsit, or compel the county court by mandamus to lay a levy for payment thereof, even though the county court has issued certificates, orders, or evidences of debt therefor.

4. An assignee of such indebtedness has no greater rights to enforce payment thereof than his assignor.

(Syllabus by the Court.)

Error to circuit court, Wayne county; Thomas H. Harvey, Judge.

Action by R. D. Davis against the county court of Wayne county for mandamus. Plaintiff had judgment, and defendant brings error. Reversed.

Campbell & Holt, for plaintiff in error.
Vinson, McDonald & Thompson, for defendant in error.

DENT, J. This is a proceeding by mandamus, instituted by R. D. Davis, assignee and holder of certain interest-bearing orders issued by the county court of Wayne county during the years 1887, 1888, and 1889, in the circuit court of said county, to compel said county court to provide by levy for the payment thereof, now aggregating, as shown by the judgment, \$6,119.87. The county court appeared to the mandamus nisi, and filed its answer, in which it relied—First, on the statute of limitations as to the original cause of action or consideration on which the orders were founded; second, that said orders were in lieu of certain certificates of indebtedness issued by said court under chapter 194, §§ 25, 26, Acts 1872-73, during the years 1881, 1882, 1883, 1884, and 1885, without first having submitted all questions relating to such indebtedness to a vote of the people, in violation of section 8, art. 10, of the constitution, and were therefore void, as they were but the renewal of an indebtedness originally contracted without authority of law. Plaintiff demurred to this answer, and the court rendered judgment for him on the demurrer, and awarded a peremptory writ of mandamus. From this judgment defendant obtained a writ of error, and now here relies on the same two matters of defense set out in its answer. If the debt, when originally contracted, was lawful, the statute of limitations will not bar it, for the reason that it is a good consideration for a new promise in writing. Code, § 8, c. 104; 2 Tuck. Comm. 152. The question, then, is whether the debt in its inception was unconstitutional and void, and, if so, had the county the authority to ratify the same by issuing new orders and providing a levy for the payment thereof? Sections 25, 26, c. 194, Acts 1872-73, are as follows, to wit:

"(25) When a bridge is necessary within a county or across the boundary thereof, and it is not practicable for the surveyor of the road precinct to have it built or repaired with the means at his disposal, the county court of the county may contract for same, or any part thereof, on such terms as may be agreed upon, and take bond and security from any contractor for the faithful performance of his contract, and pay for the work, in whole or in part, out of the county treasury or by issuing bonds or other evidence of debt, for the same, as may be agreed upon. * * *

(26) In like manner they may contract and pay for making, improving or keeping in order, the whole or any part of any county roads within the county." The several certificates of indebtedness issued thereunder by the county court were in form as follows, to wit: "State of West Virginia, county of Wayne. Wayne O. H., Nov. 14, 1883. Due James Prichard, or order, without offset, the sum of one thousand and seventy-eight dollars and twenty-five cents, payable out of the road fund of Union district number 2, levy for the year 1885, with interest from date, payable at the Catlettsburg National Bank, Catlettsburg, Ky., semi-annually. This evidence of debt is issued under and in the pursuance of an order of the Wayne county court passed at the levy term, July 7th, 1880, under the 25th and 26th sections of the road law of West Virginia, (Acts of 1872-73.) Present: Ten justices and the president of the court. James McQuinn, Pres. P. H. Napier, Clerk. By Chapman Fry, D. C." The orders issued in renewal of the certificates, and on which these proceedings are founded, are in form as follows, to-wit: Part of No. 833: "Wayne Co., W. Va., April 4, 1889. The sheriff will pay to James Prichard or order the sum of eight hundred and eighty-three dollars and 92 cents, allowed by special order entered on the 2nd day of July, 1889, after deducting therefrom the amount of all state, county, and other taxes and levies in his hands for collection against the said James Prichard, 2nd dist. road levy of 1888, with interest from date, payable semiannually at Oatlettsburg National Bank, Catlettsburg, Ky. \$883.92. Chapman Adkins, President. Chapman Fry, Clerk." Indorsed as follows: "\$883.92. No. 8,954. Chapman Adkins, Pt. Sheriff of Wayne Co., April 4th, 1889, \$118.65. Interest paid on the within claim this 2nd day of July, 1889. James Prichard." "Presented June 1st for payment. I never had any part of the levy named in my hands; that being collected before my term of office. Sanders Spurlock, S. W. C." "Value received, I assign the within to R. D. Davis, June 22, 1891. James Prichard."

In the case of *List v. City of Wheeling*, 7 W. Va. 501, Judge Haymond, in construing section 8, art. 10, of the constitution, holds that "it was not intended to and does not in any wise interfere with or prevent the

levying, collecting, and expenditure of taxes annually by authority of law by the proper legal authorities of the counties, * * * and to do and cause to be done whatever is necessary for that purpose, including the making and causing to be made contracts touching the disbursement of the taxes levied and collected annually and the like, and all this without a vote being taken." This construction has been since approved in the cases of *Brannon v. County Court*, 33 W. Va. 789, 11 S. E. 34, and *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279. In the latter case it was held that the "term 'indebtedness' includes every kind of indebtedness, no matter in what manner created, or voluntarily brought about." The constitution plainly forbids the contraction of any debt for any purpose "unless all questions connected with the same shall have been first submitted to a vote of the people, and have received three-fifths of all the votes cast for and against the same;" and it must be presumed that the legislature had this provision of the constitution in mind when it passed the law before quoted, and expected the county court, before creating any indebtedness under it, to comply with the constitutional requirements. The county court may expend the current revenues and accrued funds, and make contracts looking to that end, as that which the court may have the means of paying, either in the treasury or by the current fiscal levy, is not the contraction of debt within the meaning of the constitution, but is merely the appropriation and application of the annual income of the county to the legitimate purposes for which it was accumulated and levied. But where the county authorities attempt to or do bind, without a proper vote of the people, the levies of future years in any manner or for any purpose whatsoever, either by contract, express or implied, their action in so doing is a usurpation of power and an infringement of the constitution, and such contract is null and void, and is not a good consideration for any future order on the funds of any future year, and all orders issued on such consideration alone are invalid. Neither can any action be maintained for the work and labor performed by virtue of such illegal contract, as the law avoids the express, and will not, therefore, raise an implied, assumpsit. It is true the person furnishing the labor and material may have been misled by the county court and the legislative enactment, but this is no reason why a constitutional requirement should be disregarded. It is the supreme law of the state, and binding on all alike, and can neither be legislated away nor contracted away by the county court and individuals. Every citizen, high or low, learned or unlearned, is bound to take notice of and abide by all its provisions, and he cannot enjoy the protection, privileges, and immunities it affords, and then be heard to plead ignorance of its

inhibitions. They who deal with the county authorities are charged with notice that such authorities are limited in their expenditures to the annual income, derived from their power to levy taxes annually, and must make their contracts accordingly. To hold otherwise would place it in the power of such authorities to evade the constitutional limitation, and bankrupt every county in the state. *City of Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820. It is the first duty, and highest obligation thereunder, of every legal tribunal and citizen to preserve the constitution inviolate. For this court not to do so because of a claim meritorious but for its provisions would be only to strike down the instrument that secures its own existence, and dig a pit for its own destruction. The assignee of a non-negotiable illegal claim can stand on no higher ground than the assignor, and he is entitled to no more consideration, even though the assignment be for value. A void contract cannot be made valid by transfer or assignment. For the foregoing reasons it becomes our imperative duty to reverse the judgment of the circuit court, quash the writ of mandamus, and dismiss the petition, at the plaintiff's costs.

STATE v. BOWEN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

CREDITOR'S BILL—RETURN OF EXECUTION—PRIORITY OF LIENS—RIGHTS OF PLAINTIFF.

1. Where a bill is filed by the state of West Virginia to set aside a fraudulent conveyance made by its judgment debtor, and to subject land in the hands of the fraudulent grantee to the payment of its judgment, it is not necessary that an execution should have issued on said judgment, and that a return of nulla bona should be had, before such bill can be sustained. Neither is it necessary to convene the creditors of such judgment debtor, or to allege and show that the rents, issues, and profits of the land sought to be subjected will not pay the debt in five years.

2. In such a suit it is unnecessary to ascertain the liens existing upon the land before making a distribution of the proceeds of a sale of land made therein, and the party filing the bill and setting aside the conveyance is entitled to be first satisfied out of such proceeds, unless there are prior liens.

3. In such a suit the state stands upon the same footing with any other creditor, as to enforcing its lien in equity against the land of a fraudulent grantee.

(Syllabus by the Court.)

Appeal from circuit court, Kanawha county; F. A. Guthrie, Judge.

Bill by the state of West Virginia against Alderson Bowen and others to set aside a conveyance of land, as fraudulent. From a decree sustaining a demurrer to the bill, plaintiff appeals. Reversed.

Okey Johnson, for the State. Flournoy, Price & Couch, for appellees.

ENGLISH, P. On the first Monday in September, 1891, the state of West Virginia filed its bill in the circuit court of Kanawha county against Alderson Bowen, B. J. Pritchard, and W. B. Spurlock, in which it alleged that on the 11th day of December, 1890, said state, as plaintiff in an action at law brought in the circuit court of said county against William E. Wilkinson, late sheriff of Wayne county, and Alderson Bowen and others, sureties on the official bond of said W. E. Wilkinson, sheriff, etc., for the default of said sheriff, recovered a judgment for \$18,747.65, with interest and costs, a copy of which judgment was exhibited with said bill. That an execution on said judgment issued to the sheriff of Wayne county, which was by said sheriff levied on all the real and personal property found by him in the name of the defendants in said judgment, and that said sheriff, under said execution, on the 28th day of September, 1891, sold all of said property, and it did not bring half the amount of said judgment. That Hugh Bowen, the father of the defendant Alderson Bowen, died seised of a valuable tract of land in and near the county seat of Wayne county, containing about 147½ acres. That he left three sons, Hugh Bowen, Alderson Bowen, and Abraham Bowen. That Hugh Bowen sold his interest to Rebecca Trogden. That from ——— to 1873 suit was brought by Rebecca Trogden and William Trogden, her husband, in the county court of Wayne county, in equity, for partition, and the said property was partitioned among those having a right thereto. Copies of the decree for said partition, the report of the commissioners who made the same, and the decree confirming said partition, all of which have been recorded in the records of the office of the clerk of the county court of Wayne county, were filed as a part of said bill. That it would appear from said report of the commissioner that the part set off to Alderson Bowen, the defendant, was 48 acres and 121 poles, which was laid off to him by metes and bounds, and thereafter the same was confirmed, and he held the legal title thereto, without any deed being made to him. That after the default of said W. E. Wilkinson, sheriff, which occurred in 1883 and 1884, there was a fixed liability on said Alderson Bowen to the plaintiff in the full amount of the indebtedness at that time, which, with its interest, amounted to the judgment aforesaid on the 11th day of December, 1890. That on the 11th day of October, 1890, the said Alderson Bowen and wife conveyed to the defendants B. J. Pritchard and W. B. Spurlock about eight acres of the said tract of land, lying at and in Fairview, the county seat of Wayne county, (a copy of which was filed as part of said bill.) The consideration in said deed is \$1,075. The plaintiff charged that said \$1,075 was not paid to said Alderson Bowen. That at the time of said conveyance the said Alderson Bowen

knew that there was liability on him to the state of West Virginia, this plaintiff, for more than he was worth, and that his purpose and intent were, when he made said conveyance, to hinder, delay, and defraud the plaintiff in the collection of its claims against him; that several years before the time of said conveyance, he had been served with notice of a motion for a judgment against him in the circuit court of Kanawha county, which motion was at the time of said conveyance, and still is, pending and undetermined. All the papers in said motion case were asked to be taken and read as a part of said bill. That at the time of said conveyance the defendants B. J. Pritchard and W. B. Spurlock well knew the liability of said Alderson Bowen to the plaintiff, and well knew that he had been served with the notice as aforesaid. And plaintiff further charged that if the whole consideration named in said deed, \$1,075, as therein set out to be paid, was paid, it was greatly inadequate; that said property was then, and is now, worth more than four times the consideration named in the said deed. And plaintiff charged that the object, intent, and purpose of the said Bowen in making said conveyance were to prevent the said property from being sold to pay the said claim he owed the state, to hinder, delay, and defraud the state in collecting its said claim against him; that the said B. J. Pritchard and W. B. Spurlock had knowledge of such intent and purpose, and bought the said property at less than one-fourth of its value, to aid and assist the said Bowen in his said fraudulent purpose. It was again charged by the plaintiff that no consideration was paid, but that it was agreed that they (the grantees) would pay the low price of \$1,075 if they were permitted to hold the property. That said suit was brought to September rules, and plaintiff recorded a *lis pendens* in the office of the clerk of the county court of Wayne county. And said *lis pendens*, with the evidence of its being recorded, was filed as part of said bill. And the plaintiff prayed that said deed from Alderson Bowen to B. J. Pritchard and W. B. Spurlock might be declared fraudulent as to plaintiff's said claim and judgment against the defendant Alderson Bowen, and the said eight acres of land be subjected to the payment of said claim and judgment, and for general relief.

To this bill the defendants Pritchard and Spurlock demurred (1) because said bill was insufficient in law; (2) because the facts alleged in the bill were not sufficient to invoke the aid of a court of equity, and because plaintiff's remedy, if any it had, was complete at law; (3) because necessary parties were not brought before the court, and the relief prayed for could not, in any event, be granted until they were made parties to said suit; (4) because it appears on the face of the bill that at the institution of the suit

no execution or fieri facias on plaintiff's judgment had been returned to the office of the court from which it was issued, showing by the return thereon that no property could be found, from which such execution could be made, it appearing from the bill that said judgment was rendered within two years from the institution of said suit. And said demurrer, having been considered by the court, was sustained, and the plaintiff's bill was dismissed, and from this decree the plaintiff obtained this appeal. The question we are to consider and determine is whether or not the circuit court committed any error in sustaining said demurrer.

Now, while it is true that the state has an additional mode of enforcing its judgments and claims against the real estate of its debtor, provided by statute, which is not conferred upon the private individual, to wit, by levying upon and selling the real estate of such debtor, when there is no question as to the ownership of such real estate, and the title is unobscured by any shadow of fraud, yet when fraud does intervene, and it becomes necessary to invoke the aid of a court of equity to clear away the apparent clouds upon the title, and subject the real estate of such debtor to the payment of its demand, is there anything in the statute which prevents the state, like any other creditor, from having the benefit of section 2, c. 133, of the Code, which provides that a creditor, before obtaining a judgment or decree for his claim, may institute a suit to avoid a gift, conveyance, or transfer of, or charge upon, the estate of his debtor, which he might after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover? The state in this case is "a creditor," and that would seem all that would be requisite to entitle it to the benefit of said section. In this case, however, the state appears to have obtained a judgment against the appellees Alderson Bowen and others before it instituted this suit in equity. Can we say that this fact placed the state in any different attitude with reference to the alleged fraudulent conveyance than it would have been in if it was merely the owner of the claim by reason of the default of Sheriff Wilkinson? Section 2, c. 133, was intended to confer upon a creditor who had not obtained a judgment the same right as to instituting a suit to avoid a gift, conveyance, etc., which he might after obtaining such judgment or decree. Therefore, the state, as a creditor, occupied no worse position as to maintaining a suit to avoid a gift, conveyance, etc., but precisely the same, after obtaining such judgment, as it did before; that is as any other creditor. Now, while it is true that section 7, c. 139, of the Code, provides the manner in which

a judgment lien may be enforced against the real estate of a debtor, and provides for the distribution of the proceeds of the sale among the lienholders, this section is intended to apply when the title of the real estate sought to be subjected is in the debtor; when it is plain sailing, and no obstruction intervenes. When, however, the creditor is compelled to resort to the provisions of chapter 74 to remove the effects of a fraudulent conveyance, and to use a search light to discover the legal title, new and different rights are accorded to the successful plaintiff. It is not necessary that he should convene the creditors, and make distribution among them, as provided in section 7, c. 139. The property, if subjected, is subjected as the property of the fraudulent grantee, and the conveyance is only held void as to the plaintiff's claim; it being considered valid and binding as between the parties. In a suit of this character the plaintiff calls upon no creditor to join him and assist in the prosecution of the suit. In unearthing the fraud, and subjecting the real estate to the payment of his claim, he strikes out alone and unaided, and is not compelled to call in any one to share in the proceeds, when captured. It is not required to be either alleged or ascertained that the rents, issues, and profits of the land will not pay the debts in five years, before there can be a sale of such land. The fact that such suit may be maintained by a creditor under section 2, c. 133, of the Code, before obtaining a judgment, shows conclusively that a judgment on which an execution has been issued with a return of nulla bona is not required, as a condition precedent to such proceeding, to set aside a fraudulent conveyance as to the creditor. When the plaintiff is successful in a suit of this character, he only uncovers enough of the property fraudulently conveyed to satisfy his demand, and to the portion of the land so discovered and subjected the law gives him the priority of lien. See *Claffin v. Foley*, 22 W. Va. 434. But no such right accrues to a creditor who files his bill under section 7, c. 139, to enforce his judgment against his debtor's land.

In the case of *Core v. Cunningham*, 27 W. Va. 210, *Snyder, J.*, in delivering the opinion of the court, draws the distinction between the proceeding to subject land under these utterly different statutes. He says: "It is further contended for the appellants that the court should have referred the cause to a commissioner to ascertain the liens and priorities against the land, and to ascertain whether or not the rents and profits would pay the debts in five years. These contentions are evidently founded upon a misapprehension of the object of this suit. It is not simply to enforce a judgment lien against real estate. Its real purpose is to set aside, as to the plaintiff's debt,

a fraudulent conveyance, and subject land in the hands of the fraudulent grantee to the payment of such debt. The deed, though ever so fraudulent as to the creditors of the grantor or the husband who paid the purchase money, is nevertheless valid and binding between the parties to the fraud;" citing *Murdock v. Welles*, 9 W. Va. 552; *Duncan v. Custard*, 24 W. Va. 730. " * * * The land should be regarded and sold as hers, and not as the property of her husband. In cases of this character, it is not proper to convene the husband's creditors, nor to rent the land." In the case of *Sweeny v. Sugar Refining Co.*, 30 W. Va. 443, 4 S. E. 431, this court held that "general creditors, who, by bill, answers, or petition, assail a deed of their debtors conveying land as fraudulent, and succeed, have a lien on such land for their respective debts from the filing of such bill, answer, or petition." See, also, *Clark v. Figgins*, 31 W. Va. 156, 5 S. E. 643.

Not only the object of the suit under these respective chapters of the Code, but the mode of procedure and the results, are so radically different that one cannot be said to repeal the other by implication, or to take its place in affording a remedy. In note 4, pp. 154, 155, of *Potter's Dwarries on Statutes*, it is said: "The American authorities are of the same effect. A statute can be repealed only by an express provision of a subsequent law, or by necessary implication. To repeal a statute by implication, there must be such a positive repugnancy between the provisions of the new law and the old that they cannot stand together, or be consistently reconciled;" citing *McCool v. Smith*, 1 Black, 459; *Wood v. U. S.*, 16 Pet. 342; *Com. v. Easton Bank*, 10 Pa. St. 448; *Harford v. U. S.*, 8 Cranch, 109; *Brown v. County Com'rs*, 21 Pa. St. 37. And in *McCool v. Smith*, 1 Black, 470, Justice Swayne said: "A repeal by implication is not favored. The leaning of the court is against the doctrine, if it be possible to reconcile the two acts of the legislature together; and, where a late statute is absolutely repugnant to a former one only in part, it repeals the former only so far as the repugnancy extends, and leaves all the remainder in force. *Van Rensselaer v. Snyder*, 9 Barb. 808," etc. We, however, find no difficulty in reconciling these statutes. It is where a bill is filed by a judgment creditor to subject the debtor's land that the proceeding is to be had under section 7, c. 139; but when the object of the suit is to subject to sale land in the hands of a fraudulent grantee, to the payment of a debt or judgment against the fraudulent grantor, then section 2, c. 133, of the Code, applies, and also the provisions of chapter 74 of the Code, whether the plaintiff be the state or a private individual. It is true that in this case the state had obtained a judgment, and an execution had been issued, against W.

E. Wilkinson and others, including the defendant Alderson Bowen, for \$18,747.65; and it appears on the face of the bill that said execution was levied on all of the real and personal property found by the sheriff in the name of the defendants, and that it was sold on the 28th day of September, 1891, and did not bring half the amount of said judgment. It is also true that there can be but one satisfaction of the same judgment. But the bill shows that, after selling the property found, a large sum of money—over \$9,000—yet remained unpaid; and then the bill contains the usual, and all of the necessary, allegations with reference to the fraudulent conveyance of the land in the bill mentioned by the defendants Alderson Bowen and wife to the defendants B. J. Pritchard and W. B. Spurlock. The judgment appears to have been rendered against the defendants on the 11th day of December, 1890, and the deed was made on the 11th of October in the same year; so that the deed must have been made after the process was served.

As to the third point of the demurrer, to wit, the want of necessary parties, the defendants do not suggest who are necessary parties; but counsel for the appellees, in their brief, in support of said point, contend that the sheriff and the other 17 sureties on his bond should have been made parties to the suit. The bill, however, shows that over \$9,000 of the judgment remains unpaid, and is seeking to subject this tract of land in the hands of Pritchard and Spurlock as fraudulent grantees of Alderson Bowen. Said Bowen, Spurlock, and Pritchard are all made parties; and if the entire judgment is made out of this land the other judgment debtors could not complain, as it would be in their favor, and not against them. But this question has been settled in this state in the case of *Howard v. Stephenson*, 33 W. Va. 116, 10 S. E. 66. In that case, Howard, special receiver, had a judgment against Stephenson & Rothschild; and, in a suit in chancery to subject the land of Stephenson to the payment thereof, it was held that it was unnecessary to make Rothschild a defendant, as the plaintiff sought no redress against him or his property. No redress is sought in this case against the sheriff, Wilkinson, or his other sureties against whom the judgment was obtained. If it is said that the defendant Bowen could complain of making this judgment off of his land, the answer is that he is before the court, and so are Spurlock and Pritchard, and under the ruling in *Howard v. Stephenson* no other parties were necessary. And, so far as we can perceive, the plaintiff, in formulating its bill, having made all the requisite allegations, our conclusion is the court committed an error in sustaining said demurrer; and for these reasons the decree complained of must be reversed, and the cause remanded, with costs.

CLATOR v. OTTO.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

PAROL EVIDENCE—LANDLORD AND TENANT—TERMINATION OF LEASE.

1. In order to exclude evidence of oral agreement on the ground that the parties later entered into a written contract, the oral agreement must relate to the same agreement embodied in the written contract.

2. Where a lease provides that for nonpayment of rent the lease shall be forfeited and surrendered on 10 days' notice, and the lessor demands rent in arrear, and the lessee does not demand notice and pay, but agrees to end the term and surrender his lease, though there was no other notice, the tenancy is thereby ended, and the lessor becomes entitled to possession.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by John E. Clator against Charles Otto. Plaintiff had judgment, and defendant brings error. Affirmed.

W. W. Arnett and Denis O'Keeffe, for plaintiff in error. B. B. Dovener, for defendant in error.

BRANNON, J. Clator brought an action before a justice of Ohio county for unlawful detention of certain premises in the city of Wheeling against Otto. The case was appealed to the circuit court, and, Clator recovering judgment there, Otto has brought the case here. By one deed of lease Clator leased Otto a certain house for three years, and by another, made later, he leased Otto an adjoining house for two years.

Otto's first assignment of error is that the court refused to exclude from the jury testimony of conversation between Clator and Otto tending to show a surrender of the leases by Otto, and this is based on the idea that what is called a written assignment was made between them shortly after this conversation, and that their negotiation resulted in that, and the prior oral agreement merged in it, and the writing speaks the entire contract. This writing and the agreement to surrender were separate matters. Otto owed Clator a large amount of rent in arrear, and, unable to pay, he assigned to a trustee, not the leases, but liquors, furniture, and other personalty, with power to continue the saloon and restaurant business until the trustee could sell this property; and this assignment is confined to that, and does not touch the leases. The surrender of the leases was another thing. He agreed to give them up because he was unable thereafter, as he had been before unable, to pay rent. He assigned the property to pay past rent,—wholly different matters, different contracts. Therefore this assignment could not exclude the oral agreement to surrender. I think the evidence shows not only an agreement to surrender, but an actual surrender of possession under it. Clearly, Otto agreed to surrender, and he allowed

Clator and the trustee to go into the houses and take possession, giving Clator the keys; and he recognized Clator as in possession. When parties applied to rent or buy the premises, he referred them to Clator, and told them Clator had control; and when asked by them when they could get possession if they rented of Clator, he said, "At once," or, "Any time." He changed his mind afterwards, but it was an afterthought. The jury found a verdict consistent with the claim of surrender, and very properly so. There was much evidence tending to show delivery of possession in execution of the agreement to surrender, and we could not go behind the verdict as to that. Moreover, the leases contained a clause of forfeiture for nonpayment of rent and for surrender on notice, and, though there was no notice, yet Clator demanded rent, and told Otto he would have to shut up the place by a distress, or he (Otto) would have to make an assignment; and he agreed to surrender the leases, and assign property to pay back rent; and I incline to think this a waiver of notice, and that, even without delivery of possession, Clator could, under the forfeiture provision, recover, outside the surrender, as he acknowledged rent in arrear, and on demand virtually recognized a forfeiture, and agreed to give up his term.

Another assignment of error is that the court refused to strike out the plaintiff's evidence. Here it is claimed that Otto had paid rent to January 1, 1886, and the suit was brought December 30th. This contention is based on the fact that the attorney drawing the trust made a pencil statement of rent due, and included rent to January 1st, and this was paid out of the sale of the property. But that was by consent put into the statement because the trustee would still have to occupy the premises to carry on the business, and it was estimated distinctly by Otto and Clator as a part and parcel of the expenses attending the execution of the trust. When the surrender was made, that ended the tenancy and all claim to further rent. Greider's Appeal, 5 Pa. St. 422; Tayl. Landl. & Ten. § 518. There was no renewal of the leases. The inclusion of rent to 1st January would not operate as such. If, indeed, too much rent was charged, it would not nullify the effect of the surrender in terminating the tenancy. In fact, the inclusion of this rent was not under the tenancy, but part of the expenses under said trust.

The third assignment of error is that there was no evidence to show the surrender of part of the leased premises. Clearly, the surrender related to both leases, both houses. Possession of both—the entire leased premises—was delivered. The evidence very fairly shows this. The jury so considered it, and so found. The plaintiff recovered before the justice and the circuit court. The clear justice of the case on the evidence is with him, and we affirm the judgment.

POLING et ux. v. PARSONS.

(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

REDEMPTION FROM TAX SALE.

1. A person seeking to redeem land sold for taxes should make a legal tender of the proper amount of actual, lawful money; but that will be excused if the purchaser place his refusal, not upon the nontender of actual money, or because the amount is not the proper amount, but on the distinct ground that the party offering to redeem has no authority or right to do so.

2. Statutes allowing redemption of lands sold for taxes must be liberally construed in favor of persons entitled to redeem.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; William T. Ice, Judge.

Action by Nathaniel Poling and Mary A. Poling against Ward Parsons. Plaintiffs had a decree, and defendant appeals. Affirmed.

W. B. Maxwell, for appellant.

BRANNON, J. Appeal from Tucker county circuit court, by Ward Parsons, from a decree annulling a tax deed to Parsons for land of Mary A. Poling. The question of fact in the case is whether a tender or offer to redeem was made. The evidence is substantially confined to the husband of Mrs. Poling, on the one side, and Parsons on the other; and as it is flatly contradictory, and involves their credibility, though the burden of proof is on the plaintiffs, we may decide the case upon the principle stated fully by Judge Snyder in *Smith v. Yoke*, 27 W. Va. 639,—that where the depositions are conflicting, and different minds might reach different conclusions upon them, the appellate court will decline to reverse the chancellor, even though the appellate court might have come to a different conclusion, had it acted in the first instance. It is a safe rule, and has been many times followed in this court. *Doonan v. Glynn*, 28 W. Va. 715; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. 295; *Reger v. O'Neal*, 33 W. Va. 160, 10 S. E. 375; *Bartlett v. Cleavenger*, 35 W. Va. 719, 14 S. E. 273. Also, *Tennant v. Headlee*, 31 W. Va. 591, 8 S. E. 544; *Yates v. West Grafton*, 33 W. Va. 510, 11 S. E. 8; *Reed v. Nixon*, 36 W. Va. 683, 15 S. E. 416; *Reynolds v. Gawthrop*, 37 W. Va. 13, 16 S. E. 364,—enforce the rule. Shall this court say that one rather than the other of these two witnesses, both subject to the bias of interest, spoke the truth? Before overruling the circuit court in such a case, we should have strong and fixed conviction that it erred. Without such strong and decided conviction, it would be unsafe to do so.

The decree below found that a proper legal offer and tender to redeem had been made. Poling swears that, as agent for his wife, he went to Parsons to redeem the land, took the money out of his pocketbook,—out of his

pocket,—and said he wanted to settle the taxes, and did not want any trouble about it, and Parsons said he was not the one to redeem, and that he (Parsons) did not want anything to do with him, (Poling,) and rode away; that he did not show Parsons the money, as he would not let him do so, but rode off; and that he expected Parsons to give the amount necessary to redeem. Suppose this true, as the court must have held. I shall not say that it was a perfect legal tender, because the money was not itself shown, nor the proper or any fixed amount tendered, but enough was done to have the same effect. This court, in *Koon v. Snodgrass*, 18 W. Va. 320, in a tax-sale case, said that "the proper mode of making a legal tender is to actually produce and proffer the exact sum due; but this may be dispensed with by the party to whom the money is to be paid, when he refuses to receive the money, not on the ground that the money is not produced, nor on the ground that the amount produced was not the exact amount, but on some collateral and entirely distinct ground." It will not do, therefore, to say in this case that the very money itself was not produced to Parsons' sight, or that the proper amount was not produced, as he declined to receive it,—denied Poling's right to act in the redemption of his wife's land, when he was her agent, and himself had initiate curtesy in the land,—and rode away, and cut short every further act which the law could require at Poling's hand.

In *Danser v. Johnsons*, 25 W. Va. 380, a creditor entitled to redeem went to the agent of the purchaser, and offered to pay the amount necessary to redeem the land, and had the money, and handed a receipt to the agent to sign; and he refused, saying he did not know that the creditor had right to redeem. That case, like this, depended on two witnesses,—one saying he produced; the other, that he did not produce or offer, the money,—and this court seems not to have considered that material, and held the offer to pay the money sufficient, because the party denied the right to redeem, and that this justified payment to the clerk. In *Townshend v. Shaffer*, 30 W. Va. 176, 8 S. E. 536, a check for the money to redeem was sent to the purchaser by mail, and he returned it with a note, saying: "I cannot accept this, and release the land. Will see you soon." The court held the receipt of the check was equivalent to a tender, and operated as a redemption.

After this meeting between Poling and Parsons, Poling deposited with the clerk of the county court a proper sum to redeem the land. Poling states that on another occasion, in front of the courthouse, he offered to pay the money to redeem. Thus it appears that the plaintiff had a sincere intention, and made diligent effort, to redeem,—to do what the law required,—and nothing but the exaction from her of the most rigid and tech-

nical legal tender can deprive her of her land,—perhaps her only home,—29 acres, worth \$200, for the small sum of \$3.15.

The cases cited above evince a liberal disposition in the courts to effectuate a well-meant effort or offer to redeem, and excuse a dry, strict, legal tender, but they are conformable to the law relating to tender. This liberality is not mere arbitrary license, but follows the highest authority. The United States supreme court, in *Dubois v. Hepburn*, 10 Pet. 1, laid down the law to be that the law authorizing redemption of land sold for taxes ought to receive a liberal and benign construction in favor of those whose estates will be otherwise divested; that the purchaser suffers no loss, having knowingly bought an estate liable to be defeated by redemption; and that it would seem not necessary for the purposes of justice, or to effectuate the object of the law, that the right to redeem should be narrowed down by strict construction. It has been not untruly said that the sale of land for taxes is the instance in which free government verges most nearly on tyranny, and that the law for redemption, the last chance of the citizen to save his property from forfeiture, should be applied liberally, as a remedial statute. It was held in *Danser v. Johnsons*, 25 W. Va. 385, that redemption statutes ought to be construed liberally in favor of persons entitled to redeem. *Cooley, Tax'n*, 363.

Two children heard the conversation between Poling and Parsons, and say they saw no money or pocketbook, but knew they talked about land. They are able to give no details, and their evidence is without effect. The testimony of Poling as to his offer to pay receives corroboration in the fact that on the same day of the offer, or next day, he deposited the money to redeem with the clerk. He would not be likely to do so, unless Parsons had refused to allow redemption. The fact tends to show that he prepared the money for redemption, and sought Parsons for that purpose, and made the offer to do so. We cannot see our way safely to reverse the decree, and it is affirmed.

GREER v. WILSON et al.

(Supreme Court of Appeals of West Virginia.
Nov. 25, 1893.)

JUSTICES OF THE PEACE—SUMMONING JURY— WAIVER OF IRREGULARITIES.

1. When either party demands a jury, it is error for the justice, without consent of parties, to issue a venire facias for such jury before the summons to commence the suit has been served and returned, and the time fixed for the appearance of defendant has arrived.

2. But where the defendant appears and has the case continued, and the jury thus summoned is adjourned to the time thus set for trial, he will be held to have waived such irregularity in the writ of venire facias, it appearing that he was not injured thereby.

(Syllabus by the Court.)

Error to circuit court, Roane county; V. S. Armstrong, Judge.

Action by J. M. Greer against Wilson & McMillan. From an order denying a writ of certiorari to review a judgment in a justice's court, defendants bring error. Affirmed.

R. F. Fleming and Armstrong & Boggess, for plaintiffs in error. J. G. Schilling, for defendant in error.

HOLT, J. This is an appeal from a final order of the judge of the circuit court of Roane county, refusing to allow and award defendants, Wilson & McMillan, a writ of certiorari to the judgment of plaintiff, J. M. Greer, obtained against them before a justice. Two grounds of error are assigned: (1) No jury for the trial before the justice was demanded at the time prescribed by law, but the venire was illegally issued on the application of the plaintiff before the return day of the summons, and that defendants' motion, afterwards made, to quash the venire facias, should have been sustained by the justice. (2) Because the verdict of the jury was contrary to the evidence, unjust, and unwarranted, and defendants' motion for a new trial should have been granted.

The evidence on the trial before the justice is certified, and presents no ground for reversal for the second cause of error assigned. In the case of *Hickman v. Railroad Co.*, 30 W. Va. 296, 303, 4 S. E. 654 and 7 S. E. 455, sections 68 and 72 are construed as if they were read together, as follows: Section 68: "When a defendant does not appear the plaintiff cannot recover without proving his case. The justice if the process has been served on the defendant shall in such case proceed to hear the allegations and evidence of plaintiff and render judgment as the right shall appear." But (section 72) "either party to a civil action before a justice when the value in controversy or the damages claimed exceed twenty dollars, or the possession of real estate is in controversy, shall be entitled under the regulations herein prescribed to a trial by six jurors, if demanded." What are "the regulations herein prescribed?" Section 73: "The demand must be made before the justice has commenced an investigation of the merits of the case by the examination of any witness or the hearing of other evidence." Section 74: "The party demanding the jury must deposit with the justice six dollars to pay the fees of such jury," etc.; but (section 68) "on the day the summons is returnable the defendant on making oath may demand of right a continuance of the cause for seven days," and, (section 75,) "when a jury is to be called, the trial shall be postponed until the time fixed for the return of the jury, which if neither party show good cause for a later day shall be on the same day or within the next two days." If this order in reading the sections

of chapter 50 which relate to the question in hand is correct, then it is clear as a necessary inference that the plaintiff had no right to demand, or the justice to issue, a venire for a jury before the return day of the summons. Why should a defendant who intends, perhaps, to confess judgment for plaintiff's claim of \$24, at the return day have an additional item of \$6 saddled upon him at the discretion of the plaintiff, and he have a right to exercise such discretion, before there can possibly be any need of or use for a jury? But it may be said that plaintiff has no knowledge of such intention on the part of defendant, and that he wants to have a jury ready and waiting for the case to be called. But he did know that defendant, if he would make oath that he had a just defense, could demand a continuance of the case for seven days as matter of right, and that it is not right to force him into trial on pain of having extra jury charges to pay, no matter how unprepared he may then be to put in properly a statement of his credits or set-offs; so that if he takes the seven days the law allows him to take to hunt up, and make out, and put in proper order for filing, such statement, he has to do so under this additional penalty of unnecessary costs which the plaintiff has seen fit to impose ex parte, and in advance of any need for it. But the objection to awarding a venire for a jury at the time of or immediately after the issuing of a summons, when there is as yet not only no matter in difference for them to try, but when it is not known that the summons can be or will be served at all, stands upon the still higher ground of public policy. There should be no such temptation to the plaintiff to select his own jury before the defendant even knows that a suit has been commenced. These considerations show very clearly that the statute should be given its plain, common-sense meaning, that a jury of six to try the case should not be ordered to be summoned until the summons in the suit has been served and returned, and the time fixed for trial has arrived. But none of these things has any application to this case, for the reason that only three of the six who were thus summoned ex parte in advance attended, for the record shows that three others helped to make up the jury who tried the case, and that without challenge or objection to them individually; nor is any unfitness or misconduct on the part of this jury alleged or shown. The defendant did not make his motion to quash the venire when the case was first called for trial, but appeared and had it continued for seven days. The jurors summoned were then present in obedience to the summons, and that was the proper time for his motion; and, having passed it by, he was properly held to have waived it. There is no error in the record, and the order of the circuit judge refusing the writ of certiorari is affirmed.

UNITED STATES BAKING CO. v. BACHMAN et al.(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)**ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—CLAIM OF THIRD PERSON.**

1. The proceeding by way of attachment being a statutory remedy, and in derogation of the common law, the statute must be pursued strictly in framing the affidavit upon which the attachment is based.

2. In proceeding against a corporation by way of attachment on the ground that it has failed to comply with the requirements of section 37, c. 54, of the Code, in reference to the appointment of a person by power of attorney to accept service of process, etc., the affidavit must show that the requirements of said section have not been complied with, before an order of attachment can issue by reason of such failure to appoint such person.

3. In a proceeding under section 152 of chapter 50 of the Code to try the right of property, where the property levied on under the attachment has been sold and delivered by the party against whom the attachment issues to a third party, and the plaintiff in the attachment has no claim to the property other than that created by such levy, and such order of attachment appears to have been issued upon an irregular or insufficient affidavit, the order of attachment should be quashed, and the property restored to the possession of said third party.

4. A defective affidavit for an order of attachment cannot be supplemented by subsequent affidavit or proofs.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by the United States Baking Company against Peter Bachman & Sons and the Wheeling Bakery Company. Plaintiff had judgment, and Bachman & Sons bring error. Affirmed.

White & Allen, for plaintiffs in error.
Erskine & Allison, for defendant in error.

ENGLISH, P. This was a petition filed by the United States Baking Company under section 152, c. 50, of the Code, to try the right of certain property levied on under an attachment sued out by P. Bachman & Sons against M. Merkel and the Wheeling Bakery Company before W. H. Caldwell, justice of the peace for Madison district, Ohio county. The United States Baking Company, in its petition, alleges that it was when said attachment was issued, and has been ever since, the owner of the property levied on by virtue of said attachment; while P. Bachman & Sons, on the other hand, claim that they are entitled to said property by virtue of the lien created by the levy of said attachment. The Wheeling Bakery Company moved to quash the attachment, which motion the justice overruled, and the justice, after hearing the evidence, ordered that the officer who levied said attachment do deliver the same to the United States Baking Company, and from this judgment P. Bachman & Sons appealed to the circuit court of Ohio county, which court affirmed the judgment of the justice, and ordered that the property be delivered to the United

States Baking Company. The defendants P. Bachman & Sons moved the court to set aside the order and judgment, and to grant them a new trial, which motions were overruled. Said P. Bachman & Sons excepted, and obtained this writ of error.

The first error assigned and relied upon by the plaintiffs in error is to the action of the court in refusing to dismiss said petition of interpleader and the proceedings thereunder. In considering the questions raised by this assignment of error, let us first inquire into the validity of the attachment proceedings under which said P. Bachman & Sons claim a lien upon the property in controversy, as their only claim to the property is by virtue of said attachment. Was the affidavit upon which the attachment was predicated sufficient to authorize an attachment? Section 193, c. 50, of the Code, under which this attachment was issued, provides that, "if the plaintiff at the commencement of his action or at any time during its pendency and before judgment show to the justice by his own affidavit or the affidavit or affidavits of one or more credible persons among other things that the defendant is a foreign corporation or a nonresident of the state, such justice having jurisdiction of the action, might, subject to the provisions contained in the following section, issue an order of attachment," etc; and section 37, c. 54, of the Code provides that "every such corporation [the one against which this attachment was sued out being organized under said chapter] shall within one hundred days after organizing by power of attorney duly executed appoint some person residing in the county in this state wherein it has the office mentioned in the next preceding section, to accept service on behalf of said corporation, or any process or notice, the said power of attorney shall be filed and recorded in the office of the clerk of the county court of the county in which the attorney resides and the admission to record of such power of attorney shall be deemed evidence of a compliance with the requirements of this section. And whether such agent accept the agency or not the service of process upon such person so appointed shall be legal and binding on the corporation. Any such corporation failing to comply with such requirements shall during the continuance of such failure forfeit not less than five hundred nor more than one thousand dollars for every six months that such failure continues; and its property real and personal shall be liable to attachment in like manner as the property of nonresident defendants." Now, the effort was made in suing out this attachment to show that the plaintiff was entitled to an order of attachment against the Wheeling Bakery Company as a corporation, under said last-named section. Did the affidavit filed by the plaintiff in this case show to the justice that said Wheeling Bakery Company or its property, real or personal, were

liable to attachment in like manner as the property of a nonresident defendant? The affidavit upon which said attachment is predicated does not show when said Wheeling Bakery Company was organized, and by the statute it was allowed 100 days after its organization to appoint an agent or attorney under said section before it would be liable to an attachment thereunder; and, for anything that appears in said affidavit, at the time the same was made the property of said company may not have been liable to an attachment for the reason that 100 days had not then elapsed since its organization. The proceeding by way of attachment is a statutory remedy in derogation of the common law, and in order to create a lien the provisions of the statute must be pursued strictly; and in order to authorize an order of attachment it was incumbent on the plaintiff to show by the affidavit presented that the defendant corporation had not within 100 days after its organization, by power of attorney duly executed, appointed some person residing in the county wherein it has its principal office to accept service on behalf of said corporation of any process or notice, and that the failure to appoint such person continues if the said 100 days has elapsed before the property, real and personal, would be liable to attachment in like manner as the property of nonresident defendants; and, while it is true that a failure to appoint such person by power of attorney, as required by said section, would render the property of such corporation liable to an attachment as the property of a nonresident defendant, the affidavit would not be in accordance with the requirements of said section 37 of chapter 54 if it merely stated that the defendant was a nonresident. Neither can it be regarded as sufficient when it simply states that the Wheeling Bakery Company has failed to appoint and have, according to law, in the state of West Virginia, a person to accept service on its behalf, and on whom service might be had of process or notice against it according to law, for the reason that it does not appear by the affidavit when the defendant company was organized, and it does not appear that more than 100 days had elapsed since its organization; and, unless this is made to appear by the affidavit, it may be true that such person had not been appointed, as required by law, to accept service, etc.; and yet the property of said company would not be liable to attachment, because the failure to make such appointment would not appear to be of such duration as to make such property liable to attachment. In the case of *Mantz v. Hendley*, 2 Hen. & M. 308, the court held that an attachment irregularly issued ought to be quashed ex officio by the court to which it is returned, though bail be not given, nor any plea filed by the defendant; and in like manner the

court ought to quash it on errors in arrest of judgment after pleadings and a verdict for the plaintiff. See, also, *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409, (fourth point of syllabus,) where this court held that, "the remedy by attachment being authorized alone by statute, and being in derogation of the common law, and being, moreover, summary in its effects, and liable to be used oppressively, such statute will be strictly construed. The preliminary affidavit required by the statute must contain each element thereby prescribed." The affidavit under consideration contains none of the allegations required by section 193 of chapter 50 of the Code as to fraud or nonresidence, and, as it does not comply with section 37 of chapter 54 of the Code, which is requisite to show that the property of the baking company was liable to attachment under that section, we must regard it as insufficient to authorize an attachment. The affidavit must be sufficient in itself and on its face to authorize the order of attachment; it cannot be supplemented by additional proofs or affidavits. See *Cosner's Adm'r v. Smith*, 36 W. Va. 788, 15 S. E. 977. The only claim asserted by said P. Bachman & Sons to the property in question being by reason of the levy of said order of attachment, and that being, as we think, irregular, and unauthorized by law, constitutes no lien upon said property; and, as there is no controversy between the Wheeling Bakery Company and the United States Bakery Company as to the ownership of the property, the latter being in possession, and the proof showing that it had belonged to the latter since the 10th day of September, 1890, we think the court committed no error in ordering said property delivered to said United States Baking Company, and the judgment complained of must be affirmed, with costs and damages.

BUCKEY v. BUCKEY et al., (three cases.)
(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

DEED—CAPACITY OF GRANTOR—EVIDENCE.

1. The presumption of law is that the grantor in a deed was sane and competent to execute it at the time of its execution.

2. Old age is not of itself sufficient evidence of incapacity to make a deed.

3. The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, is entitled to peculiar weight in considering the grantor's capacity.

4. The time of the execution of the deed is the material or critical point of time to be considered upon the inquiry as to the grantor's capacity.

5. A grantor in a deed may be extremely old, his understanding, memory, and mind enfeebled and weakened by age, and his action occasionally strange and eccentric, and he may not be able to transact many affairs of life, yet if age has not rendered him imbecile, so that he does not know the nature and effect of the deed, this does not invalidate the deed. If he

be capable, at the time, to know the nature, character, and effect of the particular act, that is sufficient to sustain it.

(Syllabus by the Court.)

Appeal from circuit court, Randolph county; William T. Ice, Judge.

Action by John J. Buckey against Charles N. Buckey, and two actions by the same plaintiff against Alpheus Buckey, to set aside three conveyances of land. The three cases were tried together, and plaintiff had decree annulling two of the conveyances. Charles N. Buckey appeals. Reversed in part.

L. D. Strader, Leland Kittle, and John Brannon, for appellant. Dayton & Dayton, W. L. Kee, and A. M. Poundstone, for appellee.

BRANNON, J. John J. Buckey brought three suits in equity in Randolph circuit court,—one against Charles N. Buckey, to annul a deed made by George Buckey to Charles N. Buckey, and two against Alpheus, to annul two deeds made by George Buckey to Alpheus Buckey,—and, by a decree made in the three causes heard together, the deed to Charles N. Buckey and one of the two made to Alpheus Buckey were annulled. Charles N. Buckey appeals. John J. Buckey, in brief of counsel, alleges error in the failure of the decree to cancel the other deed to Alpheus Buckey, and asks that in that respect the decree be reversed.

The ground of attack upon these deeds is incapacity in George Buckey, from old age, to make them. He died in 1888, aged 92 years. On September 10, 1883, when 87 years old, he made a deed to Charles N. Buckey, conveying about 20 acres of land, on which stood a mill, Charles N. Buckey being a grandchild, only son of Emmet Buckey. On September 15, 1880, George Buckey made to his son Alpheus a deed conveying to him a parcel of land embracing his residence and tanyard. On October 30, 1883, George Buckey conveyed to this same son, Alpheus, a parcel of seven acres of land and one-half of two lots in the town of Beverly. These are the deeds assailed in said suits. As it would answer no purpose of utility for future cases, in a legal point of view, I shall not detail the many pages of evidence bearing on the mere question of fact of the mental capacity of George Buckey. George Buckey followed, during a long life, the business of a tanner. He was in business, industrious, prudent, and successful. He was moral and religious, bore a good character, and, so far as I see, of regular, plain, temperate habits. He was a man of decided intelligence, and acquired a considerable property in real estate, though he was not wealthy. When he made these deeds he had living four sons and four daughters and a grandson, the son of his dead son. The evidence cannot be said to conflict as to specific facts, but, in opinion as to George Buckey's mental capacity to transact busi-

ness or make these deeds, the numerous witnesses on the two sides widely differ. I can hardly say which on that subject might be said to have the preponderance. Perhaps in number there may be more on the side of his incapacity; but there are nearly as many on the other side, and when we look at the character of the evidence, the opportunity and means of observation, the business experience and capacity of the witnesses, and their ability to judge as to the party's competency, I am impressed that the evidence to sustain competency is preponderating in force and weight. This is in my mind so, and would be most decidedly so, were it not for the evidence of Dr. George W. Yokum, a long-time neighbor, family physician, and intimate acquaintance of George Buckey, who is settled in opinion that he was incapable of making the deeds, because of "senile dementia intensified." But there is the son of Dr. George W. Yokum, Dr. Humboldt Yokum, a graduate of Jefferson Medical College, who from his childhood had known George Buckey, raised a close neighbor, seeing and conversing with him very often, and in July, 1882, made a settlement of his father's accounts with Buckey, and took Buckey's note for the balance, and who expresses an opinion to the contrary. He is younger and less experienced than his father, it is true, but he seems intelligent and prudent in statement. I mention these witnesses because they are physicians, the only medical witnesses. The list of witnesses upholding George Buckey's mental capacity include the clerks of the two courts, a former sheriff, two notaries, (one an attorney,) and another attorney, all close neighbors and intimate acquaintances, whose business brought them in contact with all sorts of men, and rendered their opinions of special weight, and who had had, through years, business with Buckey. A minister of the gospel, who was frequently at his house about the dates of the deeds, and had business, social, and religious conversation and intercourse with him, is also emphatic in favor of his competency. I have already said that there is very considerable opinion evidence to the contrary. It is shown that in June, 1878, George Buckey's wife died, and it had a very depressing effect upon his mind. He said to his son-in-law, "I am in trouble; I don't know what to do." This is urged as a strong reason to impeach the old man's competency. I regard it as not irrelevant, but by no means of decisive or telling import. The loss in old age of the partner of a long life would naturally cast dark and lowering clouds over the old man's short remnant of life, and render him oftentimes, when brooding over the change, vacant and oblivious to those things of the active, business world engaging the younger, but shut out at times from him. But this would be the case with any of us. It is to be expected. He did and said eccentric things. When his

wife had been laid in her coffin for burial, he would have them to lay her on her side, and, a daughter having had the corpse changed back to its former position, he came into the room, and did not seem to notice it. He stated that he was in Washington and saw Guiteau and President Garfield, when the latter was dead, and that Guiteau was a bad-looking man. He was not at Washington at all. This lamentable occurrence, the murder of President Garfield, possessed the mind of every person, month after month, during the illness of the president and the trial of his assassin. Is it strange that it engrossed this aged man's thoughts? It is an observed fact, entirely consistent with sufficiency of intellect to execute a valid deed, that the old frequently mistake fancy for reality, thinking they remember things never really in the memory as facts, but wholly the creation of imagination. On one occasion, standing on the new bridge over Valley river, he asked where the bridge was, and was told he was on it already, and that the old bridge had been burnt, when he remarked that he might find it lower down the river, and went in search of it, soon returning, seeming to have recalled his recollection. He would sometimes be found sweeping out the old stable, saying he was going to stable horses in it, though it was disused and roofless, and supplanted by a new one near by. He remembered the old, familiar bridge and stable so fixed upon his memory through years long gone. They inhered in his memory yet, and overcame his recollection of the new. It is common—quite usual—for the aged to remember the impressions and things of their long ago, and forget, for the time, until they are specially recalled to their minds, recent occurrences. Sometimes, though not often, this aged man would be found wandering listlessly, somewhat vacantly, about his field near the town, and through the streets of the town of Beverly. There is nothing of much significance in this. He had for years labored in this field and walked the village streets among his neighbors, and he was still following his old walks and habits. When thus walking on one occasion, when his family wished him to come in, he became petulant, seeming to resent, as old people sometimes do, any hint that he was not himself as in days gone by. On another occasion he was found cutting weeds on the opposite side of the street from his house, seeming not to know it, and, when his attention was called to it, he at once returned across the street. He sometimes bade a colored woman living in his house good-bye, saying he was going to Frederick City, and then go to the tanyard and return. Sometimes he would tell her, when it was raining, to take the doors from the outhouses; that they would get wet. At times he would talk incoherently, especially in later years, after these deeds were made, and in an instance or two failed to recognize an old acquaintance, but his

sight was bad, and this is common in age. When he was told who the person was, he seemed to sharply recall him, saying, "Why, is this Arch Chenoweth?" I have given succinctly the chief part, if not all, of the peculiar conduct of George Buckey, summoned in aid of the effort to overthrow his capacity. Strange conduct we may say it is. Eccentricity, or rather the idiosyncrasies of this particular person, they are, indicating, we may admit, failing powers under the hand of years of one who had walked so far down the other side of the hill of life; but with all this there is evidence to show continued good sense, intelligent conversation and discrimination, while the conduct above spoken of is occasional, only.

The strange actions just mentioned do not go far enough; they do not drown the excellent intelligence and common sense, the industry and careful earning and management of property, which characterized his long life. They do not deprive this sensible, worthy man of the right to bestow his property as he wished. Here we must remember certain legal principles. Amid all this evidence, pro and contra, they come in with the force of a casting vote, and sustain the validity of these deeds. If we look anywhere we shall find it laid down as law, particularly in *Jarrett v. Jarrett*, 11 W. Va. 584, and *Kerr v. Lunsford*, 31 W. Va. 661, 8 S. E. 483, that "old age is not in itself sufficient evidence of incapacity to make a deed;" and that the presumption of law is always in favor of the sanity, at the time the deed was executed, of a person whose deed is brought in question; the burden of proof is on him who asserts insanity, unless a previous condition of insanity has been established. *Jarrett v. Jarrett*, supra; *Anderson v. Cranmer*, 11 W. Va. 562, 584; *Hiett v. Shull*, 36 W. Va. 563, 15 S. E. 146. "This presumption is universal, and is not defeated by common report or reputation, or the imputation of friends or relatives, or the old age or feebleness of the subject, or, in short, by any cause except controlling evidence produced." *Busw. Insan.* § 159. The principle is sound in itself, and settled as a rule, that, in the absence of fraud, imposition, or undue influence, mere weakness or feebleness of understanding is not sufficient to overthrow the party's deed. *Alman v. Stout*, 42 Pa. St. 114; *Cain v. Warford*, 33 Md. 23; *Miller v. Craig*, 36 Ill. 109; *Maddox v. Simmons*, 31 Ga. 512, 528; 2 Lomax, Dig. 298; *Chancellor Kent*, in *Van Alst v. Hunter*, 5 Johns. Ch. 160. Here I will say that no evidence shows, or tends to show, any fraud, undue influence, or even importunity, on the part of these grantees. Though alleged in the bills, there is not the slightest proof, and no contention of that kind is in the brief of counsel. The mental weakness must go further than it does in this case. The mysterious action of the person whose act was

involved in *Mercer v. Kelso*, 4 Grat. 106, went beyond that in this case. "No degree of physical or mental imbecility which does not deprive the party of legal competency to act is, of itself, sufficient to avoid his contract." *Farnham v. Brooks*, 9 Pick. 212. It must go so far as to disable him from knowing and understanding the nature and effect of his act. 2 Minor, Inst. 572; *Blish. Cont.* § 962. His mind may be weak and debilitated as compared with what it once was, the memory of things enfeebled, the understanding weak, the character and demeanor eccentric, and he may not have capacity to transact all the ordinary business of life; still, if he understands the nature of the act he does, recollects the property he is disposing of, and the person to whom he grants it, and how he desires to dispose of it, his act is valid. *Nicholas v. Kershner*, 20 W. Va. 251; *Kerr v. Lunsford*, 31 W. Va. 662, 8 S. E. 493.

The case shows that, most of all things, George Buckey would remember his property. This is both likely and appears in the case. As showing that he knew his property and the objects of his bounty and the nature of his acts, these deeds do not reflect the scheme of Alpheus and Charles N. Buckey, but the sedate, deliberate, and long-entertained design of George Buckey himself. Time and again, for 25 years before these deeds, he said he intended to give his home property to Alpheus, and the mill property to Emmet Buckey. These declarations are admissible on the question of competency, (*Dinges v. Branson*, 14 W. Va. 100-118,) and tend to show capacity, (*Whart. & S. Med. Jur.* § 87.) If crazy, he wonderfully retained, and finally executed to the letter, his long-contemplated purpose. He said he intended to keep Alpheus with him as long as he lived; that Alpheus was kind and good to him. Alpheus remained with him till his death, while all the other children went off to do for themselves. He stated that Alpheus had lived with and cared for him all his life. He advanced his other children, or most of them, considerable amounts, and he left, outside these conveyances, a farm and other real estate of considerable value. As further showing strongly that he knew what he was doing, witness his caution as to the mill property. Many years before he placed Emmet in possession of it, and he carried on milling business there, and George Buckey always declared he intended the mill for him. About one year before the deed was made, the old man spoke to Mr. Jones about drawing the deed, but told him he wanted to run lines between this mill tract and one adjoining, and engaged to meet, and met, Jones on the ground, had the surveying done preparatory to the deed, and directed what land was to go into it. He at first said he intended to make the deed to Emmet; but Emmet became embarrassed financially, and

with some reluctance, in a deliberate conversation with Jones, at last determined to make the deed to Emmet's only son, Charles N., saying he had been a good boy, and had been of great service to him. When the deed was read he declared it correct. He had Mr. Willson write one of the deeds he made to Alpheus, and a deed conveying two lots to a daughter, Mrs. Currence. He asked Willson if he had the calls, and, he replying that he had not, he told who had conveyed the property, so that he could from the conveyance get the calls. Willson suggested that he change his plan as to what lots he would convey to Mrs. Currence and what to Alpheus, but he refused to depart from his plan, giving good reason for it. And observe the prudence, favoring his own safety, evinced by the deeds themselves. The deed to Charles N. Buckey and that to Alpheus for the tanyard and home reserve a life estate and full control to George Buckey for his life; and in the other deed to Alpheus he made a charge of \$250 in favor of another son, Marteny, who he said had not received much. Another consideration is of great weight in favor of George Buckey's capacity. The two notaries who took his acknowledgments state that he was competent to make the deeds. There is no showing by any one present at their execution that at that time he was not competent. It has been often laid down that the very time of the factum of a deed is the critical point of time for inquiry as to the capacity of the party making it. "The evidence of witnesses present at the execution of a deed is entitled to peculiar weight." *Jarrett v. Jarrett*, 11 W. Va. 584; *Anderson v. Cranmer*, Id. 562; *Nicholas v. Kershner*, 20 W. Va. 251; *Beverley v. Walden*, 20 Grat. 147, 158. In *Beckwith v. Butler*, 1 Wash. (Va.) 236, it was held that the evidence of the subscribing witness as to competency to make a deed was "chiefly to be regarded," and President Pendleton spoke approvingly of a case in the Virginia court of appeals, where it overcame all other testimony before and after execution of the will. No taint or savor of incapacity is imputed to George Buckey save on account of old age. It has become quite common for interested relatives to assail the disposition made by aged persons of their property. He gave to Alpheus Buckey and Emmet's son, and perhaps Mrs. Currence, because he had not advanced them, and because they had remained near him and with him many years after they had become adult, while others had gone far away. They had done much to rock the cradle of reposing age. He said so on many occasions, especially as to Alpheus. *Whart. & S. Med. Jur.* § 87, warns us "that great caution, indeed, should be used, lest the existence of extreme old age should lead the medical witness to presume consequent imbecility." Chancellor Kent said, in *Van Alst v. Hunter*, 5 Johns. Ch. 159: "It is

one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation and the course of natural affection dictated." Our conclusion is to reverse so much of the decrees as annuls the deed to Charles N. Buckey, and dismiss the bills filed to annul it, and to refuse to reverse, but, on the contrary, to affirm, that portion of the decree in the first case dismissing the bill filed by John J. Buckey to annul the deed to Alpheus Buckey, dated September 15, 1880.

STUBBS v. MOTZ et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

LIMITATION OF ACTIONS—COMPLAINT—SUFFICIENCY.

Under Code, § 159, subd. 9, providing a limitation of three years for an action for relief on the ground of mistake, and that the cause of action shall not be deemed to have accrued until the discovery of the mistake by the party aggrieved, plaintiff need not allege in his complaint that the discovery of the mistake was within three years next before the commencement of the action, nor file a replication, alleging such fact, to a plea setting up the statute of limitations.

Appeal from superior court, Lincoln county; Armfield, Judge.

Action by E. W. Stubbs against W. H. Motz and others. There was judgment for defendants, and plaintiff appeals. Reversed.

D. W. Robinson, for appellant.

CLARK, J. This action was begun 20th March, 1885, to correct errors alleged to have been made by mutual mistake of the parties in a settlement had between them 27th October, 1881. The defendants pleaded the statute of limitations. The plaintiff did not, in his complaint nor by replication, aver that the discovery of the mistake was within three years next before the commencement of the action. The court thereupon excluded evidence offered to prove such fact, and held upon the face of the pleadings that the action was barred, and instructed the jury to find the issue in favor of the defendants. The plaintiff excepted, and this is the sole question presented by the appeal.

The Code (section 155, subd. 9) provides a limitation of three years for "an action for relief on the ground of fraud or mistake," the cause of action not to be "deemed to have accrued until the discovery by the ag-

grieved party of the facts constituting such fraud or mistake." The limitation prescribed is not three years from the mistake, but from its discovery. When the date of the accruing of the cause of action appears in the complaint, and the statute of limitation is pleaded, the court can, of course, pass judgment, unless matter in avoidance is pleaded as a new premise, or the like. It is only in such cases that a replication is now required, (Code, § 248; Moore v. Garner, 101 N. C. 374, 377, 7 S. E. 732,) though under the former practice a replication was required whenever the statute of limitations was pleaded, (Wood, Lim. 16.) The plea here, that the "plaintiff's cause of action did not accrue within three years next before the commencement of the action," devolved upon the plaintiff the burden of proving that it did. Moore v. Garner, supra. As the date of the discovery of the mistake does not appear in the complaint, the plaintiff should have been allowed to prove, if he could, that it was within three years before this action was begun. We note that the defendants' plea is not strictly accurate, as they plead that the cause of action "arose" more than three years before suit brought. Under the liberal system of pleading now in force, they have the benefit of meaning that it did not "accrue" within three years. Code, § 260. New trial.

STATE v. EDWARDS.

(Supreme Court of North Carolina. Dec. 19, 1893.)

CRIMINAL LAW—UNLAWFUL RETAIL OF LIQUORS—JURISDICTION.

Under Code, § 1076, making the unlawful retailing of spirituous liquors a misdemeanor punishable by fine or imprisonment or both, the criminal court has jurisdiction of such offense, as Acts 1893, c. 294, § 35, making it a misdemeanor to practice any trade taxable by law without having paid the tax, and providing that such misdemeanor shall be punishable by fine or imprisonment, and by a penalty of \$50, to be recovered by the sheriff of the county wherein the offense is committed, before a justice of such county, does not repeal section 1076, nor interfere with its enforcement.

Appeal from criminal court, Buncombe county; Carter, Judge.

A. R. Edwards was convicted of unlawfully retailing spirituous liquors, and appeals. Affirmed.

The Attorney General, for the State.

BURWELL, J. The bill of indictment on which the defendant was tried contained two counts,—one for unlawfully retailing spirituous liquors; and one for unlawfully selling them in quantities less than a gallon, to wit, by the quart. The jury found a general verdict of guilty. Of the misdemeanor charged in the first count the court in which the trial took place clearly had jurisdiction. The offense there specified was the violation of

Code, § 1076,¹ and not of section 35 of chapter 294 of the Acts of 1893 (Revenue Act).² The latter act does not at all repeal or suspend the operation of the former, or in any way interfere with the enforcement of its provisions. *State v. Newcomb*, 107 N. C. 900, 12 S. E. 53. This count being good, it is presumed that the conviction was upon it, (*State v. Toole*, 106 N. C. 736, 11 S. E. 168,) and that the evidence supported that conviction; there being no exception on that score. Hence it becomes unimportant to consider the second count. But that also was good, as it would be sustained, unless there was evidence that showed that the offense against the state revenue act therein charged was committed within twelve months before the finding of the bill. Code, § 892, Acts 1889, c. 504; *State v. Dalton*, 101 N. C. 680, 8 S. E. 154. What has been said disposes of the defendant's motion to "dismiss the action for want of jurisdiction," and also of his motion to quash the bill for the same cause. The judgment of the court is in strict accordance with the provisions of the act therein referred to. No error.

STATE v. REAVIS et al.

(Supreme Court of North Carolina. Nov. 21, 1893.)

CRIMINAL ASSAULT—INTENT.

Where defendants—one with a pistol in his hand, one with a drawn sword, and one with a pistol in his pocket—went to the door of prosecutor's house, where he was sitting, with the admitted purpose of compelling him to leave his home and accompany them, and ordered him to go with them, they were guilty of an assault, though they were prevented from actually doing violence to his person by the interference of others.

Appeal from superior court, Iredell county; Winston, Judge.

Sant Reavis and others were convicted of assault, and appeal. Affirmed.

The defendants and one Houston Brown were indicted for an assault with a deadly weapon on one Way. There was evidence introduced on the part of the state tending to prove the guilt of all of the defendants, except Brown, and as to him a nol. pros. was entered. The defendant Reavis, testifying in his own behalf, and in behalf of the other defendants, said that they had a warrant for

the Carson boys, and went in the night to Way's dwelling to get him to go, and show them where the Carson boys were; had met Way that day, and told him they were looking for them. He said he had not seen them in two weeks. That night the witness and the other defendants, Reynolds and Hays, and one Miller, went in the yard of Way,—went in one step of the door,—called to him, and told him he had told them a lie that day, when he said he had not seen the Carson boys in two weeks, and that he must "come and show them to us;" that they had come for him as a witness. He admitted that they stayed near the door three or four minutes; that he had out his pistol, in his right hand; that defendant Hays was two or three steps from him, with a drawn sword in his hand; that Miller was there with a pistol in his pocket; that there were about a dozen men of their crowd near by in the road; that Way was sitting down near the door, it being open, when the defendants went in the yard, and to the door; that when they notified Way to go with them, etc., he got up, and slapped his hand on his breast, and told them to shoot; that his wife "acted like a wild woman," and ran out into the yard, and "screamed at the top of her voice." Way and his wife ordered them to leave. They remained near the door 3 or 4 minutes, and in the yard 15 minutes. They had searched the house that day. The noise and confusion that night were very great. The neighbors came in. He admitted that the defendants (except Brown) and Miller went to the house to make Way go as a witness, if he resisted them, and was not willing to go. They had a warrant for the Carsons, but they had neither a warrant nor a subpoena for Way, and had no warrant when they searched his house. They were not officers of the law. The other defendants, Reynolds and Hays, testified, in substance, to the same facts. His honor told the jury that these three defendants were guilty, "upon their own showing." The jury rendered a verdict of guilty against them, and they appealed from the judgment pronounced.

The Attorney General, for the State.

BURWELL, J. We consider what his honor told the jury as equivalent to saying to them that, if they believed what the defendants themselves testified was true, each of them having given the same account of the affair, they should return a verdict of guilty against them. Hence, if, putting the construction most favorable to them upon what they testified to, we find that they were guilty of an assault upon the prosecutor, Way, they are not entitled to a new trial. An assault is defined by Judge Gaston, in *State v. Davis*, 1 Ired. 125, to be "an intentional attempt, by violence, to do an injury to the person of another." It is elsewhere said to be "an attempt, unlawfully,

¹ Code, § 1076, makes the unlawful retailing of spirituous liquors a misdemeanor punishable by fine or imprisonment or both.

² Acts 1893, c. 294, § 35, provides that every person who shall practice any trade or profession, or use any franchise taxed by the laws of North Carolina without having paid the tax and obtained a license as required in this act, shall be deemed guilty of a misdemeanor, and punished by fine not exceeding \$50, or imprisoned not exceeding 30 days, and shall also forfeit and pay a penalty of \$50, which penalty the sheriff of the county in which it has occurred shall cause to be recovered, before any justice of the peace of the county, for the benefit of the school fund of the county.

to apply any—the least—actual force to the person of another, directly or indirectly.” 1 Amer. & Eng. Enc. Law, 779. In the case cited above, the learned judge says that “it is difficult, in practice, to draw the precise line which separates violence menaced from violence begun to be executed, for until the execution is begun there can be no assault.” And he adds: “We think, however, that where an unequivocal purpose of violence is accompanied by any act, which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun,—the battery is attempted.” Now, in the case before us, each of the defendants stated that they went to the house of the prosecutor to make or force him to leave his home, and accompany them. They had no authority to do this. They purposed, by force or fear, to compel him to go where they wished. Their intention was, they admit, to do this great violence to his person,—to thus falsely imprison him; and false imprisonment generally includes an assault and battery, and always at least a technical assault. *State v. Lunsford*, 81 N. C. 528. We have proof, then, of intended violence to the person of the prosecutor, not from threatening words or gestures, but by their own admission. The intention is unequivocal. Was this unequivocal purpose of violence accompanied by any act which, if it had not been stopped or diverted, would have been followed by personal injury? If so, according to the high authority cited above, the execution of the purpose is begun, and there was an assault. We think it very clear, from their own statements, that the unlawful and most outrageous acts of the defendants would have been followed immediately by personal injury to the prosecutor,—in which we of course include the enforced subjection of his body, through fear or force, to the command of the defendants,—if their purpose had not been thwarted. The three defendants, accompanied by another,—one with a pistol in his right hand, one with a drawn sword, and one with a pistol in his pocket,—went to the door of the prosecutor’s house, where he was sitting. All that is needed to make such an approach to a man an assault—that is the beginning of the execution of violence to his person—is to prove that there was a present purpose to commit such violence. That purpose may be proved by the words or gestures of the armed and advancing party, or if the approach or attack is made in such a manner as to put a reasonable man in fear, and it does put him in fear, that will establish the purpose to commit violence, of the execution of which the act is the beginning. Here, we have no need of the direct attempt or offer to shoot or strike, to prove the purpose to commit violence. They admit it, and themselves testify to the commission of acts, in the immediate presence of the prosecutor, which could have no other object than the consum-

mation of that purpose. By their own testimony, they established the fact that they passed “the line that separates violence menaced from violence begun to be executed,” and therefore that they were guilty of an assault. No error.

STATE ex rel. RAILROAD COMMISSION v. WESTERN UNION TEL. CO.

(Supreme Court of North Carolina. Nov. 21, 1893.)

RAILROAD COMMISSIONERS — TELEGRAPH RATES—INTERSTATE COMMERCE — PARTIES—AMENDMENT ON APPEAL.

1. The board of railroad commissioners, authorized by Laws 1891, c. 320, § 26, to make just rates for telegraph companies, after disposing of a complaint against a telegraph company by an individual, having the defendant company before it, proceeded to make rates for it. *Held* that, though the commission should have amended the proceeding so as to substitute as complainant the state ex rel. the commission, still, no reference having been made to the irregularity, the amendment would be made on appeal.

2. There having been evidence to warrant findings on questions which it was agreed the court should pass on in place of a jury, they will not be reviewed.

3. The board of railroad commissioners, under its authority to make rates for “the transmission of messages by any telegraph line or lines doing business in the state,” has the incidental power of ascertaining what particular corporation owns or is in control of a line.

4. Regulation of telegraph rates between points in the state is not an interference with interstate commerce, though the line passes out of the state between the points, it all being owned and operated by one corporation.

5. The authority given by Laws 1891, c. 320, to the board of railroad commissioners, relative to telegraph companies, being only to regulate rates, it cannot direct offices of a telegraph company to be opened for commercial business. *Mayo v. Telegraph Co.*, 16 S. E. 1006, 112 N. C. 343, followed.

Appeal from superior court, Wake county; G. H. Brown, Judge.

Proceeding by the state, on the relation of the railroad commission, against the Western Union Telegraph Company, to regulate rates. From the order of the board of railroad commissioners, the telegraph company appeals. Modified.

Strong & Strong and Robt. Styles, for appellant. Robert O. Burton, for appellee.

SHEPHERD, C. J. The board of railroad commissioners is “authorized and required to make or cause to be made just and reasonable rates of charges for the transmission of messages by any telegraph line or lines doing business in the state.” Laws 1891, c. 320, § 26. It may cause notice to be served upon corporations or persons charged with a violation of the rules prescribed by it in pursuance of the above authority, and upon a hearing may ascertain and direct ample and full recompense to be made by the company, corporation, or person offending, which recompense may be enforced by civil action as prescribed in sec-

tion 10 of said act. *Mayo v. Telegraph Co.*, 112 N. C. 343, 16 S. E. 1006. It is a court of record, with "the powers and jurisdiction of a court of general jurisdiction" as to all subjects embraced in said act, by virtue of Laws 1891, c. 498. *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 N. C. 463, 16 S. E. 393; Const. N. C. art. 4, § 2.

The defendant, being served with process, appeared before this court to answer the complaint or petition of Eugene Albea, called plaintiff herein, and filed its answer. Thereupon, a trial was had, and, it appearing that the said Albea had tendered no commercial message to any of the offices of the defendant, it was adjudged that he had no cause of complaint, and the proceeding was practically dismissed as to him. The commission, however, having the defendant before it, proceeded, under its general powers, to make rates of charges for the transmission of business by the defendant from and to points in North Carolina, which rate of charges is the same as that applicable to all the offices of the defendant within the limits of the state. The commission, after having disposed of the complaint of Albea, should have amended the proceeding so as to substitute as complainant the state of North Carolina *ex rel.* the railroad commission; but, as it has been fully heard without reference to this irregularity, we have ordered that the amendment be now made, and the proceeding be entitled accordingly. Code, § 273; *Reynolds v. Smathers*, 87 N. C. 24.

The order of the board which is the subject of review is as follows: "That the telegraph offices at Edenton and Elizabeth City, and at other points on the Norfolk & Southern Railroad in North Carolina, are offices of defendant, and that said offices shall transmit commercial messages at rates prescribed by the commission to any point in North Carolina." This order is based upon certain findings of fact, some of which are excepted to; but inasmuch as it was agreed that his honor might pass upon these questions in the place of a jury, and as there was evidence sufficient to warrant such findings as, under the view we have taken are material to be considered, they cannot be reviewed in this court. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384; *Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467.

It appears, in the language of his honor, "that the defendant owns, controls, and operates a line of telegraph from Edenton, N. C., passing through Elizabeth City, N. C., Hertford, Moyock, N. C., and other places along the track of the Norfolk & Southern Railroad to Berkley and Norfolk, Va.; * * * that the company receives and transmits over this line (commercial) messages at the towns and villages of Hertford, Moyock, and other places along said line to any place in North Carolina where it has an

office, at the uniform rate of twenty-five cents per message of ten words, except at Edenton and Elizabeth City," at which two last-named offices the defendant receives no commercial business; the said offices being devoted exclusively to the business of the Norfolk & Southern Railroad Company, in respect to the running of its trains, etc. It is very clear to us that, under the authority given it to make rates for "the transmission of messages by any telegraph line or lines doing business in the state," the commission—subject, of course, to the right of appeal—has the incidental power of ascertaining what particular corporation is at least in the control or operation of the same. This would seem indispensably necessary to a proper exercise of its authority to fix rates, as well as to know against whom to proceed, under section 10 of the act, in the event of a violation of such regulation. The exception, therefore, in this respect, must be overruled.

A more serious question, however, is presented by the ruling of the court upon the third conclusion of the commission, which is as follows: "That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or other points in North Carolina, to points in said state, do not constitute commerce between states, although traversing another state in the route, and are subject to the rate prescribed by the commission." It appears from the findings of fact that the shortest and only route over the wire of the defendant, by which messages can be transmitted to many points in this state, necessarily "traverses, in part, the state of Virginia, and thence back into North Carolina;" and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the commission. It is not denied that the offices of the defendant along the line of the Norfolk & Southern Railroad Company, except those at Edenton and Elizabeth City, receive commercial messages for transmission, in the manner described, to various points in North Carolina; and it is plain that such business does not relate to the intercourse of the citizens of this state with those of some other state. It is purely an intercourse between the citizens of North Carolina, through the means afforded by a corporation having extensive facilities of communication within the limits of the said state; and the uniform rates fixed by the commission for the business which the said corporation accepts, or is under legal obligation to accept, in no wise affect or interfere with any business which the defendant undertakes for the citizens of Virginia, either between themselves, or with the citizens of other states. Neither are we able to see how the mere fixing of rates between different points in this state can in any way conflict with any regulation

which the state of Virginia may have the power to impose in respect to its domestic business. It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that, in the transmission of a message, it must traverse a part of the defendant's own line in the state of Virginia. We have been referred to several cases in which it has been held, in respect to the continuous carriage of freight by a railroad company under such circumstances, that a state commission had no power to prescribe rates, and also that a state had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its territory. *State v. Chicago, etc., R. Co.*, 40 Minn. 267, 41 N. W. 1047; *Sternberger v. Railroad Co.*, 29 S. C. 510, 7 S. E. 836; *North Carolina Cotton Exchange v. Cincinnati, N. O. & T. P. Railroad*, 2 Inter St. Com. Com. R. 386.

Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that, if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the supreme court of the United States (Fuller, C. J.) in *Lehigh Val. R. Co. v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 506. The state of Pennsylvania levied a tax on the gross receipts of all railroad companies, derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same state; that is to say, passing out of Pennsylvania into other states, and back again into Pennsylvania, in the course of transportation. The Lehigh Valley Railroad Company has no road of its own from Mauch Chunk, Pa., to Philadelphia, but in transporting its coal, and general freight traffic, it uses its own line from Mauch Chunk to Phillipsburg, N. J., from which point it is, under an arrangement for a continuous passage with the Pennsylvania Railroad Company, transported by the latter road, via Trenton, to Philadelphia. It was insisted that the state could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the state of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce. The court sustained the tax, and, although it may be said that the decision relates only to that part of the receipts which arose from the transportation within the state, yet it must be apparent, from a perusal of the opinion, that this conclusion was reached on the ground that such continuous transportation was not interstate commerce. Indeed, the entire course of the reasoning of the court is in support of this very principle, and is clearly applicable to the question involved in this appeal. The language of the court is plain and emphatic, and we do not feel at liberty to ignore it, and especially when it is applied to telegraphic communica-

tion, under the peculiar circumstances of this case. The court, in speaking of the grant of power to regulate commerce between the states, remarked: "But, as was said by Chief Justice Marshall, the words of the grant do not embrace that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to nor affect other states. 'Commerce,' observed the chief justice, 'undoubtedly, is traffic, but it is something more: it is intercourse.'" The court further proceeded to say: "The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points, and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate, because, in its accomplishment, some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line onto the soil of another state?" Again, in another part of the opinion it is said: "It is simply whether, in the carriage of freight and passengers between two points in the same state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." The court uses the words 'continuous passage,' from which it is to be inferred that if, after the freight passed beyond Pennsylvania, it was transferred to another transportation agency in New Jersey, and by this other agency carried to Philadelphia, it would be interstate commerce; and the same, if consigned to a point in New Jersey, and then reshipped to Philadelphia. It is in evidence that the defendant owns and operates a continuous wire, or system of wires, from the offices mentioned to other points in North Carolina, and therefore it is not compelled to transfer its business to any other agency outside of North Carolina, in order that it may reach its destination in this state. In this respect, our case is stronger than the one from Pennsylvania, as the road from Phillipsburg to Philadelphia was owned and operated by another corporation, and not by the Lehigh Valley Railroad Company. We refrain from entering into an extended discussion of the subject, and are content to follow the reasoning of the supreme court of the United States, whose authority upon such questions is conclusive. We will observe, however, that we think the principle laid down by that court is peculiarly adaptable to cases like the present, in which there is such an exceptional facility for the evasion of state authority to fix the rate of charges. This may be done in

an instant, and without expense, by so adjusting the wires that messages must go through a part of the territory of another state. We think the exception should be overruled.

The remaining exception which it is necessary to consider relates to that part of the order which substantially commands the defendant to open its offices at Edenton and Elizabeth City for the transmission of commercial messages. It is urged, but not very seriously pressed, that the order only means that the company shall transmit such messages at the prescribed rates whenever it undertakes to do that character of business at those points. The order of the court is not, in our opinion, susceptible of such a construction; but whatever doubt there may be must surely vanish when it is considered in connection with the finding of the commission upon which it is based, and which the court, in its judgment, approves and adopts. This finding is that the operators in said offices "are the agents and operators of the defendant, and that it is their duty to transmit commercial messages, when tendered to them, to points in North Carolina, at the rate prescribed by the commission." It is impossible, without violating all rules of interpretation, as well as destroying the plain import of language, to adopt the view contended for; and it is therefore necessary to determine whether the commission act conferred upon the commission the authority to direct that the said offices should be opened for commercial business. That it has no such authority is settled by this court in *Mayo v. Telegraph Co.*, supra, (decided since the trial of this proceeding,) in which it is declared that "there is nothing to show the intent of the statute to give to the commission power to prescribe other rules and regulations for telegraph lines than those directed in section 26 with regard to their charges for the transmission of messages, as neither of the other sections could be made to apply to telegraph, even if the same had been specifically named." Under this decision, so much of the order as is open to the objection referred to must be set aside, but in all other respects it is affirmed. Let it not be understood that we are deciding that a corporation like the defendant, exercising its franchise, the right of eminent domain, and other unusual privileges, under a grant from the state for the benefit of the public, can give any undue or unreasonable preference or advantage to any particular person, company, or corporation. This question may be presented when commercial messages have been tendered and declined at the said offices, but we think it would be going outside of the record to pass upon it now; and especially should we refrain from doing so when the intelligent counsel who appeared for the defendant very properly concluded that the court would not anticipate a point of such importance, and

therefore did not deem it necessary to discuss it. The order of the court is modified and affirmed.

BORDEN et al. v. RICHMOND & D. R. CO.
(Supreme Court of North Carolina. Nov. 21, 1893.)

CARRIERS — CONTRACT OF AFFREIGHTMENT — EXPRESSION OF INTENT — UNILATERAL MISTAKE — EFFECT.

Where, in reply to inquiry of its local agent about freight rates, defendant railroad company's general agent quotes a rate of 83½ cents per hundred, which by some error is received by the local agent as 69½ cents, and is so quoted to plaintiffs, who accept such rate, without knowledge of the mistake, there is a valid and binding contract between plaintiffs and defendant, under which the latter is bound to ship plaintiffs' freight at the rate quoted them by the local agent. Clark, J., dissenting.

Appeal from superior court, Wayne county; George H. Brown, Judge.

Action by A. Borden and others against the Richmond & Danville Railroad Company for breach of a contract of affreightment. There was judgment for plaintiffs, and defendant appeals. Affirmed.

Busbee & Busbee, for appellant. Allen & Dortch and Aycock & Daniels, for appellees.

* **BURWELL, J.** It is conceded that the local agent of the defendant at Goldsborough made a written offer to ship for the plaintiff 500 bales of cotton to Liverpool in November, 1891, and that the said agent was authorized to make such a proposal on the part of the defendant, and that plaintiff at once accepted this offer, his acceptance being also in writing. Furthermore, it seems to be conceded that the said agent plainly and unequivocally expressed what he understood to be the price to be charged by the defendant company for the transportation of the cotton, and there was no misunderstanding between the plaintiffs and the agent as to any of the terms of the alleged contract. Now, it is evident that if the agent is considered, not as the mere mouthpiece of the defendant corporation, through whom the intention of its higher officers in this matter was to be simply communicated to the plaintiff, but as its authorized contracting agent,—its alter ego in this affair,—there was no error or mistake at all, much less one that would prevent the written proposal and its written acceptance from constituting a valid contract, by the plain terms of which each party would be bound. In this view of the matter, there was no variance between the intention of the defendant and the expression of that intention. The contracting agent expressed in unequivocal language exactly what he intended to express. The plaintiff accepted the offer thus made to him. The defendant cannot escape liability on this contract by asserting that its agent would

not have so conducted himself if he had known at that time what he was afterwards informed of; and it might well be insisted on the part of the plaintiff that, in the absence of notice to the contrary, he had a right to assume that that agent had power to act for his principal in this matter, and that defendant should not be allowed to dispute that authority.

Passing by that question, and assuming for the sake of argument that the local agent at Goldsborough was the mere mouthpiece or spokesman of the defendant in this matter, and that plaintiff knew this fact, then we have here a variance between the intention of the proposer (the defendant) and the expression of that intention. There was an error in the expression of the defendant's intention, but that error was unknown to the plaintiff. He had no good reason to suspect that the writing submitted to him did not correctly express the intention of the defendant. He did not "snap up" an offer which he knew or suspected was erroneously expressed. He merely accepted a plainly-expressed proposition. In the view of the matter we are now taking, the question, then, is, if in the expression of the intention of one of the parties to an alleged contract there is error, and that error is unknown to and unsuspected by the other party, is that which was so expressed by the one party and agreed to by the other a valid and binding contract, which the party not in error may enforce? The law is well settled, says Mr. Lawson in his work on Contracts, (section 206,) that a man is bound by an agreement to which he has expressed his assent in unequivocal terms, uninfluenced by falsehood, violence, or oppression; and it judges of an agreement between two persons exclusively from those expressions of their intention which are communicated between them. And Wharton, in his work on the same subject, (section 196,) quotes from *Tamplin v. James*, 15 Ch. Div. 215, this general rule, as he denominates it: "Where there has been no misrepresentation, and where there is no ambiguity in the terms of the contract, the defendant cannot be allowed to evade the performance of it by the simple statement that he has made a mistake." "But," he adds, "where a proposal evidently contains a mistake, an acceptor, by snapping at it, will not be permitted to take advantage of the mistake." In section 202a he announces the rule thus: "A unilateral mistake of expression of one party cannot be set up by him as a ground for rescinding a contract, or for resisting its enforcement, when his language was accepted by the other party in its natural sense. But when the blunder made by the proposer is obvious, an acceptor will not be allowed, by catching it up, to take an unfair advantage." An essential bilateral error as to the nature of a contract avoids it if based upon such error, but a unilateral error will not have

that effect. Bish. Cont. §§ 701, 702. "It would open the door to fraud if such a defense was to be allowed. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side." *Tamplin v. James*, supra. We must consider also that "one of the remarkable tendencies of the English common law upon all subjects of a general nature is to aim at practical good, rather than theoretical perfection; and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business." 1 Story, Eq. Jur. § 111. We think, therefore, that all evidence in regard to plaintiff's purchase of the cotton was irrelevant. He had a valid contract for its shipment at 69½ cents. His rights thereunder could not be affected by a notice that the defendant's agent had been misinformed, as we have seen. Hence we need not consider the exception taken by the defendant to the admission or exclusion of evidence relating to that part of the controversy. Under the law as we hold it to be, it being admitted that the plaintiff had been required to pay more than the contract price for the shipment of his cotton, he was entitled, as his honor held, to recover the difference between the sum so paid and the contract price. Affirmed.

CLARK, J. (dissenting.) The evidence is not controverted that the local agent at Goldsborough did not have authority to quote rates of freight from that point to Liverpool, (passing, as the freight must, over so many lines besides that for which he was agent;) that the general agent at Richmond, in reply to an inquiry from the local agent, quoted a rate of 89½ cents, and that by some error in transmission by telegraph this was received at Goldsborough as 69½ cents, and so quoted to the plaintiffs. The mistake having been made by an agent or an employe of the railroad company, it is bound, but only to the extent that the plaintiffs had been misled and damaged by having acted upon it before the mistake was corrected, which was done promptly as soon as the general agent had notice of the mistake which had been made in the transmission of the message. If by reason of the supposed reduction of the rate from 89½ cents to 69½ cents the plaintiffs had, before correction of the mistake, sold cotton in Liverpool at less than the market price,—which is very improbable,—or had bought cotton somewhat above the market rate in Goldsborough,—which is possible,—to whatever extent they had been thus damaged by relying upon the correctness of the dispatch they are entitled to compensation. There was no offer on the part of the railroad company, through its general agent, who alone was authorized to speak for it, to carry at 69½ cents. The local agent did not even hold himself out as

having authority. He merely reported the query of defendant to the general agent, and communicated his reply to the plaintiffs. There was no offer by the defendant by accepting which a contract was made between the parties. There was simply an erroneous message delivered to the plaintiffs by an agency used by the defendant. The plaintiffs' right to recover is not based upon a breach of contract on the part of defendant, for it made none at 89½ cents, nor offered to make it. The right to recover is based upon the mistake made by the agent in delivering a message which the plaintiffs had a right to rely upon till corrected; and to the extent that they were so misled and damaged by reliance upon the supposed message they are entitled to recover, but no further. This damage was not necessarily, and not even probably, the difference between 89½ cents and 69½ cents, but only the lower price at which the plaintiffs sold or the higher price at which they bought by reason of supposing they had gotten 20 cents per 100 pounds off of the usual rate of freight; and this, not on the 500 bales, but on only so much thereof as they had bought or sold before the correction of the error was made known to them. This is the measure of plaintiffs' loss, and not the value of the good bargain they thought they had made. There was no contract at 69½ cents. The mind of the defendant never entered into such. There was a mistake of the agent used in transmitting the message, and the loss caused thereby should be borne, not by the party who in good faith relied on it, but by the party who employed such agency. The principal is only bound by the acts of its agents within the scope of their agency. The scope of Drake's agency at Richmond was to contract for rates. He made no offer at 89½ cents. He made no mistake. He has done nothing that fixes any contractual liability upon the defendant. Yet he is the only one who could have done so. The scope of the agency of the telegraph operator at Chase City, who, it seems, made the mistake, was not to make contracts, but to transmit messages. The defendant is only bound by his acts within the scope of its agency. Whatever damage the plaintiffs sustained by the mistake in relaying the message, the principal, the defendant company, is liable for; but not for a breach of a contract, since that agent could not make a contract if he had offered to do so, and certainly could not by making a mistake. In relaying the message he inadvertently took or erroneously transmitted six dots (.), the telegraphic marks for 6, instead of a dash and four dots (-), the sign for 8. This mistake of a dash for two dots was, so to speak, a lapsus pennae on his part. It was no mistake on the part of the contracting agent. The learning about unilateral mistakes has, therefore, no bearing, for there was no mistake on either side to the contract. The two sides

simply never agreed. The defendant offered 89½ cents, the plaintiff thought he was accepting 69½ cents. Take a homely example: A landowner has an overseer, who is authorized to employ hands. The overseer sends a message by one of his employees to some one that he will give him employment for a year at \$10 per month. By reason of carelessness, drunkenness, or stupidity the messenger says the overseer will give \$30 per month. Could it be contended that the landowner must pay for a year three times the usual price for an ordinary farm hand? Not at all. He is bound by the act of his overseer, who is authorized to hire hands, in the absence of collusion and the like. But as to the messenger, the principal is bound by his mistake only to the extent of the damages actually suffered by the other party by relying upon the message before it is corrected. In the present case it does not appear whether the telegraph line was operated by the defendant's agents and employees or by an independent company. Nor does it make any difference to the plaintiffs, as the telegraph agency acted for the defendant, who is liable for damages caused by its mistake. If the telegraph line was operated by a telegraph company, the defendant could recover of it what damages it had to pay the plaintiffs by reason of its mistake in transmission. But that does not affect this question, which is as to the measure of damages the defendant must pay by reason of the mistake. The court should have instructed the jury, as prayed by the defendant, "that there was never a contract, or coming together of the minds of plaintiffs and defendant to ship cotton at 69½ cents per 100 pounds to Liverpool; but that, as the error was that of defendant's agent, the defendant was obliged to indemnify the plaintiffs against actual loss," and that "the defendant was not obliged to pay plaintiffs any profit plaintiffs would have made on the reduced price for freight on cotton."

STATE v. ROLLINS.

(Supreme Court of North Carolina. Nov. 21, 1893.)

MURDER—EVIDENCE—RES GESTÆ—IMPEACHMENT OF WITNESS—CHARACTER OF DECEASED—WHEN MAY BE SHOWN—RESCUE OF PRISONER—EXCESSIVE FORCE IN RESISTING—INSTRUCTIONS.

1. On a murder trial, in which defendant pleaded self-defense, a witness for defendant, near whose house the homicide occurred, testified that on the night of the homicide she heard men quarreling, and a man threatening to cut another's throat. She cried "Murder," and two or three men came to her. *Held*, that evidence that she told the men a man's throat was being cut at her door was properly excluded.

2. A witness for defendant testified that on the night of the homicide he ran towards the place, hearing shots in that direction. He saw defendant and some more men in front of a house, and saw defendant take hold of one of them. Witness kept going towards defendant, and saw the blaze of a pistol, and he had then

reached the place where defendant was standing. *Held* error to exclude evidence of what defendant said to witness at the time, such evidence being a part of the *res gestae*.

3. Evidence that one who testified as an eyewitness to the homicide was "very drunk" at the time of the homicide is competent, as going to his credibility.

4. Though defendant set up the plea of self-defense, it was not competent for him to show that deceased was a man of violent character, where he did not know the character of deceased for violence.

5. Where a person is lawfully under the arrest of a police officer, and another attempts to rescue him, the officer, in resisting such arrest, is justified in the use of excessive force, if he acts in good faith and without malice.

6. Where the rescue of a prisoner lawfully in the custody of an officer is attempted, and the officer, in resisting the attempt, uses such force as causes the death of the person attempting the rescue, there is no presumption of law that the officer acted without malice and in good faith, and the burden is on him to show matter either of excuse or in mitigation.

7. Where a person submits to arrest, and a rescue is attempted, the officer has not authority to resist such rescue, and to use such force as is necessary to prevent the rescue, if the original arrest was unlawful.

8. Where a prisoner is lawfully in the custody of an officer, and a rescue is attempted, the officer may arrest the person attempting the rescue, and may use such force as is necessary.

9. Where the killing is admitted to have been done by defendant, an instruction that if the facts of the homicide are in doubt "and the jury are unable to say how the deceased came to his death, and under what circumstances, the jury will render a verdict of 'Not guilty,'" is inapplicable to the facts.

10. In such case, it was proper to refuse to charge that "if there is a reasonable hypothesis, supported by the evidence, which is consistent with the prisoner's innocence, then it is the duty of the jury to acquit," in that all matters of excuse or mitigation devolve on defendant, where the killing is proved.

11. Though the court cannot single out witnesses, and charge the jury that they must make a designated finding if they believe such witnesses, it may properly charge that if the jury believe a certain state of facts, as deposed by certain witnesses, then a certain law is applicable to such facts, the attention of the jury being thereby directed, not to the credibility of the witnesses, but to the facts.

12. The court charged that an officer may arrest without warrant for a breach of the peace committed in his presence, but that he must, unless a known officer, notify the person that he is an officer, and if he fail to do so, especially on demand, the arrest is illegal, and may be lawfully resisted by the person arrested, or third persons, and that the person making the arrest, slaying any one of those resisting it, would be guilty of murder, unless excessive force was used by those resisting, and then he would be guilty of manslaughter. *Held* a correct proposition of law, and not objectionable as expressing an opinion that defendant was or was not a known officer.

13. The court charged that where the arrest is made legally, by a lawful officer, he may use the amount of force necessary to prevent an escape or rescue, and no more, and if he use excessive force, and death results, he is guilty of manslaughter, but if excessive force is used, and he intentionally slays the person resisting arrest, or the person attempting the rescue, he is guilty of murder. *Held*, that the omission to further charge that what would be excessive force in an individual, in an ordinary encounter, might not be so in an officer resisting the escape or rescue of a prisoner, was not error, when such further instruction was not asked.

Appeal from superior court, Durham county; H. R. Bryan, Judge.

Wayland P. Rollins was convicted of the felonious slaying of Sandy Jones, and appeals. Reversed.

Defendant was a policeman of the town of Durham, assigned to special duty in a locality called "Smoky Hollow," just beyond the corporate limits of the town; the locality being inhabited, for the most part, by lewd women. On the evening of the homicide, he was drunk, and called, in company with Dick Happer, at a house of ill fame kept by Nan White. While in Nan White's room, deceased and his brothers, John and Charles, stopped at the house. As to the circumstances connected with, and leading up to, the homicide, John Jones testified for the state that he went upon the porch, and knocked at the door, and was told by the woman that he could not come in. He knocked again, and defendant came up the steps, and took him by the arm, advising him that he was under arrest. Witness asked him to show his authority, and defendant did not do so. Happer took witness by one arm, and defendant took him by the other, and deceased came up, and told them to turn witness loose, saying that he would take charge of him. This defendant refused to do, and, on being asked by witness to show his authority, pulled out his pistol, and shot deceased. Before defendant shot, deceased took witness by his left arm, and tried to get him out of defendant's hands. Witness and deceased then ran off in different directions, and deceased died an hour after. Dr. A. Cheatham was called, and testified that deceased died from a pistol wound in the stomach. After introducing witnesses to testify to the good character of John Jones, the state rested.

Dick Happer testified in behalf of defendant that, on the night of the homicide, he and defendant visited Nan White's house. Defendant went into her room; and witness, into another room. Witness heard some one kicking at the door about 15 minutes after. Witness heard a voice say, "It takes a damn good man to carry me up town." Then he heard defendant say, "Well, you will have to go." Witness went out, and found deceased and his two brothers and defendant on the porch. One of them asked defendant to show his authority, and defendant said "Here is my authority," and showed his badge. At defendant's request, witness took John Jones' hand, and they started up town, deceased and Charles Jones following them. Witness heard some one running up behind them, and, looking back, saw deceased and Charles right behind them. Deceased grabbed defendant on the shoulder, and said: "You damn son of a bitch! You shan't carry my brother off." Charles also seized defendant, and a struggle ensued. One of them said, "Cut his damn throat." Defendant fell, and deceased struck him, witness at the same time having his

arms around deceased's waist. Charles had defendant by the throat, and said, "Out the damn son of a bitch's throat." Then a pistol was fired twice, and deceased said, "The damn son of a bitch has shot me twice." Defendant called out "Help," or "I'll give up," and witness ran for a policeman, and told him that defendant had tried to arrest some men in Smoky Hollow; that they had jumped on him, and the policeman had better go there quick. Mrs. Brandon's house was the closest house to the shooting.

Nan White testified that, while Rollins was in her room, some men came on her front porch, and kicked the bottom of her door. She stepped into the hall, and told them that she was sick, and that there was no one to see them, and asked them to go away. The kicking continued, and she requested defendant to go out and take them away. The kicking at the bottom of the door was so severe that one of the panels was broken loose.

Mrs. Mary Brandon testified, in substance: "I live on East Main street, near where Reams avenue runs into it. I live on left-hand side of street. No fence around my house. None in front. A wire fence at the side. The night of the homicide, I was at my house, and heard some men coming from towards the railroad. They were coming towards town. There was cursing going on among them. Just as they got to the fence at my house, the cursing was loudest. I heard a man say, 'I'll cut his throat.' Then a pistol fired, and then, right straight, another. Some one said: 'I will cut his G—d d—n throat. I'll cut his head off.' I opened front door, and shut it. Went to back door, and hollowed 'Murder' four or five times. Two or three came to my back door. Jasper Phipps was the only one I knew." Defendant asked witness, "What did you say to those that came to your door?" The state objected, and the answer was ruled out. The defendant excepted. Defendant stated the purpose of the question to be to show that she said to those that came up that they were killing a man at her door; that they were cutting a man's throat at her door, —and insisted that it was competent as a part of the *res gestae*, and that it tended to corroborate witness in what she now says. Witness had not been attacked.

Jim Potts, a witness for defendant, testified as follows: "I was in Smoky Hollow the night of the homicide, at Lilly Bennett's, about three hundred and fifty yards from Mrs. Brandon's,—back of Nan White's. Heard two pistol shots. Sounded as if shot in a box or house. Heard some one, in a woman's voice, hollow 'Murder.' I saw Mrs. Brandon in her door, hollowing 'Murder.' She continued till I got there. I ran around to the front door. Saw defendant and Jasper Phipps, and some more men in front. I went on after them. Pretty soon, Rollins overtook one, and caught hold of him. Phipps was in front of Rollins, a little bit.

By that time, had gotten out of my sight. I kept going towards Rollins. Saw the blaze of a pistol. By that time, I had gotten up to Rollins." Defendant then asked, "What did Rollins say to you as you ran up, between third and fourth shots?" State objected. Defendant stated that he expected to prove that defendant said, "Catch hold of this man. He has tried to kill me," and insisted on its competency as a part of the *res gestae*. The answer was excluded, and defendant excepted. "I don't know who fired those last two shots. I could see the blaze, but it was too dark for me to see who shot. Rollins did not. I caught hold of the man that Rollins had. It was Charles Jones. Phipps was standing near, with John Jones." The defendant asked, "What was John Jones' condition?" The state objected. The defendant stated that he expected to prove that he was very drunk, to contradict John Jones, to impeach his credit as a witness, and as a circumstance corroborating defendant's contention of self-defense. The answer was excluded, and defendant excepted.

J. W. Bradford testified, in substance, that he was chief of police of Winston; that he knew the deceased, Sandy Jones, and knew his general character. The defendant offered to prove by this witness that the deceased, Sandy Jones, was a man of most violent and dangerous character. The state objected. The defendant insisted on its competency, there having been introduced evidence going to establish self-defense, and, further, as a circumstance going to show whether the said deceased introduced the knife into the difficulty, the evidence on this point having been circumstantial. The evidence was excluded on the ground that it was not shown that the defendant knew deceased, or his character, and that the evidence of the homicide is not circumstantial, and defendant excepted.

The following instructions were requested by defendant, and their refusal duly excepted to. "If the jury shall believe that the said John D. Jones was under lawful arrest, and in the custody of the defendant, and that the deceased, Sandy Jones, and Charles Jones, either or both of them, attempted to rescue the said John D. Jones from such custody, then the defendant, in resisting such attempt, would be protected in the use of such force that a jury would ordinarily consider excessive, if the defendant was acting in good faith, and was free from malice. If the jury believes that the said John D. Jones was under lawful arrest, in the custody of the defendant, and that the deceased, Sandy Jones, or Charles Jones, both or either of them, attempted to rescue said John D. Jones from such custody, then the law presumes that in resisting such rescue the defendant acted in good faith, and free from the influence of malice. If the jury shall believe that John D. Jones submitted to arrest by the defendant, and submitted to remain in

the custody of the defendant, and after the defendant and the said John D. Jones walked together for the distance of twenty or thirty yards, and if the jury believe that the deceased, Sandy Jones, or Charles Jones, or both or either of them, attempted then to rescue the said John D. Jones from such custody, the defendant had the power and authority to resist such rescue, even though the original arrest of John D. Jones was unlawful, and to use such force as was necessary to prevent such rescue and escape. If the jury shall believe that after John D. Jones was arrested by the defendant, if the same was lawful, the deceased, Sandy Jones, or Charles Jones, both or either of them, assaulted the defendant, then the defendant had the power to arrest said Sandy Jones or Charles Jones, or both of them, for such assault, and to use such force as was necessary to make such arrest." The following charges were given at the request of the state, and excepted to by defendant: "(1) That, the killing having been admitted or proven to have been done with a deadly weapon, it devolves upon the prisoner to show to the jury facts or circumstances to mitigate or excuse the crime, and, if the testimony does not satisfy them of the mitigating facts and circumstances, then it is their duty to convict of murder." To this the defendant excepted and assigns as error that the instruction not only ignores, but contradicts, the principle that an officer, in resisting a rescue, is presumed not to use excessive force, nor to have been actuated by malice; the evidence having established he was a police officer, within his jurisdiction and territory. "(2) That if the jury shall find that John Jones was doing no more than knocking at the door of Nan White's house, and asking for admission, as testified to by the said John Jones, W. B. McCulloch, and Charles Jones, then the court charges that the said John Jones was committing no offense, and his arrest was illegal, and that he had the right to resist the arrest, and the deceased had the right to aid him in so doing, and that right existed as long as the arrest continued, and they had the right to use the necessary force to free said John Jones; and the killing of Sandy Jones, in resisting his attempts to free said John Jones, would be murder, unless excessive force was used by the said Sandy, or those acting with him, and, if excessive force was so used, then the crime would be manslaughter." The defendant excepted, and assigned as error that his honor erred in singling out and naming certain state's witnesses, and telling the jury that, if they believed what they said, they would find such and such a verdict, thus giving their testimony undue prominence and dignity, and further insists that the right to resist unlawful arrest was personal to the one arrested, and did not extend to deceased, nor did it extend after John Jones had peacefully submitted. "(3) That an officer

may arrest without warrant for a breach of the peace committed in his presence, but he must, unless a known officer, notify the person that he is an officer and has authority, and if he fails to do so, especially upon demand, then the arrest is illegal, and may be lawfully resisted by the party arrested, or third persons; and the person making the arrest, slaying any one of those making the resistance or rescue, would be guilty of murder, unless excessive force was used by those resisting, and then he would be guilty of manslaughter." The defendant excepted, and assigned for error that there is no evidence that defendant was not a known officer; the only evidence on that question being that he had been a policeman of the town, and recognized as such, for more than six months; that if he were an officer, though not known to the one arrested to be such, his said failure would not make an arrest illegal; and, further, that the right to escape, even from illegal arrest, was personal to the party so arrested, and did not extend to third persons. "(4) That where the arrest is made legally, by a lawful officer, then he may use the amount of force necessary to prevent an escape or rescue, and no more, and if he uses excessive force, and death results, then he is guilty of manslaughter; but if excessive force is used, and he intentionally slays the person resisting arrest, or the person attempting the rescue, he is guilty of murder." The defendant excepted, and assigned for error that his honor failed to tell the jury that what would be excessive force in an individual, in an ordinary encounter, would not be so in an officer resisting the escape or rescue of a prisoner, and, further, that in using the phrase, "if excessive force is used," his honor failed to tell the jury by whom the excessive force, if used, led to such a conclusion, and left them to infer that if used by any one, either defendant or deceased and his associates, the same conclusion followed, which was erroneous.

W. A. Guthrie, Boone & Parker, and J. S. Manning, for appellant. The Attorney General and Fuller & Fuller, for the State.

CLARK, J. Ex. 1. The question was properly ruled out. It would not have served to corroborate witness as to what she saw which would have been competent, but only to show her belief or surmise, at the time, of the nature of the occurrence. It was simply irrelevant, and could throw no light upon the facts attending the homicide. There was no attempt to "cut off the head" of any one. That the witness thought and said otherwise that night, when she saw nothing that took place, is immaterial.

Ex. 2. The question was improperly excluded. It was competent to show the declaration of the prisoner made at the time as a part of the res gestae, and also to confirm his testi-

mony of the transaction as given on the trial. While error in excluding competent testimony is cured by afterwards admitting it from the same witness, it is not cured by admitting another to testify to the same purport. *State v. Murray*, 63 N. C. 31.

Ex. 3. The third exception is well taken. John Jones, on behalf of the state, had testified, as an eyewitness, to the homicide, and had stated that he was not drunk when it occurred. Had this been pertinent only to impeach his character, his answer would have been conclusive. *State v. Roberts*, 81 N. C. 605. But it went, rather, to his capacity to know and remember with accuracy what took place. It was error, therefore, to exclude proof offered to show that he was "very drunk on that occasion." It would have served to contradict him, and to impair the credit to be given to his evidence, and would have been somewhat corroborative of the prisoner's theory of self-defense. When a witness has testified as an eyewitness to a transaction, it would be competent to show that during the occurrence he was asleep or insensible, and of course, also, that he was very drunk.

Ex. 4. The evidence of the homicide was not circumstantial, and, though the plea of self-defense was set up, it did not appear that the prisoner knew the character of deceased for violence. Evidence to show such character was therefore properly excluded. *State v. Turpin*, 77 N. C. 473; *State v. Hensley*, 94 N. C. 1022.

Ex. 5. The ninth prayer for instruction was erroneously refused. *State v. Sigman*, 106 N. C. 728, 731, 11 S. E. 520.

Exs. 6 and 10. The tenth prayer for instruction was properly denied. Much is left, necessarily, to the judgment of the officer, in such cases, when acting in good faith and without malice. *State v. McNinch*, 90 N. C. 605; *State v. Sigman*, 106 N. C. 728, 11 S. E. 520; *State v. Pugh*, 101 N. C. 737, 7 S. E. 757. But, when force so signal is used that death is caused thereby, there is no presumption of law that the officer acted without malice and in good faith, i. e. without excess of force. The jury must judge of the reasonableness of the force used, (*State v. Bland*, 97 N. C. 438, 2 S. E. 480,) and the burden remains on the prisoner to show matter of excuse or mitigation. Good faith and the absence of malice are matters of defense.

Ex. 7. The eleventh prayer for instruction was properly refused. Good faith and want of malice apply as to extent of force used, when the arrest is legal, but do not validate an illegal arrest. *State v. Hunter*, 106 N. C. 796, 11 S. E. 366. *State v. Black*, 109 N. C. 856, 13 S. E. 877, does not apply to cases where an officer is on trial for using excessive force, nor where the transaction is not fully completed and finished. If the arrest was invalid, while third parties had no right to assault the officer to take away

the prisoner, (*State v. Armistead*, 106 N. C. 639, 10 S. E. 872,) the officer was also guilty of an affray, in attempting to hold the prisoner by force, against the efforts of himself and friends.

Ex. 8. The twelfth prayer for instruction was properly modified by inserting the words, "If the arrest was lawful."

Ex. 9. The sixteenth prayer for instruction was: "If the circumstances and facts of the homicide are left in doubt to the jury, and the jury are unable to say how the deceased came to his death, and under what circumstances, the jury will render a verdict of 'Not guilty.'" This would be correct, in passing upon the killing, if not conclusively shown to have been committed by the prisoner. But if the killing is proved or admitted to have been done by the prisoner with a deadly weapon, as in this case, exactly the opposite of the prayer is the settled law in this state. *State v. Smith*, 77 N. C. 488; *State v. Gooch*, 94 N. C. 987. The use of a deadly weapon is proof of malice, for which the prisoner must show excuse or mitigation.

Ex. 10. The eighteenth prayer was: "If there is a reasonable hypothesis, supported by the evidence, which is consistent with the prisoner's innocence, then it is the duty of the jury to acquit." This would be correct as to finding the killing to have been done by the prisoner, when that fact is left in doubt. But when, as in this case, the killing by the prisoner has been established, the instruction would be illegal as to matters of excuse or mitigation, and the prayer must be construed with reference to the evidence. *State v. Tilly*, 25 N. C. 424. The law is too well settled in this state to be shaken now, that, if the killing is proved or admitted, all matter of excuse or mitigation devolves upon the prisoner. *State v. Johnson*, 48 N. C. 266; *State v. Ellick*, 60 N. C. 450; *State v. Haywood*, 61 N. C. 376; *State v. Willis*, 63 N. C. 26; *State v. Bowman*, 80 N. C. 432; *State v. Vann*, 82 N. C. 631; *State v. Boon*, Id. 637; *State v. Brittain*, 89 N. C. 481; *State v. Mazon*, 90 N. C. 676; *State v. Carland*, Id. 668; *State v. Gooch*, 94 N. C. 987; *State v. Thomas*, 98 N. C. 590, 4 S. E. 518; *State v. Byers*, 100 N. C. 512, 6 S. E. 420. And there are others to same effect. The case of *State v. Miller*, 112 N. C. 878, 17 S. E. 167, relied on by the prisoner, makes no change whatever in this well-established rule.

Ex. 11. This raises the same point as exception 6.

Ex. 12 is without merit. The court cannot single out a witness or witnesses, and charge the jury that, if they believe those witnesses, to find so and so. *State v. Rogers*, 93 N. C. 523, and cases there cited. But there is no impropriety in saying to the jury that if they believe a certain state of facts, as deposed to by certain witnesses, then the law applicable is so and so, when

the court, as in this case, has called to their attention the opposite state of facts, as deposed to by other witnesses, and instructed as to the law applicable thereto. This directs the jury's attention, not to the credibility of such witnesses, but as to a certain hypothesis or state of facts; and the reference to the witnesses is simply incidental, to refresh them as to the evidence tending to show that particular state of facts.

Ex. 13. There is no ground for this exception. The proposition of law was correctly stated, (*State v. Kirby*, 24 N. C. 201,) and contained no expression of opinion that the prisoner was or was not a known officer.

Ex. 14 is not well grounded. The prisoner has no cause to complain of the instruction. If so requested, the judge might have told the jury that what would be excessive force in an individual, in an ordinary encounter, might not be so in an officer resisting the escape or rescue of a prisoner. *State v. McNinch* and *State v. Sigman*, *supra*. But the omission was not error, when the instruction was not asked. Nor is the officer clothed with authority to judge arbitrarily of the necessity for killing. It must be left to the jury to judge of the necessity in each case. *State v. Bland*, 97 N. C. 438, 2 S. E. 460. Nor do we think that this instruction is open to the charge of ambiguity, pointed out by the exception. Error.

MACKENZIE et al. v. HOWARD.

(Supreme Court of Georgia. Nov. 27, 1893.)

EXECUTION — PROPERTY SUBJECT TO — TITLE OF PROPERTY IN CREDITOR AS SECURITY — RECEIVERS.

A judgment creditor whose debt is secured by an absolute conveyance of land, he having made a bond to reconvey, has no right to levy his *fi. fa.* upon the land, or to cause the sale of it, until he has made and filed a deed reconveying to his debtor. Nor, before doing this, has he any right to deprive the debtor of possession, and have the property put in the hands of a receiver, merely because the debt remains unpaid, the debtor has become insolvent, and his wife threatens to claim the land. After a proper levy is made, should a sale be hindered or delayed by a frivolous claim interposed by the wife, the creditor's right to equitable relief may then be different.

(Syllabus by the Court.)

Error from superior court, Burke county; H. C. Roney, Judge.

Action by H. N. Howard, administratrix of the estate of William H. Howard, deceased, against James H. Mackenzie and another, for the appointment of a receiver, and for an injunction. There was judgment for plaintiff, and defendants bring error. Reversed.

The following is the official report:

The administratrix of William H. Howard brought a petition for injunction and receiver against James H. Mackenzie and his wife. On the hearing the injunction was

granted, and the receiver appointed, and the defendants excepted. The petition sets forth, in substance, the following allegations: About February 6, 1888, Mackenzie delivered to Howard his promissory note, payable November 1st after date, to Howard or order, for \$10,000, with interest from date at 8 per cent., together with attorney's fees of 10 per cent., and containing a waiver of homestead and exemption. On March 10, 1888, by deed recorded on the 16th of the following month, Mackenzie conveyed to Howard certain real estate in Waynesborough as security for the payment of the note. As additional security therefor he transferred to Howard 27 notes of various customers, representing them to be worth their face value, \$10,108.29. He asked Howard to forward to him for collection two of these notes, amounting to \$365, stating that he would collect the same, and send proceeds to Howard, which was done. On February 5, 1889, after repeated and earnest requests of Mackenzie to be allowed to collect said collaterals as agent for Howard, and for his account, the same were delivered to Mackenzie for collection only, all sums collected on any of them to be promptly remitted to Howard, and a full statement of all collections and notes still on hand to be rendered whenever called for, Mackenzie acting as agent for Howard, and not in any manner for his own use. On information and belief petitioner charges that a large part of said collaterals were collected by Mackenzie, but that only \$1,500 were paid to Howard out of the collections, leaving a large amount unaccounted for in Mackenzie's hands; and that on demand, repeatedly made, for a full statement, he has failed and neglected to make it. Howard demanded the return of the uncollected notes, but Mackenzie refused to return any. On November 12, 1889, Howard sued Mackenzie in Burke superior court on his note for \$10,000, with interest, alleging that Mackenzie had conveyed to him the land above mentioned as security, receiving from Howard a bond conditioned to make titles upon payment of the \$10,000 with interest and attorney's fees. This action was defended by Mackenzie, and on June 5, 1890, a verdict was rendered in favor of Howard, and an award was granted by the judge for \$6,756 principal, \$412 interest to judgment, \$500 attorney's fees, and costs, together with interest on the principal and attorney's fees from date of judgment at 8 per cent., with a special lien only on the premises described in the declaration. Judgment was duly entered on the verdict and award for said amounts. The same was not appealed from, and execution issued. After the rendition of the judgment, it was agreed between the parties, through their counsel, that the time of payment be extended on the execution, one-third to be paid on or before one year from date, one-third on or before two years from date, and the other third, in three years; all

except costs to bear interest at 8 per cent.; the premises to be adequately insured in favor of Howard, and the policies to be delivered to him; failure to pay any installment rendering all due and collectible. Mackenzie failing to make any payment as per agreement, the execution was levied, February 29, 1892, on the lands described in the deed and judgment, as the property of Mackenzie. Notice was given to him, and the property was duly advertised for sheriff's sale on the first Tuesday in April, 1892. On the day before the day so advertised, Mackenzie's wife interposed her claim to the property, and made affidavit in forma pauperis; and the sheriff postponed the sale. Upon investigation petitioner found that Mrs. Mackenzie's claim to the property was based on a deed from her husband to her, dated September 4, 1888, reciting a consideration of \$8,000, and recorded on February 17, 1891. Petitioner charges that this deed to Mrs. Mackenzie is without consideration, was intended to delay, hinder, and defraud creditors, and is void and of no effect against petitioner, especially as its date is subsequent to that of the deed to Howard, and its record is subsequent to that of the date of the judgment. From time to time pending the claim case, Mackenzie, for himself and wife, recognized and admitted that the judgment in favor of Howard was a valid lien on the property, and superior in dignity to the claims of any one, and asked and obtained further time until February 1, 1893, in which to pay the same; partly on which account and partly because at the time of the levy no deed had been filed under section 3654 of the Code, the levy on the property was dismissed by order of plaintiff's attorneys, December 5, 1892, no payment having been made. The extension of time granted has expired, and still no payment has been made. Mackenzie threatens that if another levy is made he will procure his wife to file another claim, and litigate that as long as he can, and that it will be years before the land will be subjected to the payment of Howard's judgment. Mackenzie has not only failed to make any payment on the judgment, but has failed to keep up the insurance, and to pay the taxes due on the property; and to avoid the risk of loss by fire petitioner has been compelled to pay \$40 for insurance for the year ending March 10, 1893, and the same amount for the following year, and the sum of \$34.50 city tax for 1892 to avoid a sale of the premises by the marshal of Waynesborough. Mackenzie and wife are in possession of one piece of the property, which is worth \$400 per annum for rent, and by their tenant are in possession of the other piece, which is worth \$200 per annum rent, and are thus receiving the benefit of all income therefrom. Demand has been made by petitioner for the payment of the debt and for the payment at least of the insurance premiums, taxes, and rental

value of the premises; but all payment has been refused. At the time he made the deed to Howard, Mackenzie was solvent, but has since become insolvent, and there are now outstanding against him judgments for large amounts, unsatisfied; and Mrs. Mackenzie, according to her affidavit, is insolvent, and has little, if any, property subject to levy; and petitioner has reason to believe that the premises will not sell for enough to pay the principal of the debt, much less the interest, etc., and that the rental value of the premises will be applied to Mackenzie's use, and not to the reduction of the debt. In view of the danger of loss to petitioner, she prays for the appointment of a receiver to take charge of the premises, collect the rents therefrom, and hold the proceeds until further order of court; that, if the amount due on the judgment is not paid within a reasonable time, to be fixed by the court, the premises be sold, and the proceeds applied to the payment of the judgment; that Mackenzie and wife be enjoined from collecting any further rents, and from altering the present status of the property, etc. Discovery is waived. The defendants answered the petition, and also interposed a demurrer thereto. This demurrer alleges that there is no cause of action set out in the petition, and that the plaintiff has an adequate remedy at law; that the law furnishes means of enforcing plaintiff's judgment lien on the premises by levy and sale; that, the property being realty, and held under adverse claim of right, a court of equity will not take possession of it, especially as the petition shows that the plaintiff claims a lien thereon which she has the right to enforce, and has had such right since June 5, 1891, and in view of the fact that she has caused the judgment to be levied, and voluntarily abandoned the prosecution of the levy; that if the facts as alleged are true they can be fully determined by any issue that may be made on the levy of the *fi. fa.*, especially as petitioner waives discovery. Defendants specially demur to so much of the petition as refers to the collateral notes given in 1888 to Howard, there being no allegation that they are in any way connected with the title to the land or to plaintiff's claim of lien thereon, and there being no prayer in the petition to make Mrs. Mackenzie account for the same. Further, the petition is not an ancillary proceeding to any suit now in court, the allegation being that prior to the filing of the petition the plaintiff dismissed her levy; and there is in the petition no relief sought to which the bill is an aid or claimed to be. The evidence introduced before the judge at the hearing is brought up by full copies in the bill of exceptions, without making a brief of the same. In the order appointing the receiver he is authorized to demand possession of the realty, and is directed to take possession thereof, rent it out to the best advantage to such tenants

as will give proper security for the rent, and from the rents collected pay all taxes, insurance, and necessary repairs, holding the balance until the further order of the court. He is authorized to rent to the defendants the place which they occupy, upon their giving satisfactory security for the payment of the rent and they are ordered to deliver possession of the premises to the receiver.

R. O. Lovett, for plaintiffs in error. Harper & Bro. and J. R. Lamar, for defendant in error.

PER CURIAM. Judgment reversed.

JACKSON v. STATE.

(Supreme Court of Georgia. Oct. 30, 1893.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—REVIEW.

1. The only effect the newly-discovered evidence could possibly have would be to impeach the evidence of one of the state's witnesses, and therefore, under the oft-repeated rulings of this court, a new trial cannot be granted on this ground.

2. Alleged error in admitting oral evidence cannot be considered unless the evidence objected to is itself set out in the motion for a new trial or in the bill of exceptions.

3. The evidence, though far from satisfactory to this court, is sufficient to authorize the verdict, and, there being no error of law for correction, the discretion of the trial judge in refusing to grant a new trial was not abused, though the case was one in which it might well have been exercised in granting a new trial.

(Syllabus by the Court.)

Error from superior court, Greene county; W. F. Jenkins, Judge.

John Jackson was convicted of murder, and, his motion for a new trial having been denied, he brings error. Affirmed.

The following is the official report:

John Jackson was indicted for the murder of Richard J. Youngblood, and found guilty, with a recommendation to life imprisonment. His motion for a new trial was overruled, and he excepted.

It appears from the evidence that Dr. Youngblood was killed in his store on the night of Monday, December 26, 1892, the indications being that he was shot with a gun from the outside. One McJunken testified: "I went by his store Monday evening, about seven o'clock. The door was closed. Don't know whether Dr. Youngblood was there. I saw a negro there. Thought it was John Jackson at the time. He came right along, and passed right to my rear, and went down on the last side of Dr. Youngblood's store, and then came back, and asked me where was Dr. Youngblood. I told him I thought he was at the store, and he said it was so cold that he would not stay. He went back the same way he came. He passed the mill, and I saw him when he went into Mr. Caldwell's store. I have known John Jackson for three years. He has been working

around there. I am positive that this was the man I saw there. I said at the coroner's inquest that I was informed that the boy I saw was a yellow boy living at Mr. Wood's. After seeing him, I am satisfied. It was dark and sleeting. He was about ten feet in my rear. I didn't turn only my head. Heard no gunshots that night; only firecrackers. The party I saw went back of Mr. Caldwell's store. I watched him, and saw his legs under the house as he went up on Mr. Caldwell's platform. I could not have been mistaken in reference to this John Jackson being the man I saw. It was cloudy, and I saw it was a colored man; but it was not a yellow negro." The first ground of a motion for a new trial is based upon alleged newly-discovered evidence as contained in the affidavits of the coroner and one of the jury that held an inquest over the body of Dr. Youngblood. These affidavits are to the effect that the witness McJunken was a witness before the coroner's jury, and that he stated in his testimony at that time that he had noticed a negro boy in the neighborhood of Dr. Youngblood's store on the night of the murder; that he was a boy about half grown, and that he came in the direction of Eatonton road, and returned that way; that witness didn't know who the boy was, and that this boy was the only person that he saw in the neighborhood of Dr. Youngblood's store on the night of the murder. The usual affidavits of the defendant and his counsel accompany this ground, and it appears from the affidavit of counsel that they represented the defendant by appointment of the court. The next ground of the motion is that the court admitted in evidence, over the defendant's objection, certain alleged incriminating admissions as shown by the testimony of John S. Hall; the ground of objection being that the defendant was induced by Hall's conduct and language to make the admissions on the promise of Hall that he would need no lawyer to defend him of the charge of murder for which he was confined in jail if the defendant would only tell what he knew about it. The error assigned is in not excluding the admission on the grounds that they were induced by the hope of reward, and in leaving to the jury to pass upon whether the admissions were made voluntarily and free from hope of reward or fear of punishment. In the brief of evidence appears the testimony of Hall, substantially as follows: "I saw John Jackson on the Friday after the murder. I asked him if he didn't go out to the river the Sunday before, to see Mr. Caldwell. He said 'Yes.' I asked him why he went, and he said Mr. Caldwell sent for him. I asked him if he was not under contract with Capt. Linticum. He said he was. I then asked him if he didn't have an understanding with Mr. Caldwell to come back Monday, and he said he did. I asked him why he did not

go and confirm the contract. He said he didn't go, and then said, 'I don't know anything about the murder of Dr. Youngblood.' I said I did not accuse him of it. He said he could prove his whereabouts from Thursday before the murder until Thursday after, by Fed Armour and his wife. Said he could prove by them that he was at their house on the night of the killing. I replied, 'That clears you then.' He went off, kept looking back, and seemed uneasy. I saw him two weeks after, and asked him if he had not traded coats with somebody in the Fork, and paid one dollar and a half in money. He said he had traded coats, but only paid one dollar, in front of Mr. Vincent's in Greensborough. Said he got the money from Capt. Linticum Saturday before the homicide. I had a conversation in the jail with defendant. I was feeding the prisoners during Sheriff English's absence. Saw some parties outside of the jail talking to Isom and defendant. I told them, 'If you think all this talking to people will do you any good, you had better hush.' Afterwards John said to me he was the best witness I had, and I said I knew he was if he would tell all he knew. I said if he was a witness he would not need a lawyer. Defendant sent for me to come to the jail, and started the conversation himself. He asked me, if he was only a witness, if he would need a lawyer. I told him no; further told him if he was not able to employ, the court would give him one. Before he made his statement I told him that I had nothing whatever to offer him, and it would not be lawful if I did; that I wanted him to distinctly understand this; and then told him that I had nothing to offer him. He then told me that he was down there the night of the murder, with Dawse Williams and Isom Lewis, playing cards. They went up to the store to buy some cheese, etc. Mr. Caldwell came in, and took a gun, and he and Dawse Williams fired and killed Dr. Youngblood. John then went up the river to George Jordan's, getting there the next morning at breakfast. Mr. Caldwell was suspected by many to have been connected with the murder as soon as Dr. Youngblood was killed. John possibly knew that when I had the conversation with him on Friday, in which he said he knew nothing of the killing." Capt. Linticum testified that the defendant came to him on Saturday before Christmas, and wanted to borrow \$10, which witness refused to let him have, and that he paid him no money whatever before the murder. John E. Bernhart testified that he heard the second time defendant made a confession to Hall, and corroborated Hall's testimony. Afterwards defendant sent for witness and Hall, and said what he had said to them before was tales. Other circumstances in evidence, which need not be here detailed, point to the defendant as the murderer. On the other hand, numerous witnesses appeared in his behalf, and gave testimony tending to

prove an alibi. The motion for new trial contains the general ground that the verdict is contrary to law and evidence.

Hart & Sibley, Jas. B. Park, Jr., Jas. Davison, and Edward Young, for plaintiff in error. H. G. Lewis, Sol. Gen., J. M. Terrell, Atty. Gen., and Hines, Shubrick & Felder, for the State.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., concurring with great doubt.

HARRISON et al. v. BALDWIN et al.
(Supreme Court of Georgia. July 24, 1893.)

JUDGMENT LIEN—PROPERTY SUBJECT.

Where a will gives to the husband of the testatrix and his two minor children the whole estate, making him executor, and conferring upon him a power of sale and reinvestment, and he withdraws from the estate more than one-third thereof, and devotes it to his own use, he has no interest in what remains, and a judgment thereafter rendered against him personally for his own debt has no lien thereon.

(Syllabus by the Court.)

Error from superior court, Macon county: R. L. Gamble, Judge.

Action by Baldwin & Co. against B. B. Odom. Plaintiffs obtained judgment, and levied execution on defendant's individual interest in realty. Calvin M. Harrison and Daniel S. Harrison intervened, claiming the property levied on under conveyance from defendant as executor of the will of his deceased wife. The court found against claimants, and they bring error. Reversed.

J. W. Haygood, R. F. Lyon, and Harrison & Peeples, for plaintiffs in error. E. A. Hawkins, for defendants in error.

BLECKLEY, C. J. By the will of Mrs. Odom, made in 1884, her husband and her two children each became the beneficial owner of one equal share in her estate. According to the evidence, that estate was of the value of \$3,200, and, before the judgments against Odom were rendered, he had withdrawn from the assets more than his full share of the estate. This being so, what was left belonged to the two children, and a sale and conveyance of the same, made by Odom as executor under a power contained in the will, passed title to the purchasers free from the lien of the judgments in question, though that sale and conveyance did not take place until after these judgments were rendered. A legatee or devisee has no interest left in an estate upon which a lien could attach in favor of his creditor, after he has received and appropriated to his own use as much of the estate as he was entitled to. That he has done this informally, and without any partition or division in terms, would certainly make no difference, where the estate is in the hands of the legatee or devisee himself, and he is also executor, and enough of it is in ready money to pay off his interest, and

he retains the money and appropriates it to his own use. In this case, suppose Odom had not exercised his power of sale as to these lands, but had retained the lands until after his children became of full age; could not the children have recovered them from him as their property, upon proof that he had expended, for his own use, money belonging to the estate, amounting to more than one-third of the whole value of the estate? We think there can be no question that they could. The direction in the will to keep the property together was not obligatory upon Odom as to his own interest in it, for he was a mature man, and no trust of which he was both the beneficiary and the trustee could be raised by the will which would be obligatory upon him as to his one-third clear interest in the assets of the estate. The court erred in directing a verdict for the plaintiffs, and against the claimants, in the court below. Judgment reversed.

MAYNARD v. MARSHALL.

(Supreme Court of Georgia. Sept. 3, 1893.)

STATUTES—TITLE OF ACT—AMENDMENTS—USURY.

1. The title of a law being "An act to regulate and restrict the rate of interest in this state, and for other purposes," a provision in the body of the act declaring it unlawful for any person to reserve, charge, or take any rate of interest greater than 8 per centum per annum, and that any person violating this provision shall forfeit the interest and the excess of interest so charged or taken, or contracted to be reserved, charged, or taken, is covered by the title, and is not matter variant or different therefrom.

2. In view of the rule that statutes amending prior statutes are to be construed as intended to have operation on future transactions only, and as having no retroactive purpose not plainly expressed, the act of September 27, 1881, which amends the act of October 14, 1879, does not repeal or modify the second section of the latter act, save as to contracts entered into subsequently to the passage of the amending act. The effect of the amendment was to leave persons who had violated the original act subject to forfeit the interest, as well as the excess of interest, charged or taken, or contracted to be reserved, charged, or taken, while those violating the provisions of the act after the amendment would forfeit the excess of interest only.

3. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Monroe county; J. S. Boynton, Judge.

Action by W. T. Maynard against Ira J. Marshall to foreclose a mortgage. There was a verdict for defendant, and a new trial denied. Plaintiff brings error. Affirmed.

W. D. Stone, R. L. Maynard, and Hall & Hammond, for plaintiff in error. T. B. Cabaniss, Berner & Bloodworth, and Harrison & Peebles, for defendant in error.

BLECKLEY, C. J. 1. The title of the act was sufficiently comprehensive to cover all the provisions embraced in the body of the

statute, and nothing on this subject need be said in addition to what is set out in the first headnote.

2. The statute on the subject of interest which was of force when the note and mortgage involved in this case were made was the act of October 14, 1879, the first section of which was in these words: "That from and after the passage of this act, it shall not be lawful for any person, company or corporation, to reserve, charge or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly, by way of commissions for advances, discount, exchange, or by any contract or contrivance or device whatever." This section of the act is still of force, without modification. So, also, is the third section of the act, which reads thus: "That the legal rate of interest shall remain seven per centum per annum, where the rate per cent. is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum." The jury have found that, of the amount set forth in the note as principal, the sum of \$99.03 was usury. This means that \$99.03 over and above 8 per cent. interest on the loan went into the principal of the note as a usurious charge for the use of the money loaned. It results that as to the whole interest, including the usury, the contract evidenced by the note was unlawful when it was made, and remains unlawful still. Inasmuch as courts will not aid in the enforcement of an unlawful contract, the interest is not collectible upon general principles. Indeed, if it were not for the language of the second section of the act, which will be presently quoted, this illegality would taint the note, not alone as to the interest, but as to the principal also; and this it would do without any express provision in the statute declaring the note to be void. Such was the ruling of the supreme court of the United States in *Bank v. Owens*, 2 Pet, 527. The principal of the note, and that alone, was saved by the second section of the act, that section being in these words: "That any person, company or corporation violating the provisions of the foregoing section of this act, shall forfeit the interest, and the excess of interest, so charged or taken, or contracted to be reserved, charged or taken." It is contended, however, that by the modification of this section, which took place by the amending act of September 27, 1881, interest up to the lawful rate of interest on the principal of the loan was relieved from the taint, and rendered collectible. The first section of the amending act reads as follows: "That section 2 of an act entitled 'An act to regulate and restrict the rate of interest in this state, and for other purposes,' approved October 14th, 1879, which provides for forfeiture of all interest in cases of vio-

lation of its provisions be, and the same is hereby, amended by striking out the words 'the interest and' in the third line of said section, so that, as amended, it will read as follows: "That any person, company or corporation violating the provisions of the foregoing section of this act shall forfeit the excess of interest so charged or taken or contracted to be reserved, charged or taken." The second section of the amending act expressly repeals section 4 of the prior act, which relates to the mode of proof, and the third section repeals all conflicting laws. The question is whether the first section ought to be so construed as to work a repeal, or even a partial repeal, of the second section of the amended act with reference to usurious contracts entered into prior to the date of the repealing act. The constitution of 1877 expressly prohibits the passage of retroactive laws, and the general rule laid down by the Code is that laws prescribe only for the future. It is also a general rule applicable to amending statutes that they are to be construed as intended to have operation on future transactions only, and as having no retroactive purpose not plainly expressed. The amending act left untouched sections 1 and 3 of the original act. There can be no doubt that these sections still apply to the note involved in this case, and we have already seen that they denounce in express terms the contract in that note to be illegal, both as to the interest and the excess of interest. This being so, is there the slightest probability that the legislature intended the amendment to retroact upon that note, and similar contracts in existence when the amending law was passed? We think not, and so rule. The case before us is not like that dealt with by the supreme court of the United States in *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, where the whole fabric of usury laws had been swept away by a provision contained in the constitution of Texas. Ours is a case in which the legislative declaration that the contract is unlawful is left standing upon the statute book unmodified and unrepealed. Indeed, if this were not so, it would be difficult to abide by the principle of several decisions made by this court, and yet treat contracts as gaining a legal status by the repeal of usury laws, when they did not have it at the time the parties contracted. See *Shealey v. Toole*, 56 Ga. 210; *Campbell v. Murray*, 62 Ga. 86; *Broach v. Kelly*, 71 Ga. 696. Are notes, deeds, etc., fatally vicious on account of usury, to become legally operative when the usury laws are repealed, and again vicious when those laws are reinstated, and so continue to rise and fall as often as the policy of the state with respect to usury may change, or will the first change only take effect upon them, and subsequent changes pass them by? We need not at present insist that the better and safer line of decision in respect to usurious contracts is the one

which this court has heretofore adopted in the three cases just cited, because, whether the repeal of all usury laws would or would not infuse life into a contract which was not in it before, we can safely hold that where such laws are not repealed, so as to remove from the statute book all denunciation of such contracts as unlawful, they get no new life by an amendment of the law which can be fairly construed as intended to operate prospectively only. We thus reach the same result in the present case, wherein the effect of the amending act of September 27, 1881, has been made a direct question, as was reached in *Crane v. Goodwin*, 77 Ga. 362, in which the direct question appears not to have been presented.

3. The evidence was conflicting, and the verdict is not altogether satisfactory to this court; but it was satisfactory to the court below, and we cannot say that there was any error in denying a new trial. Judgment affirmed.

GORDON, Governor, v. TRIMMIER.

(Supreme Court of Georgia. April 3, 1893.)

DEED—WHEN TITLE PASSES—DESCRIPTION—STATUTE OF LIMITATIONS.

1. If a husband, being the owner of two adjacent town lots, execute to his wife a deed embracing both, though using in the description the number of one of them only, this would be a conveyance of both, provided the deed was delivered; but, if not, it would convey neither. Recording the deed, or having it recorded, would be sufficient, but not conclusive, evidence of delivery. If, notwithstanding the recording, it be shown affirmatively that there was really no delivery, and that the intention to deliver was abandoned, the deed would be inoperative. Should the deed embrace only one of the lots, it would convey no more, and the same rule as to delivery would, of course, apply.

2. If a father was the owner of two adjacent town lots, lying in the angle formed by the junction of a street with an alley, and conveyed to his daughter certain premises, (not specifying the quantity or dimensions,) described as lying in that angle, but designated by a number not corresponding with the number of either of the lots, and afterwards died intestate, the presumption is that he misdescribed the number of the lot which he intended to convey; but there is no presumption that he intended to convey both lots, although they were inclosed together, and his residence was located on one or both of them. His intention in this respect would be open to determination by extrinsic evidence of all relevant facts and circumstances. If he intended to convey both, although he specified but a single number, the daughter would acquire title to both. If, however, he intended to convey only one, and afterwards died intestate still owning the other, his widow, unless she took dower, would inherit from him at least a one-fifth undivided interest in the other, and this would be subject to levy and sale as her property under a judgment against her.

3. While a claim case is pending, an incomplete prescriptive term, as between the claimant and the defendant in *fi. fa.*, will not become complete, as against the plaintiff in *fi. fa.*; the levy having been made and the claim interposed while prescription was running, but before it had ripened.

(Syllabus by the Court.)

Error from superior court, Catoosa county; T. W. Milner, Judge.

Action on an official bond by John B. Gordon, governor of the state of Georgia, against one Brantley, principal, and Mrs. C. N. Trimmier and others, as sureties. There was judgment for plaintiff, and execution thereon was levied on property as that of Mrs. C. N. Trimmier. Mary Trimmier intervened, claiming to be owner of the property levied on. The court found for claimant, and plaintiff brings error. Reversed.

R. J. & J. McCamy, for plaintiff in error. McCutchen & Shumate, for defendant in error.

BLECKLEY, C. J. According to a map of the town of Ringgold, in evidence, three adjacent lots, (filling the space between Buck alley and Mountain street,) Nos. 40, 41, and 42, fronted on Middle street; and, of these, No. 40 was bounded on one side by Buck alley, and lay immediately in the angle formed by the junction of that alley with Middle street. Next to this lot, on the Middle street front, was No. 41, and next to it was No. 42, which extended to Mountain street. Neither of these two lots touched Buck alley; the first being separated from it by No. 40, and the second by both 41 and 40. The map is silent as to the dimensions or extent of any of the lots. It is clear from other evidence that No. 42, the "Vincent land," was never owned by O. W. Trimmier, and is no part of the premises now in controversy. It is conceded that the other two lots both belonged to him, but the only conveyance to him shown was a deed from Robert L. Barry, made in 1867, which described the premises thus: "Lot forty-one in the eastern division of the town of Ringgold, fronting on Middle street ninety feet, and running back two hundred and ten feet, more or less." There is no evidence as to whether 90 feet on Middle street would embrace two lots, or only one. It does appear, however, that O. W. Trimmier inclosed both lots together, and that his dwelling house was within the inclosure. Which lot it was on, or whether partly on each, does not appear. In September, 1871, he conveyed to his wife by deed of gift, describing the premises thus: "All that part or parcel of land in the town of Ringgold known and distinguished as 'Lot Number Forty-One,' being the lot I bought from Robert L. Barry, whose deed of conveyance to me is recorded in book —, page 53, of the Land Records of said county." This deed was duly recorded by himself on January 4, 1873; he being then clerk of the superior court, the recording officer designated by law. There is no direct evidence of its delivery, and his widow testifies it was never actually delivered, nor was she informed of its execution or existence. On the 8th of January, 1873, 14 days after he recorded the deed to his wife, he conveyed to his daughter Mary

M., the claimant in this case, a lot described as follows: "Known as town lot number forty-two, in the eastern division of the town of Ringgold, and in the angle of Buck alley and Middle street." This deed, also, was duly recorded by him on the day of its execution, and there is evidence of its actual delivery. The premises under levy as the property of Mrs. Trimmier—formerly the wife, now the widow, of O. W. Trimmier—are described in the levy thus: "Town lot in the town of Ringgold, Georgia, known as the 'Trimmier Property,' fronting on Buck alley on the south, and on Middle street on the west, and lying west of Mrs. J. M. Comb's property and the jail lot, and south of the Gilbert Vincent property." The levy is dated October 28, 1889, and the judgment on which it is founded was rendered in the previous month. O. W. Trimmier died in October, 1884, and up to that time resided with his family, including his wife and his daughter Mary M., on the premises embraced in his inclosure. It is certain he recognized the property, or some of it, as belonging to his wife, for he returned it for taxation as hers; and after her death it was returned in a similar manner by her son, down to and including the year of the levy. The evidence indicates that in some of the years the father, and after him the son, returned a part of the property, and a part only, as belonging to the daughter, the claimant. After the death of the husband and father, the family continued to reside on the premises; the daughter, as it would seem, claiming the whole, and the widow making no claim for herself, but recognizing the daughter's title. She testifies that she never heard of the deed from her husband to herself until after the levy. The son could not explain why he returned as hers the land for taxation, but he ceased so returning it when the levy was made, and has since returned it all as the property of his sister, the claimant.

1. Under the evidence, it is quite impossible to tell whether the deed to Mrs. Trimmier covers both lots, or only one. It is certain that it covers lot No. 41, but the doubt is whether it also embraces No. 40. If 90 feet front on Middle street would include both lots, the deed would convey both, although it, as well as the deed from Barry, to which it refers, describes the premises as one lot, and designates but one number. To make it effective at all, however, it would have to be delivered, not literally and manually, but substantially and virtually. The recording of it would be sufficient, though not conclusive, evidence of such delivery. The inference arising from this fact could be overcome by affirmative evidence showing nondelivery in fact, and that the intention to deliver was abandoned. On this question the circumstantial evidence in the record bears in one direction, and most of the direct evidence in the other. Upon either of two suppositions, the making of the second deed could

be reconciled with the making of the first. One of these is that the first deed, whether it embraced the whole tract or not, was never made effective by delivery. The other is that each deed was intended to cover one lot only; the first being applicable to No. 41, and the second to No. 40.

2. As to the second deed, whether it be treated as embracing one lot or two, there is certainly a mistake in the number. The number specified is applicable to the "Vincent land," and that lot is in the angle of Middle and Mountain streets, not in the angle of Middle street and Buck alley. This deed, rejecting the mistaken number, would seem, on its face, to be intended to convey one lot, and no more,—the lot in the angle last mentioned, that lot being No. 40. It would be possible, however, to treat this angle, using the term in a very loose sense, as embracing both lots, to wit, Nos. 40 and 41, and this construction could be adopted, if shown by extrinsic evidence to be the correct one, according to the intention of the maker of the deed. The mere fact that both lots were in the same inclosure, and that his residence was within the inclosure, would afford no presumption that he intended to convey both by this deed. But all the relative facts and circumstances, taken as a whole, might manifest such an intention. Among these, a very important element would be the extent of the first deed. If that deed was confined by the 90-foot limit on Middle street to one of the lots, it is almost absolutely certain that the second was intended to cover the other lot only. If, on the contrary, the first deed embraces both lots, it is fairly probable that the second might be intended to displace the first, and embrace both also. It is manifest that, if the second deed conveyed only one of the lots, the non-delivery of the first, even if conclusively established, would not be decisive of the whole case, for in that event title to the first remained in the maker of both deeds, and when he died, if he died intestate,—and there is no evidence of a testacy,—his widow, unless she took dower, inherited from him at least a one-fifth undivided interest in that lot, and this would be subject to sale as her property under the levy already made upon the whole tract. The claimant could have no right, by virtue of the deed from her father, to defeat a sale, even of the whole of lot 41, unless this deed covers that lot as well as the other. By instructing the jury that, if they found that the deed to Mrs. Trimmer was never delivered, their verdict should be in favor of the claimant, the trial court erred, for the nondelivery of that deed would not be decisive of the whole case.

3. The court erred, also, in delivering any charge whatever on the subject of prescription. Prescription was not in the case, for O. W. Trimmer was in possession until his death, in October, 1884; and there is certainly no evidence that he held for his daugh-

ter, as against his wife, but the weight of the evidence is to the contrary. The levy was made in October, 1889, about five years after the possession of O. W. Trimmer was terminated by death. From that time up to the levy, no prescriptive title could have ripened in favor of any one, for the shortest period in which that could take place would be seven years. It is too plain for argument that no prescriptive title available on the trial of a claim interposed as against that levy could be acquired pending the litigation to enforce the levy on one side, and to defeat it on the other. Judgment reversed.

AUGUSTA RY. CO. v. GLOVER.

(Supreme Court of Georgia. June 5, 1893.)

DEATH BY WRONGFUL ACT — WHO MAY SUE — PLEADINGS — STREET-CAR COMPANIES — NEGLIGENCE — EVIDENCE — DAMAGES.

1. The declaration sets forth a cause of action.

2. Where there is no special demurrer to a declaration, it is not error to refuse to strike from the latter certain words, as not relevant either in matter of form or substance, the motion to strike being made orally at the trial.

3. The right of action given by the act of October 27, 1887, to a mother for the homicide of her son, upon whom she is dependent in whole or in part for support, is not confined to residents of this state, but belongs alike to all mothers under like circumstances, wheresoever they may reside.

4. It is no bar to a suit by the mother for the homicide of her minor son, that the father has a pending suit in which he claims damage for the loss of the son's services up to the time the latter would have arrived at his majority.

5. Evidence of the father's physical disability to labor is admissible in behalf of the mother, as tending to show her partial dependence on the minor son whose homicide is complained of.

6. Where father and mother and minor children all reside together, and are mutually dependent upon the labor of the family for support, a minor child over 15 years of age, whose labor, or the proceeds of it, come into the common stock, is to be considered as contributing substantially to the support of the mother.

7. The fact that the passenger killed had never before ridden upon an electric car was admissible in evidence, for the purpose, at least, of illustrating the cause of his failure to alight from the car in safety.

8. An electric railway company which has provided its cars with gates to prevent passengers from alighting on the side next to a parallel track cannot defend itself against the charge of negligence in not keeping one of the gates closed, by the evidence of its president "as to observations he had made in reference to electric street-car lines, cable-car lines, and other street-car lines operating on double tracks, that he had made recently in various cities of the United States in reference to the use of gates on the cars, and to show that gates are not used."

9. Although there may be no negligence whatever in the failure of an electric street railway company to have gates to the platform of its cars, for the purpose of guarding against accidents to passengers by preventing them from leaving the cars on the side next to a parallel track of the same company, in the street, yet when a particular company has such gates to the platforms of its cars, not to keep them closed may or may not be negligence is

the given instance, and this is a question of fact for the jury.

10. Although it is the duty of a street-car company to select a reasonably safe place for landing passengers wherever it may stop a car for that purpose, yet, if the place be safe for a passenger to get off while the car is at rest, the company is not responsible for any peril which the passenger incurs, without its fault, from attempting to alight after the stoppage has terminated and the car has been put in motion, provided a reasonable time for alighting was allowed while the car was at rest, and the conductor did not know that the particular passenger intended to get off at that place, and did not see him attempting to get off in time to warn or prevent him from so doing while the car was in motion.

11. When a car stops because of an obstruction on the track, and not to afford any passenger an opportunity for getting off, the company is not responsible for the safety of the place as one for getting off, whether the car, at the time the passenger undertakes to do so, be in motion or at rest, the conductor not seeing the passenger, or being aware of his purpose, at the time the attempt to get off is made.

12. Improper statements made by counsel in argument, which the presiding judge did not hear, and to which his attention was not called, either then, or afterwards during the progress of the trial, not even by any request to charge the jury, will not require or justify the grant of a new trial.

13. The charge of the court touching the measure of recovery was subject to misconstruction, and was not quite full enough as to the right of the jury to avail themselves of facts in the evidence, irrespective of the mortality tables.

14. In view of the facts of the case and the general charge of the court to the jury, there was no error in denying any of the requests to charge made by the defendant below.

15. It was not error to allow the plaintiff to write off part of the damages found by the jury.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Barbara E. Glover against the Augusta Railway Company to recover for the death of plaintiff's son. Plaintiff had judgment, and a new trial was denied. Defendant brings error. Reversed.

The following is the official report:

On January 13, 1891, Mrs. Glover sued the railway company for damages for the killing of her son, who was alleged to have been, at the time of his death, 15 years and 5 months old. The declaration alleged that her son was single, and had no child or children, that she was dependent on him, and that he contributed to her support; further, that he boarded one of defendant's street cars propelled by electricity in Augusta, for the purpose of going to the Georgia Railroad depot, took his seat, and paid his fare; that when the car reached a certain point, about opposite the Union Depot, it came to a stop, and her son got off the car from the rear platform, near to the parallel street railroad track of defendant, at which moment another of defendant's cars, running on the parallel track in an opposite direction to that of the car from which he had just dismounted, ran over him, killing him; that he was not familiar

with the method in which the cars were run and operated; that he resided in the country, and had never before ridden on said electric cars; that the approach of the car which ran over him was wholly unexpected and unseen by him until too late to get out of the way; that it was the duty of defendant's agents in charge of the car on which he had ridden to the depot, to have had the platform gate next to the parallel track on the rear end of the car closed, and to have cautioned and seen that he did not leave the car from that side, which duties they negligently and carelessly failed to perform; that it was also the duty of defendant's agents in charge of the car which ran over him to have slowed up as it approached the point where it was to pass the other car, which duty was wholly disregarded, the car being actually run at the time at the rate of 12 miles per hour, a rate not only positively prohibited by the city ordinances, but which, in the absence of such prohibition, would at the locality have been an act of gross carelessness; that the motorman in charge of the car that ran over her son, at the moment or just before, was negligently engaged in a conversation with the conductor on his (the motorman's) car, instead of being on the lookout ahead of his car, as was his duty. Contemporaneously with the filing of the mother's suit, the father filed his suit in the same court, alleging the same acts of negligence as causing the death of his son, and claiming damages by reason of having been deprived of his son's services up to the time of his majority. The defendant demurred to the declaration of the mother on the grounds: (1) It set forth no legal cause of action. (2) There was no allegation that deceased could not have seen the car approaching him in time to have avoided coming in collision with it, or that he made any effort to avoid coming in collision with it. (3) Plaintiff failed to allege that the point at which he left the car was the regular stopping place, or that the stopping of the car was for the purpose of taking on or letting passengers off. If it was not stopped for such purposes, then plaintiff failed to allege that deceased gave any notice of his desire or intention to leave the car, or that defendant's servants in any other way had notice of such intention. (4) Because plaintiff failed to allege that defendant had any notice of deceased's want of familiarity with the running and operation of electric cars, or that his size or appearance were such as to cause notice thereof to be taken by defendant's servants. (5) Plaintiff failed to allege that she is a widow, or is living separate from her husband, or in what way she was dependent on her child, it appearing that he was only 15 years and 5 months old, and there being no allegation as to his ever having worked or earned money. Defendant also filed its plea in abatement, alleging the pendency of

the two suits for the same cause of action, and that they were inconsistent, and praying that plaintiff be required to elect with which of the suits he or she would proceed, and other pleas. The father's case standing first on the docket when the court met to assign cases, the defendant insisted that the cases should be assigned in the order in which they appeared, and called the attention of the court to the plea in abatement. Thereupon the attorneys for the father, the attorneys in the two cases being the same, dismissed the father's case. The court overruled the defendant's demurrer, and struck defendant's amended plea, to the effect that plaintiff and her son, being residents of South Carolina at the time of his death and at the time of the trial, and ever since, could not recover under the act of October 27, 1887, giving the right of action to the mother. The court also refused, on defendant's motion, to strike from the declaration the words: "That the said John C. Glover was not familiar with the manner in which said cars of the defendant were run and operated; that he resided in the country, and had never before ridden on said electric cars,"—it being alleged that these words were irrelevant and illegal, and tended to confuse the issues, and raised an issue which, if established by testimony, tended to prejudice the rights of defendant. To these rulings defendant excepted *pendente lite*, and assigns error upon them in its final bill of exceptions. The jury found a verdict for plaintiff for \$7,733.98. Defendant moved for a new trial. Before the hearing of this motion the father renewed his suit for the services of his minor son, whereupon defendant filed an amended motion for new trial, bringing to the attention of the court the fact of the filing and dismissal of the father's first suit, and the filing of the second, and, upon defendant's presenting this amended motion, the attorneys for the father dismissed the second suit.

The motion for new trial contained the grounds that the verdict was contrary to law, evidence, etc.; also, that the verdict was grossly excessive, and, having been rendered by the jury within 18 minutes from the time they left the court room, showed that the jury did not fully consider the case, but found the verdict upon a mistake of fact and without due consideration. Because the court overruled the objection of defendant to the evidence of one Westbrook that deceased had never ridden on the electric cars before, the objection being that the evidence was irrelevant, and tended to confuse the legal issue before the jury. Error in admitting, over objection of defendant, the answer of one Hammond to the following question of plaintiff's counsel: "Q. Now, I will ask you if you are able to make any further statement on the question, as to anything that comes within your own knowledge regarding the question, as to whether his mother was not

wholly or in part dependent upon the services of this son. A. I know his mother received benefits from the services of this boy, and I know that she is a dependent person." The objection was that the answer showed it was simply the opinion of the witness, and illegal, and because the witness only stated that the mother received "benefits" from the services of the boy, and that part is irrelevant, as it does not show dependence, and because the dependence referred to by the witness was not prior to the death. Because the court overruled defendant's objection to the following question and answer to and of Hammond? "Q. Do you know any fact that incapacitated the father from working? A. I know a fact which has incapacitated him for twenty-five years. Well, he has been working for me a number of years, and I have known him to be completely incapacitated, and for weeks at a time, on account of an old wound received at Secessionville, which breaks out now and then on him,"—the objection being that the testimony was irrelevant and illegal, and tended to prejudice the jury against defendant, and raised an issue for argument to the jury which did not legitimately belong to the issues to be tried. Because the court admitted, over defendant's objection, testimony of plaintiff that her husband was incapacitated to labor at times, and was over 50 years old; that there was an old wound which gave him trouble, and incapacitated him from 8 to 10 weeks, and when he was not laid up he was not able to do as much work as other men on account of his wound. The objections to this evidence were similar to those stated in the last ground above. Because the court admitted, over similar objections of defendant, similar testimony of plaintiff's husband. Error in charging: "The duty of exercising extraordinary diligence to protect the lives and persons of passengers continues not only while in transit, but until the passenger has reached his destination and safely disembarked. Carriers of passengers are required to provide, at points of destination, places where passengers can leave their cars safely." Alleged to be error, because, while correct in the abstract, it was not applicable to the facts in the case, and tended to confuse and mislead the jury, and further tended to impress the jury that it was defendant's duty to provide a regular station at which deceased could get off, and that any place where he did get off was to be considered such a station, notwithstanding defendant claimed that he got off the car without notice to it, and at a point not intended for passengers to alight. Error in charging: "If carriers contract or agree to deliver passengers at points other than regular stations or stopping places, the law requires that they shall select places where passengers can safely disembark." Alleged to be error because tending to confuse and mislead the jury, not applicable to the facts, and not sus-

tained by the evidence, especially in that the court nowhere undertook to define or explain to the jury what constituted a station or stopping place for a street car on the public streets. Error in charging: "If you are satisfied from the evidence that deceased was a passenger of defendant's company, and that while disembarking from one car he was run over and killed by a passing car of defendant's company, I charge you the defendant would be responsible for the injury sustained, and your verdict should be for the plaintiff, unless you find also from the evidence that the servants or employees of defendant's company used extraordinary care and diligence to protect him against the injury, or that when the negligence of defendant's employees became apparent, or was existing, the deceased could have avoided the consequences of defendant's negligence. In either event your verdict should be for defendant." Alleged to be error because it put upon defendant the responsibility of exercising extraordinary diligence in protecting deceased from being run over by a passing car, notwithstanding defendant claimed that, after he had alighted from its car, the relation of passenger and carrier ceased, and it was only bound from that time to the exercise of all reasonable care and diligence to protect deceased; and because the charge was misleading and tended to confuse the jury, in that the court failed to explain what he referred to in speaking of the negligence of defendant's employees, in connection with the exercise of extraordinary diligence at that particular time. Error in charging: "If the injured person and the agents of the company are both at fault, the plaintiff may recover, but the damage shall be diminished in proportion to the fault attributable to the injured person." Alleged to be error because the court failed to qualify the same by adding: "Unless deceased could have avoided the effects of defendant's negligence by the exercise of ordinary care." Error in charging: "For the homicide by the negligence of a railroad company of her child, unmarried and childless, a mother may recover when the child contributed to her support, and she was substantially dependent on such child in part for support, although she was likewise dependent upon her husband and her own labor." Alleged to be error because the court simply took the language in *Daniels v. Railway Co.*, 86 Ga. 236, 12 S. E. 363, without explaining to the jury that the law meant that the contribution must be a substantial one, and the dependence must be material. Error in charging: "If your verdict be for the plaintiff, it should be for full value of the life of deceased as shown by the evidence, without making any reduction for personal expenses had he lived. In determining the value of life of deceased, you consider his age, his expectancy of life, the amount he was earning when killed, his capacity to earn money in the avocations of

life in which he was engaged. It is the cash value of the life that is to be given; not the gross amount he would have received during the term of years the tables say he could reasonably have expected to live. It is the gross amount reduced to present cash value." Alleged to be error because calculated to mislead the jury by impressing upon them the fact that they must find the full value of deceased's life, if they determine to find for plaintiff, without regard to deceased's contributory negligence; because the court failed to explain to the jury that they were not bound by the tables introduced, or by any procrustean rules, in arriving at the value of the life of deceased; because the court failed to explain to the jury the manner in which they should arrive at the cash value of the life of deceased; and because the charge, in effect, told the jury that they were bound to give deceased the expectancy that the tables showed. Also error in the entire general charge because the same stated only abstract legal principles, and failed to apply them in any way to the evidence, the jury being left entirely to their own convictions as to what points in the evidence such principles applied; because the charge nowhere explained when the relation of passenger and carrier ceased with reference to a passenger on a street railroad car, and, without such explanation applied to the facts, the jury were left under the charge to suppose that defendant was bound to furnish some kind of depot or alighting place for passengers getting off a street car in the streets, and this notwithstanding defendant claimed that the evidence showed that deceased voluntarily alighted from its car while in motion, without notice to its conductor, and at a point other than the place intended for passengers to get off; and because the charge failed to cover all the issues involved. Error in charging: "A carrier of passengers is legally bound not only to safely transport, but to furnish the means of safe egress from the trains and passage therefrom." Alleged to be error because tending to confuse and mislead the jury, and to put upon defendant the burden and duty not only of providing a safe exit from its cars, but of protecting deceased after he left the car and was upon the street; and because inapplicable to the facts.

Error in refusing to allow defendant's counsel to ask Dyer, president of defendant, and to permit Dyer to testify, as to observations he had recently made in reference to electric and other street-car lines operating on double tracks in various cities of the United States, in reference to the use of gates on the cars, and to show that gates were not used. One of the allegations in the declaration being that defendant was negligent in not having the gates on the rear platform of the car closed, the defendant alleges that this evidence was pertinent. Error in refusing to charge the following written requests of defendant: "The first

question for you to consider under the evidence is, was the mother substantially dependent on deceased for a support? To be dependent substantially upon him she must 'rely maternally on him' for support. She must be unable to support herself materially or substantially without his aid in whole or in part, and he must be essential to her support in whole or in part. A dependent is 'one who is sustained by another, or who relies on another for support or favor.' The second question for you to consider, if you find that she was substantially dependent on deceased, is: Did he, before his death, substantially contribute to her support? That is, did the aid he furnished her substantially or materially contribute to her support? If you find from the evidence that deceased was about 15½ years old; that he lived at home with his father and mother; that he had an older brother and some sisters, who also lived at home and worked on the farm, and they all helped their father in this work; that deceased worked on the farm with his father and sisters and older brother, as one of the family, without wages, when he could, and helped his father at other work when he could; and that the proceeds of his labor, both on the farm and elsewhere when he worked, went into the common lot, or was used by the father and mother, and thus contributed to the help and support of (all) the entire family,—then I charge you that the mother, under the law, was not substantially dependent on him for a support, and you should find a verdict for the defendant. I charge you that the court understands the law to be that where a mother is substantially dependent on a child for support, and that child materially contributes to her support, the child stands in the place of and represents the father or husband, so far as he substantially contributes in whole or in part to her support. If you find in this case that the father lived with his wife and family, that he was the head of such family, and did all he could to support the same, and that deceased only aided and helped as a son would naturally do, and the result of his labor went for the benefit of himself and his father and mother and other members of the family, then I charge you that under the law the plaintiff was not substantially dependent on him, and you should find for the defendant." Alleged to be error because these requests were legal, pertinent, applicable to the facts, not covered by the general charge, and because they assisted the jury in applying the law to the evidence, and would have enabled the jury to have seen whether the facts came up to what the law required in each element of its requirements; also, because, if the court had given the charge divided as requested, the jury could have seen that the fact as to the son's contributing to his mother's support and her material dependence were issues to be tried, while under the charge as given these issues

were not explained according to the facts. Error in refusing to give the following written request of defendant: "If you find from the evidence that plaintiff and her deceased son and the entire family, at the time of this injury, were residents of South Carolina and have so continued and are now, then I charge you that the act of October, 1887, giving the mother a right to sue for the homicide of her son, does not apply, and your verdict must be for the defendant." Alleged to be error because the uncontradicted evidence showed that plaintiff, her husband and entire family, were residents of South Carolina when the son was killed, and have ever since so continued, and the son was only in Georgia on a visit the day he was killed; defendant alleging that the act of October 27, 1887, applies only to one who when the right of action accrued was a resident of Georgia. Error in refusing to give the following written request of defendant: "I charge you that if deceased could have seen the car approaching him and avoided it by the exercise of ordinary care, then the plaintiff cannot recover." Alleged to be error because legal, pertinent, applicable, etc., and because the evidence showed that the view was unobstructed, and if deceased voluntarily got off the car while in motion, and on the side next to the parallel track, without notice to the conductor, and after the car had left the stopping place at the crossing, then deceased was bound to exercise ordinary care in looking as to where he was going and as to what was coming. Error in refusing to give the following written request of defendant: "I charge you that if you find from the evidence that deceased got on the car to go to the Union Depot; that the car stopped at the usual place of stopping to let passengers off at said depot; that it moved on, and that deceased left said car at a point beyond the stopping place, and on the side next to the parallel tracks, and while the car was in motion,—then you may consider these facts in passing on the question as to whether deceased could have avoided the accident by the use of ordinary care, and, if you find he could, then plaintiff cannot recover." Alleged to be error because legal, pertinent, and applicable to the facts. Error in refusing to give the following written request of defendant: "If you believe from the evidence that deceased stepped from a moving car, and that there was space enough between the tracks for a person to stand, and that from the manner in which he got off of the car he was thrown upon the other track, and that the motorman and other agents of defendant exercised all ordinary and reasonable care and diligence to prevent the injury, then plaintiff cannot recover." Alleged to be error because legal, pertinent, and applicable to the facts, and because if deceased voluntarily got off a moving car, without notice to the conductor and beyond the stopping place, he terminated himself the relation of carrier and passenger, and

defendant from that time was only bound to exercise towards him all ordinary and reasonable care and diligence. Error in refusing to give the following written request of defendant: "If you believe from the evidence that deceased stepped off of the car while it was in motion, and that another car, coming in the opposite direction, was within a few feet of him, and that the motorman of that car did not see him, or could not, in the exercise of extraordinary diligence, see him until he stepped off, and if you further believe that just as soon as he did see him he did all that was possible to prevent the car running over him, then I charge you that you may consider these facts in reaching a conclusion as to whether the defendant exercised all ordinary and reasonable care and diligence after his danger became apparent, and, if you find it did, then plaintiff cannot recover." Alleged to be error because legal, pertinent, and applicable to the facts. Error in refusing to give the following written request of defendant: "If you find from the evidence that the time between the deceased stepping from the car and the injury was but a few seconds, you may consider this fact in determining if defendant used all ordinary and reasonable care and diligence in the time allowed, and under the circumstances of the accident, and, if you find it did, then plaintiff cannot recover, and you should find for defendant." Alleged to be error because legal, pertinent, and applicable to the facts, and because the evidence showed that the time between Glover's leaving the car and the injury was but a moment, and it was proper for the court to direct the jury's attention to this, and for them to consider what defendant could have done more than it did do in the time allowed.

Error in refusing to give the following written request of defendant: "If you find from the evidence that the deceased saw the parallel tracks of defendant road, or could have seen them by the exercise of ordinary care, then I charge you that you may consider this fact in arriving at a conclusion as to whether deceased exercised ordinary care in getting off of the car of defendant on the side next to the parallel tracks of the road; and if you find he did not, and, as a result of getting off on that side, was killed, and defendant exercised all ordinary and reasonable care and diligence after his danger became known, then plaintiff cannot recover, and you should find for defendant." Alleged to be error because illegal, pertinent, and applicable to the facts, and because the presence of a railroad track is itself a warning of danger, and defendant had a right to have the court call the attention of the jury to this element in the transaction, that they might consider it in passing upon the question as to what Glover could have done in protecting himself from injury. Error in refusing to give the following written request of defendant: "If you find that it was not

customary, at the date of the accident, for the gates of the cars on the side next to the parallel tracks to be closed except on Broad street, and that they were closed on that street on account of the posts between the tracks, then you may consider this reason in passing on the alleged negligence of defendant; and, if you are satisfied that it was not negligence to open them while off of Broad street, you may relieve the defendant of any negligence charged on this account." Alleged to be error because legal, pertinent, and applicable, and because defendant's evidence tended to show that the gates were only intended to be closed on Broad street on account of the posts, and defendant was entitled to have the attention of the jury called to this claim. The charge as asked left the question entirely with the jury as to whether defendant should be relieved of the negligence charged in reference to open gates. Error in refusing to give the following written request of defendant: "If you believe from the evidence that the defendant was negligent in leaving open the gates of the car on the side next to the parallel track, and yet that deceased saw it was open, or by the exercise of ordinary care could have seen it, and after he saw that the gate was open he stepped off of the car while in motion, and on the side of the parallel tracks, then you may consider this fact in determining as to whether deceased could have avoided the injury by the exercise of ordinary care, and, if you believe he could, then plaintiff cannot recover, and you should find for defendant." Alleged to be error because legal, pertinent, and applicable, and because the evidence clearly showed that the gates were open all the time, and Glover therefore had no reason to rely upon their being closed, and it was defendant's right to have the jury's attention called by the court to this fact, as proper for their consideration in passing upon what deceased should have done, under the law, to protect himself against defendant's alleged negligence in not having the gates closed. Error in refusing to give the following written request of defendant: "A railroad company is not an insurer against accidents, and if you believe that the death of Mr. Glover resulted from an accident, in his losing his balance in stepping off of the car, and so near to the passing car that he was run over by it, and that the man on the passing car exercised all ordinary and reasonable care and diligence, after he saw him step off, to prevent running over or striking him, then I charge you that plaintiff cannot recover." Alleged to be error because legal, pertinent, and applicable, and because the evidence showed that Glover, either from holding to the car railing or stepping off backwards, lost his balance, and fell across the parallel track just as a car was passing in the opposite direction from the car off which he alighted, and defendant had a right

to have the jury's attention called to this circumstance by the court in passing upon its liability; also, because Glover's death resulted, as defendant claimed, from an accident, and defendant had the right to have the jury told by the court that a carrier of passengers was "not an insurer against accidents." Further, because the abstract charge given by the court upon the questions of extraordinary diligence upon defendant's part and ordinary care upon the part of deceased did not cover the issue, there being a very general belief that there is no such thing as an injury to a passenger by a railroad company from which it can escape liability; and defendant had the legal right to have the court tell the jury that the law recognized the possibility of accident as such, even in a carrier of passengers. Error in refusing to charge the following written request of defendant: "If you believe that deceased got off of the car while it was in motion, then I charge you that you may consider that fact as to whether he should not have looked out for himself for danger; and if you believe from the evidence that, if he had looked, he could have seen the car which ran over him approaching, but stepped off when the car was too near him to be stopped by the exercise of all ordinary and reasonable care and diligence upon the part of those operating it, then plaintiff cannot recover, and your verdict must be for the defendant." Alleged to be error because legal, pertinent, and applicable, and defendant had the right to have the court call the jury's attention to the difference in care which might be required between getting off a standing and moving car, and especially in view of the fact that the court had told the jury defendant was bound to safely disembark deceased. Error in refusing to charge the following written request of defendant: "If you believe from the evidence that Mr. Glover voluntarily stepped from the car while in motion and got upon the ground, then the relation of passenger and carrier ceased, and Mr. Glover was from that time entitled only to the same care and diligence from the railroads that any other citizen upon the street had. That care was the exercise of all ordinary and reasonable care upon the part of the company, and not extraordinary care. Extraordinary care is only required as long as the relation of carrier and passenger exists." Alleged to be error because legal, pertinent, and applicable, and because one of the issues was as to when the relation of carrier and passenger ceased, and defendant had the right to have the court inform the jury as to what the law on that subject was; and, further, because the general charge was too indefinite on this point to be a substitute for the charge asked. Error in refusing to charge the following written request of defendant: "If you find from the evidence that the car in which Mr. Glover rode had posted in the car, where

they could be seen, notices to passengers not to get off while the cars were in motion, or next to the parallel tracks, then you may consider this fact in passing upon the question as to whether deceased had notice of the way and side on which, and the time at which, he should have gotten off of the car. The presumption is that these notices are seen and read." Alleged to be error because legal, pertinent, and applicable, and because the evidence showed warnings were placed in the car, and plaintiff's declaration claimed that defendant should have warned deceased, and defendant had a right to have the court call the jury's attention to the claim that notices were posted, and that the law presumed they were read; the evidence showing that Glover had been to school, was a bright, intelligent boy, was sitting inside the car, and that notices were posted in the car. Because the court erred, though he says he did not hear the remarks, in not stopping Judge Twiggs, who concluded for the plaintiff, in his closing argument to the jury, who said, after saying that the jury knew it was not dangerous or negligent to get off the street cars while in motion, the following: "Why, gentlemen of the jury, I do it myself every day. I live on the hill, and when the cars get opposite my gate I just step off of the cars. The cars do not stop, and I don't ask them to stop; and I step off when they are going pretty fast at that, and there is no more danger about it than there is in stepping on this floor." Defendant alleges that the omission or failure to stop Judge Twiggs in making this statement was error, because equivalent to allowing him to be a witness in the case, and to state facts which would not have been evidence even if he had been a witness; and the issue before the court and jury was not as to whether he could step off a moving car without danger, but as to whether it was negligent for Glover to have stepped off at the time and under the circumstances of his injury; and Judge Twiggs referring in his remarks to the cars of this identical company, it was calculated to mislead the jury, and the statement was therefore illegal, and should not have been allowed.

After argument on the motion, the judge took the papers, stating that he would render his decision later. Afterwards, and before the motion was determined, the father again renewed his suit for the loss of services of his son, which suit is still pending, and defendant filed an amendment to the motion, and brought to the attention of the court the facts herein before stated, as a proper matter to be considered in passing upon the motion. Before any decision upon the motion, plaintiff's attorneys, without notice to defendant's attorneys, wrote off from the verdict \$905.02. Afterwards the court overruled the motion in the following order: "After argument on the within motion, the plaintiff having voluntarily written off from

said verdict the sum of \$905.02, it is ordered that said motion be overruled on each and every ground, and a new trial refused." Defendant alleges that it was error in the court to allow plaintiff's counsel, after argument and pending consideration of the motion, and without notice of it, to thus write off from the verdict, for, if the court was of the opinion that the verdict was excessive, it should have set aside the verdict and granted a new trial. Defendant assigns the allowing of the writing off from the verdict as error, because such a practice is unfair and illegal, and tends to the manifest injury of defendant. It further alleges that it is fairly inferable, if not conclusive, from the language of the order overruling the motion, that if plaintiff had not written off the \$905.02 a new trial would have been granted; and further alleges that the amount of the verdict, as left, is still grossly excessive, and unwarranted by the evidence. Defendant also alleges that the court erred in overruling the motion.

J. S. & W. I. Davidson, for plaintiff in error. Twiggs & Verdery, J. C. C. Black, Smith, Glenn & Smith, and J. T. Pendleton, for defendant in error.

BLECKLEY, C. J. 1. The material contents of the declaration are stated in the official report. A legal cause of action under the act of 1887 was set forth. It was not necessary to allege that the deceased could not have seen the car approaching him in time to avoid coming in collision with it, or that he made any effort to avoid coming in collision with it. It was not necessary to allege that the point at which he left the car was the regular stopping place, or that the stopping of the car was for the purpose of taking on or letting off passengers. It was not necessary to allege that he gave any notice of his desire or intention to leave the car, or that defendant's servants had notice of such intention. It was not necessary to allege that the company had notice of his want of familiarity with the running and operation of electric cars, or anything as to his size or appearance. The plaintiff's right of action did not depend upon widowhood or living apart from her husband, and as she alleged dependence on this son, although he was only between 15 and 16 years of age, it was not necessary to allege in what way she was dependent on him, or that he had ever worked or earned money. The declaration imputes the homicide to the negligence of the company, and points out specifically in what respects the company was negligent. The plaintiff's right to sue and to recover for the negligent homicide of her son is sufficiently apparent on the face of the declaration. There was no error in overruling the demurrer.

2. The motion to strike from the declaration the words: "That the said John C. Glover was not familiar with the manner

in which said cars of the defendant were run and operated; that he resided in the country, and had never before ridden on said electric cars,"—was properly denied, the motion to strike being made orally at the trial. If these words were objectionable as having no appropriate place in the declaration, the right mode of expelling them was by special demurrer filed at the appearance term. It would be altogether impracticable for the court, when the trial is on hand, to entertain motions to purge the pleadings of superfluous and irrelevant matter, whether of form or of substance. The pleadings, so far as possible, should be settled before the trial term arrives, and this is the scheme of our law, except in so far as voluntary amendments are concerned. These, as matter of right, may be made at any stage of the case.

3. The special plea to the effect that the plaintiff and her son were both residents of South Carolina, and that she has resided there ever since, presented no defense to the action. The statutory right is given by the act of 1887 to all mothers, no matter where they reside, and without reference to the residence of the child whose homicide is the subject-matter of the action. Whenever a Georgia mother can recover, any other mother can do so under like circumstances. The act is general in its terms, and has no hint of any discrimination in favor of residents or against nonresidents.

4. Neither as a plea in abatement nor as one in bar is the pendency of a suit by the father of a minor son for the damage occasioned to him by the loss of the son's services, or in any other respect, any defense to an action by the mother founded on the act of 1887. By the terms of that act the mother is entitled to recover the whole value of the life. A claim by the father, and a suit to enforce that claim, whether it be well founded or not, cannot defeat or abridge the statutory right of the mother to bring her action and maintain it. If there is an exclusive right in either parent to complain of the homicide, it is certainly not in the father. But in truth there is no exclusive right, for the same tortious injury resulting in the death of a minor child may be a damage to both,—to the mother in the arbitrary measure of damages prescribed by the statute, and to the father to the extent of his own loss, irrespective of the statute, whatever that loss may be. The act of 1887 does not purport to withdraw from the father any right of action which he had before by the common law. What it does is to confer upon the mother a right which neither of the parents had at common law. The statutory right of the mother is to recover for the child's death; the common-law right of the father is to recover for the loss of services which the child would have rendered him had the child not been disabled by the tort complained of. *Factory v. Davis*, 87 Ga. 648, 13 S. E. 577.

5. There was no error in admitting evidence of the father's physical disability, and consequent impairment of ability to labor. He was a laboring man, and without fortune. This being so, anything which reduced his capacity to perform labor whereby to procure the means of support for the plaintiff, his wife, would render her less independent of any aid from her children, including the deceased son. The evidence, therefore, would tend to show her partial dependence on that son for support, present and future. The disability referred to had its origin long before the homicide of the son, and was in some degree operative at the time of the homicide, and has been so ever since.

6. The father, mother, and minor children all resided together, and were mutually dependent upon the labor of the family for support. The deceased child, although not 16 years of age, performed some labor, and it or its proceeds went into the common stock. Evidence to prove all this, or which tended to prove it, was admissible, and, if this condition of affairs was established, the deceased son might well be considered as contributing substantially to the support of his mother. Members of the same household, who live by their common labor and its proceeds, have a mutual dependence one upon another. Certainly so, unless it be affirmatively shown that a particular member consumes as much, or more, of the common stock than he contributes to it. Even that would not be a conclusive test, for the services of a child to a mother, or of a mother to a child, may well be reckoned as contributing substantially to the support of the recipient far beyond any money value which the services may have, and the chief element of dependence may be in respect to personal service of this nature. Moreover, in the case of laboring people, some regard must be had to the probability of future dependence of an older member of the family upon younger ones. A son between 15 and 16 years of age, whose vocation it is to labor for the family, may well be regarded as one of the stays and props, both present and future, of his mother, she being also a laboring woman, and liable to become disabled by age or infirmity before her son shall have passed the meridian of life.

7. Evidence that the son had no previous experience in traveling upon an electric car was admissible, not for the purpose of changing or affecting the measure of the company's diligence, but as a fact tending to illustrate the cause of his failure to alight in safety. The jury, in looking at the facts and circumstances of the homicide, would naturally desire to classify the particular passenger, not alone by his age, but also by his experience, or the want of it, in handling himself as a passenger on electric cars. Familiarity with this mode of transportation would qualify him to see and appreciate danger which he would not be likely to observe if

he was wholly without experience. With experience he might be chargeable with fault; without it, with none. And hence in the one case his failure to come off safely might be attributable to his own negligence. In part or in whole, whereas, in the other case, he might be treated as free from any negligence whatever. It may be that the evidence might have other bearings, but it has this, at least.

8. The negligence charged as to gates was in not having the gate of this particular car closed on the side next to the parallel track. We think what the president of the company would have testified as to his observations on other double-track lines of street cars in various cities was not relevant, and was consequently properly rejected. Two reasons against the admissibility of this evidence occur to us. The first is that the practice of other lines would not serve for comparison on the question of diligence unless it was shown that these lines were properly equipped and managed, or were so recognized and reputed to be by experts in the business; the other is that it was not stated whether the other lines had gates to their cars or not, but only that gates were not used. There is no recital in the record of what was proposed to be proved by the president, except what is quoted, in the eighth headnote, from the motion for a new trial. If the lines examined by the president were without gates to their cars, their practice in not using gates would throw no light on the diligence of a company which, like the defendant, has provided gates, but omits to use them.

9. There may be no negligence whatever in failing to have gates for the very highest order of equipment may be dispensed with, provided the equipment is sufficient to come up to the standard of extraordinary diligence. This standard may be reached short of the very best or the superlative of the attainable. But, when a company has provided gates, due diligence might require it to use them, and failure to use them might be negligence in the given instance. Whether it would be or not is a question of fact for the jury. There was no error in so treating it; and this is so, irrespective of the particular object which the company had in view in procuring the gates, or of its own practice in their use. A hackman might put brakes on his hack for use in descending mountains only, and might restrict the use by his own practice to the making of such descents; but, having them upon his vehicle, it might be negligence not to use them on proper occasions, in descending ordinary hills as well as mountains. Extraordinary diligence may require the carrier to use what he has though it would not require him to have as much as he has provided.

10. The charge of the court that "carriers of passengers are required to provide at

points of destination places where passengers can leave their cars safely" was somewhat misleading, as applied to a street railway. Companies engaged in carrying passengers on cars along a public street are not understood as engaging to make safe landing places, but to select them. The duty is to select such place with reference to getting off while the car is at rest. The company is not responsible for peril which the passenger incurs without its fault, in attempting to alight after the stoppage has terminated and the car has again been put in motion, provided a reasonable time for alighting was allowed while it was at rest. This is true, more especially if the conductor did not know that the particular passenger intended to get off at that place, and did not see him attempting to get off in time to warn or prevent him from so doing while the car was in motion. The charge that "a carrier of passengers is legally bound not only to safely transport, but to furnish the means of safe egress from the trains and passage therefrom," was not applicable to the facts. There was no question about furnishing the means of safe egress, but the complaint was that the passenger was permitted to use unsafe means, and in so doing was carelessly injured by another car.

11. Of course no duty touching the selection of a safe place for landing passengers is operative on any stop made on account of an obstruction upon the track. When a stop is made for that reason, and there is broad daylight by which passengers can see for themselves, if one of them undertakes to get off, whether the car be in motion or at rest, the conductor not seeing him or being aware of his purpose, he cannot complain that a safe place was not selected for him to alight. This, however, would not justify the company in negligently running over him, if, by accident, he failed to gain a firm footing on alighting, but fell on a parallel track, exposing himself to danger on that track.

12. The presiding judge did not hear the improper statements made by counsel in argument, and his attention was not called to them at the time, or afterwards during the progress of the trial, and no request was made to charge the jury touching the same. To say that a new trial is not required nor would be justified on this ground of the motion is but to repeat in substance what has been ruled many, many times.

13. In charging the jury touching the measure of recovery the court said: "In determining the value of the life of deceased you consider his age, his expectancy of life, the amount he was earning when killed, his capacity to earn money in the vocations of life in which he was engaged. It is the cash value of the life that is to be given, not the gross amount he would have received during the term of years the tables say he

could reasonably have expected to live. It is the gross amount reduced to present cash value." This charge was subject to misconception. Neither here nor elsewhere was the charge quite full enough as to the right of the jury to avail themselves of facts in the evidence irrespective of the mortality tables.

14. What may be contained in the motion for a new trial which we pass over in silence we deem free from substantial error. This includes the many requests to charge the jury which were denied, and some other topics besides. If the plaintiff's son had, before he was injured, succeeded in getting a footing upon the street which he could have maintained, his relation as passenger would then have ceased. But we understand the evidence as warranting the conclusion that he failed to effect a landing upon the street, and fell upon the parallel track as the result of his attempt to land, and not as a sequence to a landing already accomplished. In *Creamer v. Railway Co.*, 156 Mass. 320, 31 N. E. 391, the passenger had safely landed, and when stricken by the car was walking on the street.

15. We can see no objection to allowing a plaintiff to write off from her recovery voluntarily any sum whatever. If, by so doing, any excess of damages found by the verdict is voluntarily relinquished, it would seem that the amount of the verdict would no longer be a cause for a new trial. Why should there be a new trial solely for the purpose of reducing the damages, when the plaintiff had voluntarily relinquished all that could be treated as excess? Other grounds for a new trial would of course, stand unaffected. Judgment reversed.

McCAMY v. CAVENDER.

(Supreme Court of Georgia. July 10, 1893.)

COMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENTS—APPLICATION OF PAYMENT.

1. A general agent in the transaction of his principal's business is not incompetent, under the act of 1889, to testify to a particular transaction or communication, at which he was present, but in which he took no part, as agent or otherwise, between his principal and her debtor, since deceased, the case on trial being between her executor and the administrator of her debtor. As to transactions or communications between himself, as agent, and the debtor, he is incompetent to testify.

2. Where, at the time of making a partial payment, for the amount of which a receipt was taken, the creditor most probably held three promissory notes, of the same date, given by the debtor for the purchase money of a tract of land, the receipt being equally applicable to each and all of the notes, and for a less sum than the amount due upon any one of them, and afterwards, when a controversy arose as to the balance unpaid, the creditor produced two of the notes, and the debtor one of them, none of them being credited with the amount covered

by the receipt, the presumption is, in the absence of any explanatory evidence, that, in taking up the note produced by the debtor, the amount embraced in the receipt was treated as a payment upon that note.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Miller, Judge.

Action on two promissory notes by R. J. McCamy, administrator, against J. W. Cavender, administrator. From the judgment rendered, plaintiff brings error. Reversed.

R. J. & J. McCamy, for plaintiff in error. McCutchen & Shumate, for defendant in error.

BLECKLEY, C. J. 1. By the act of 1889, an agent is disqualified to testify in behalf of his principal as to any transaction or communication between himself and the person with whom the transaction or communication was had, when that person is dead, and his legal representative is a party to the suit on trial. But the act does not disqualify the agent to testify to transactions and communications between his principal and the deceased person, in which the agent took no part. As to what they did and said in his presence and hearing when he was doing nothing as agent, but was a mere passive spectator and listener, he is upon the footing of any other disinterested witness. Although Walker was the general agent of his sister, the plaintiff's testatrix, and in other instances had acted for her touching her business with Cavender, the defendant's intestate, he did not so act at the interview between them, concerning which he testified. He was wholly passive. His sister acted and spoke for herself, and Cavender did the same for himself. Neither by conduct nor speech did Walker represent her on that occasion. His functions as agent were in no manner exercised, but, for the time being, were completely dormant. This is fairly inferable from the tenor of his testimony. He was competent to prove what he saw and heard at that interview, and, so far as relevant, to show the limits of the conversation between his sister and Cavender, as, for instance, that Cavender said nothing of any other credit which should appear on the notes. He was incompetent to prove anything favorable to the plaintiff as to what payments were or were not made to him, or as to entering them on the notes or receipting for them, or as to anything he said to Cavender, or Cavender said to him. The court erred in ruling out so much of the testimony as related to the fact and date of the interview, and to what the witness then saw and heard, together with the further fact that on that occasion Cavender said nothing of any additional credit on the two notes

which the parties to the interview had before them.

2. The two notes in suit were for \$100 each. They were given for the purchase money of land. Both of these, and a third similar note, were outstanding on the 1st day of January, 1884, as appeared from a written instrument of that date, in which Cavender promised to pay the plaintiff's testatrix 10 per cent. on three such notes in consideration of extending the time of payment. The inference is warranted that all three of the notes were mature at that date, though it does not appear to this court when any of them matured. Receipts produced by the defendant show that he made three payments,—one of \$80, in November, 1884; one of \$50, in February, 1885; and one of \$30, in January, 1886. The last two are credited upon the notes in suit, both on one, or one on each. The first is not credited upon either of them, nor is it credited upon the third note, the latter note having been produced by the defendant at the trial. There was no evidence showing when or how this third note was paid off. The terms of the \$80 receipt are equally applicable to each and every one of the three notes; the receipt mentioning notes, but not specifying any particular note. The amount embraced in that receipt is less than the principal of any one of the notes. As it was not applied to either of the two not paid off, the fair presumption is that it was applied in paying off the third. When a note is surrendered to the maker on being discharged by payment, there is no occasion to take up a receipt which has been given for a partial payment. In this instance, the balance may have been paid very soon after the receipt was given,—possibly on the same day,—and this may account for failure to enter it as a credit. The possession of the third note by the maker's administrator proves that it had been paid off, and the possession of the receipt as well as the note simply accounts for a partial payment which might as well be referred to that note as any other. So to refer it involves no inconsistency with the possession of the note, or with any other fact in the case. There is nothing to indicate that this note was paid off before the receipt was given. The decided probability is that all three of the notes were then outstanding. They certainly were on the first day of that year, and nothing appears by which to fix the time when one of them was taken up. We think the court erred in referring the \$80 payment to the notes which were left out as unpaid, instead of to the one which was treated by the parties as paid and surrendered accordingly. In the absence of explanation, the surrender of that note was an application to it of the partial payment evidenced by the receipt. Judgment reversed.

COMER v. COMER.

(Supreme Court of Georgia. June 26, 1893.)

INJUNCTION PENDENTE LITE—RECEIVERS.

The controversy being as to whether there is a tenancy in common existing between the parties, and there being controverted facts on which the evidence is conflicting, and also difficult questions of law, there was no error in granting the injunction and appointing a receiver, and thus preserving and protecting the property until the respective rights of the parties can, after a full investigation, be ascertained and fixed by final decree. The property consisting entirely of realty and income derived therefrom, the receiver was rightly directed to take possession of all the realty, it being within the power of the court, by proper interlocutory orders, to provide that he pay over to the defendant from time to time such sums, not exceeding one-half of the income, as she is beyond dispute entitled to receive.

(Syllabus by the Court.)

Error from superior court, Bibb county; O. L. Bartlett, Judge.

Petition by Ann Comer against Eliza Comer for the appointment of a receiver and for an injunction. There was judgment for petitioner, and defendant brings error. Affirmed.

The following is the official report:

This is a litigation between Ann Comer and Eliza Comer. In a case between the same parties a decision was rendered by this court on the 3d of last March. 18 S. E. 300. Afterwards, Ann Comer filed her petition, under which a receiver was appointed and an injunction granted, to which decision Eliza Comer excepted. The petition alleges the following: Both Ann and Eliza bore the relation of wife to Mack Comer while they all were slaves, they being negroes. Ann bore such relation for many years before and up to the time they were emancipated, and while bearing that relation had two children, of whom Mack was the father. One of these children died in infancy, the other, Cornelia, still lives. Ann continued to bear said relation to Mack up to and after March 9, 1866, and until his death, about January 8, 1888, and honestly supposed she was his lawful wife, until it was recently decided by the courts that Eliza became his lawful wife by virtue of the act of the legislature of March 9, 1866. Eliza has no children, and has never had any. In December, 1866, Mack moved Ann from Monroe county, where they originally became husband and wife, and where he had resided while a slave, to Vineville, a suburb of Macon, where she procured employment as a seamstress and house servant, and subsequently, for a short period, at other places in Vineville and Macon, he visiting and cohabiting with her regularly as his wife, and she honestly supposing that he was her husband. Eliza also resided in Monroe county before, and for a number of years after, December, 1866. In February, 1869, Mack selected a home for Ann, with her approval,

in or near Vineville, and moved her and Cornelia thereto, where all three continued to reside until his death. Cornelia was recognized and treated by him, from her birth to his death, as his lawful daughter, he sending her to school and providing for her maintenance and education until her marriage, about January 7, 1879. She married against his objections, and there was, on this account, a temporary alienation between them, continuing until a short time before his death, when he sent for her, and they became reconciled; and she remained and resided with her parents (having previously procured a divorce from her husband) until his death, and has since resided with her mother, who has continued to occupy the place near Vineville up to now. From the time of her emancipation to the death of Mack, Ann got regular employment, making on an average one dollar per day. After Mack procured the Vineville home, he and Ann paying therefor with their joint earnings, they from time to time, with their joint earnings, and in part with other means in which they were jointly interested, procured other adjoining and contiguous lots, and erected thereon buildings which they rented out, using the income therefrom in supporting themselves and their daughter, and in procuring and paying for other property, Ann contributing about one-half the money which went to the purchase of the home place and the adjoining lots and improvements. She generally collected the rents from such of the property as was rented, kept house for Mack, cooked his meals, making up the beds and fires, drawing and bringing water for drinking, cooking, and other purposes, and generally caring for and attending to everything necessary about the dwelling and premises, and waiting on and serving Mack both while he was well and when he was sick, with some little assistance from her daughter. Mack was in a bad state of health for two years or more prior to his death, and required a great deal of care, attention, and waiting on by Ann, which service she faithfully and cheerfully rendered, often at late hours of the night, and continuously for many weeks prior to his death, when he was mostly confined to his room, and subsequently to his bed. During his ill health she also continued to earn wages as a seamstress, and used them in providing for him delicacies and other necessary comforts suitable to his infirm and diseased condition. Eliza did not visit him, nor contribute to his care, nor furnish him with money or other thing of value. They had no intercourse with each other for many years prior to his death, except possibly they may have casually met on the streets, as to which petitioner is not informed. The Vineville lands, purchased partly with the savings and earnings of Ann, are divided into lots on which are fourteen small dwell-

ing houses and other improvements, one of which Mack and Ann occupied, and which has been continuously occupied since his death by Ann and her daughter. Eliza is now about to take out letters of administration on his estate, and claims the right to take possession of all of said property, and will do so unless restrained, depriving Ann and her daughter of the possession and of a home. Ann and Cornelia are dependent on their interest in said property very largely for a support, both of them being in such physical condition as prevents them from earning a living. By reason of her age and physical infirmities, Ann is and has for two or three years been so feeble as to prevent her from working, except part of the time. Cornelia has been in bad health for some years, and is still unable to earn a support. Both of them are without means to procure and pay for another home or place of residence, and are unable to procure regular employment and do daily service. Eliza has offered, as securities on her administration bond, A. T. Holt and his son C. C. Holt. The former claims to be worth \$6,000; the latter, \$15,000. Ann has reason to believe they both are not worth more than \$10,000, and the property involved is reasonably worth about \$8,000. She believes that, while the ordinary will feel bound to accept said securities, the bond will not protect the interest and rights of herself and daughter. A. T. Holt has hitherto favored Eliza, and treated Ann with marked harshness. He will doubtless control Eliza as administratrix, and will do all in his power to deprive her and her daughter of their rights, and will show them no consideration or kindness. The prayer is that Eliza be enjoined, as administratrix or otherwise, from interfering with the occupancy by Ann and her daughter of the dwelling where they reside, and from taking possession of any of the property in question, until that which rightly belongs to Ann, for the reason aforesaid, can be divided off and set apart to her under proper proceedings for that purpose; that to this end commissioners be appointed to make partition between Ann and the estate of Mack Comer of said property, either in kind, or by a sale and division of the proceeds; that, if the court deem it necessary, it be referred to an auditor or master to ascertain how much money or other things of value was contributed by Ann and Mack Comer, respectively, for the purchase of the property, and make report as to the same, and as to what would be an equitable and just division of the property or its proceeds; that a receiver be appointed to take charge of the property and collect the rents until such division or further order of court; and that general relief be granted. It is further alleged that J. P. Ross, the temporary administrator, has several hundred dollars in hand belonging to Ann and the estate, which

is amply sufficient to meet the present expenses of administration, and until such division can be had, and which arose from the rents and profits of the real estate set forth in the petition. For the reasons already stated, Ann claims that half of the net amount so in his hands belongs to her, and prays that Eliza be enjoined from receiving or demanding from him more than half the amount remaining after the payment of expenses incurred by him. By further amendment, Ann alleges that Mack visited and cohabited with her as his wife, and constantly treated her as such, for a number of years while he and she were slaves, up to their emancipation, and thence until his death, except for a few months in or about 1867, when some trouble arose which caused her to bring suit against him for divorce and alimony. This trouble and the suit were settled a few months afterwards. During their pendency she did not receive visits from him and cohabit with him as before, but he recognized her as his wife, and she him as her husband. He recognized her as his wife during slavery, and after he moved her to Bibb county, with the exception of the short time just referred to, he not only treated and recognized her as his wife, but introduced her to his friends as such, both at their Vineville home and elsewhere. He used her earnings in buying and paying for the lands and houses already referred to, and spoke to her often of said property as having been paid for by their joint earnings, and told her that it was his purpose to accumulate and hold said property for their joint use and support, and for her and Cornelia after his death, if they outlived him. No debts contracted by him remain unpaid, so far as she knows or believes. If there be any, the money in the hands of the temporary administrator is amply sufficient to pay the same and leave a considerable surplus. Eliza Comer demurred on the grounds that there is no equity in the petition; that the plaintiff has an ample common-law remedy, if she has any right; that the petition shows that the defendant had not qualified as administratrix when it was filed, and she was entitled to 12 months before any suit could be brought against her; that the action is barred by the statute of limitations, it appearing that the title to the property was taken in the name of Mack Comer alone, more than 20 years before the filing of the petition, and that no copy deed to the property is exhibited. She demurred to the prayer on the grounds that no title in common is shown in Ann and Mack Comer, and that no notice for partition was given before filing the application.

The answer alleges the following: Mack and Eliza, prior to emancipation, bore the relation of husband and wife, which relation continued to his death. She was his lawful wife, his legal widow, and, since the filing

of the petition, has been appointed administratrix on his estate. It is untrue that Ann and Mack ever bore the relation of husband and wife before or since emancipation. Ann was the slave of Dr. Winn, of Monroe county, Eliza was the slave of Dr. Searcy, and Mack was a slave of William Winn, all three of whom were near neighbors, and the families intimate. The relation of husband and wife between Mack and Eliza began some 17 years prior to emancipation, and continued up to emancipation, and for many years thereafter, up to his death, which fact was well known to Ann when she arrived at the age of womanhood, she being some 10 or 15 years younger than Eliza. There may have been some illicit intercourse between Mack and Ann, but the relation of husband and wife never existed between them. Some 10 years after Eliza and Mack married, and while they were living together as husband and wife, he commenced visiting Ann illicitly. Her master forbade him so doing, and once, catching Mack on his place at night, he shot at him with intent to kill him; and whatever relations Mack had with Ann during slavery were secret and illicit. It is true that after emancipation he removed to Macon, where he resided to his death. Ann followed him, and there continued her illicit intercourse with him, and Eliza, discovering this fact, required him to elect between them, and to abandon one of them. While he always denied to Eliza that there were any illicit or other relations between him and Ann, after the act of March 9, 1866, (he having from emancipation to that time, as he had from their first marriage during slavery to emancipation, continued to live with Eliza, as husband and wife,) he had a public ceremony of marriage between him and Eliza celebrated, and continued thereafter to live with her as her husband, and at all times to acknowledge her as his wife up to his death. Ann testified, on the trial of the suit which resulted in the judgment establishing that Eliza was the wife of Mack, and Ann was not, that she was informed of the celebration of the marriage ceremony the day after it occurred, and thereupon she separated from Mack, and did not cohabit with him again for some months. Ann being many years younger than Eliza, and a very comely woman, did succeed in seducing Mack from his allegiance to her, and cause him to desert Eliza for her, and they for years thereafter lived in illicit intercourse, she being supported by Mack; but Eliza denies that Ann ever contributed one dollar to the purchase of said property, or has any interest therein. The title of all of it was taken by Mack in his own name with the full knowledge of Ann, he paying every dollar of the money towards the purchase price, except what he received from Eliza, a large portion of which was furnished by her from her wages to him as her husband. The purchase was made April 2, 1870, the consideration being \$1,100. It is

not true that the daughter of Ann was the daughter, either legitimate or illegitimate, of Mack. It is untrue that the bond as administratrix is inadequate. Apart from her interest in the estate as Mack's widow and sole heir, Eliza has considerable property. A. T. Holt has real estate worth from six to eight thousand dollars, in Bibb and Houston counties; C. C. Holt is worth from fifteen to eighteen thousand dollars,—each of them over and above their liabilities. J. T. Searcy, the other security on the bond, is worth, over all liabilities, at a low estimate, \$25,000 in mills and lands in Monroe and Bibb counties. If Ann contributed any moneys to Mack, as alleged, they were for an immoral and illegal purpose, to wit, inducing him to live with her as his concubine, and all rights are barred by the statute of limitations, more than four years having elapsed between the time of delivering the moneys, if delivered to him, and his death. He purchased the lands himself, took the title in himself, went immediately into possession, and so remained to his death. Upon his death the temporary administrator went into possession of all the property, and is in possession now. Ann obtained the possession of the house in which she resides, from the temporary administrator, by a contract of rent. Eliza, having qualified as administratrix, is entitled to receive from the temporary administrator all of the property.

At the hearing there were affidavits tending to sustain the allegations of fact set forth in the petition and answer. The title to the property in question was in evidence, the deeds conveying the land to defendant's intestate. It was admitted that on March 9, 1893, before she was served with or had any notice of the restraining order, the defendant was duly qualified as administratrix on the estate. One affidavit was that the deponent was well acquainted with Mack Comer, who was known by the name of Mack May. She knew him in Monroe county before the war as Mack May. His master was Ben May, and, after Ben May was old, Mack was sold to Bill Winn. He was still known by the name of Mack May. Deponent knew him after he came to Macon, and he was known as Mack May after he came there. Deponent remembers that Ann Comer, who was also known as Ann May, brought an action for divorce against Mack May, and deponent knew Mack Comer was Mack May. The plaintiff introduced a judgment of the superior court, dated July 24, 1867, in the case of "Ann May vs. George Mack May, application for alimony and counsel fees," to wit: "It appearing to the court that a libel for divorce has been filed between the above-named parties, and plaintiff having, in the opinion of the court, proved her legal marriage to defendant, and showing that she has no separate estate, it is ordered by the court that the defendant pay to Messrs. Harris & Hunter, counsel for plaintiff, ten dollars per month from this date as temporary alimony for the support of plain-

tiff and her child, these payments to continue until the final trial in the action of divorce, or until the further order of this court." This judgment was admitted over the defendant's objection that it was an interlocutory judgment between parties strangers to this issue, and that it was not pertinent to the issue on trial. The overruling of the objection is assigned as error. Another assignment of error is upon the admission of the testimony of Charles J. Harris, now deceased, given at the trial, November term, 1891, of the case between these same parties, being their contest for administration of the estate. The objection was that the former suit was as to who was the widow of Mack Comer, and therefore it was not substantially upon the same issues as the cause now pending. The order excepted to grants the injunction as prayed for, and appoints a receiver to take charge of all the property, rent the same, and collect and hold the rents, to be disposed of by further order of court; also, to take charge of the net amount in the hands of the temporary administrator, and to pay over half of that amount to the defendant as administratrix, etc.

Hardeman, Davis & Turner, for plaintiff in error. Lanier, Anderson & Anderson, M. W. Harris, and Dessan & Hodges, for defendant in error.

PER CURIAM. Judgment affirmed.

**BEASLEY et al. v. HUYETT & SMITH
MANUF'G CO.**

(Supreme Court of Georgia. July 17, 1893.)
SALE—WARRANTY—ACTION FOR PRICE—PLEADINGS.

1. A "dry kiln," an apparatus for drying lumber, being sold and "warranted to be of good material, well made, and, with proper management, capable of doing as good work as similar articles of any other manufacture in the United States," with a stipulation that "if said machinery, or any part thereof, shall fail to fill this warranty within thirty days of first use, written notice shall be given to the sellers, stating wherein it fails to fill the warranty, and time, opportunity, and friendly assistance given to reach the machinery and remedy any defects." * * * Continued possession or use of the machinery after the expiration of the time named above shall be conclusive evidence that the warranty is fulfilled,"—the reasonable and proper construction of the warranty is that it undertakes to protect the purchaser against all defects discoverable, and actually discovered, within 30 days of first use, of which written notice shall be given; defects not discoverable, or not discovered, until after the expiration of 30 days, being at the purchaser's risk.

2. To an action upon one of several promissory notes given for the price of the dry kiln above mentioned, all the others being previously paid, a plea alleging a partial failure of consideration on account of defects in the engine and piping (parts of the machinery included in the dry kiln) is no defense; the plea not alleging that any written notice of these defects had been given, and no point being made that the written contract introduced by the plaintiff

in evidence, which contract contained the warranty and the stipulations in regard thereto, was not set out in the plaintiff's pleadings. Had this point been made, that contract, although in evidence, could not have been considered upon a motion to strike the plea.

3. But the plea of partial failure of consideration being amended and enlarged by a further plea of actual fraud on the part of the plaintiff, by having knowledge of, and fraudulently concealing, the alleged defects, knowing that they were latent and could not be discovered within 30 days from the first use of the apparatus, as in fact they were not, would be a defense to the action, to the extent, at least, of the partial failure of consideration occasioned by the fraud. The court erred in striking the special plea as finally shaped by the plea of fraud, and in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by the Huyett & Smith Manufacturing Company against Beasley, Hollett & Co. on a note given for a part of the purchase price of a dry kiln. There was judgment for plaintiff, by direction of the court, and defendants bring error. Reversed.

Blance & Noyes, for plaintiffs in error. Ivy T. Thompson, for defendant in error.

BLECKLEY, C. J. 1. What was the warranty? It was that the dry kiln was of good material, well made, and, with proper management, capable of doing as good work as similar articles of any other manufacture in the United States. What was the consequence stipulated for between the parties, of a failure of this warranty? It was that written notice should be given to the warrantors, stating wherein the kiln failed, and time, opportunity, and friendly assistance were to be given to reach the kiln and remedy the defects. This notice was to be given, and the defects were to be remedied, if the failure occurred within 30 days of first use. The contract added: "Continued possession or use of the machinery after the expiration of the time named above shall be conclusive evidence that the warranty is fulfilled." Did the warranty extend to any defects not actually discovered within 30 days of first use, or to any which were so discovered if there was a failure to give written notice of the same? We think not. The fair construction of the contract, as a whole, is that 30 days would be allowed to test the kiln and develop any defects which could be and were discovered within that time, but as to any which were not discoverable, or not actually discovered, until the expiration of the 30 days, the purchasers took the risk. It will be noticed that possession or use of the machinery after the time limited was to be conclusive evidence that the whole warranty, not merely a part of it, was fulfilled. This stipulation manifests an intention to restrict the general words in which the warranty was expressed from their apparent application to all defects whatsoever to such of them as should be discovered within 30 days

from first use. Perhaps a more accurate statement would be that the warranty embraces all defects whatsoever, and the stipulation introduces a condition equivalent to the expression, "provided they are discovered within the specified time, and written notice thereof be given." What we have said treats the warranty as an honest contract made upon an honest and fair sale of the property, with no fraud or fraudulent concealment on the part of the warrantors.

2. The plea of partial failure of consideration, not alleging that any written notice was given of the defects therein mentioned, was no defense to the action, testing it by the contract containing the warranty, which was in evidence. No point seems to have been made that it could not be so tested for the reason that the contract was not set out in the declaration. Had this point been made, of course the declaration alone could have been regarded, in testing the plea on motion to strike it.

3. But the plea of partial failure of consideration, when amended and enlarged by the further plea of actual fraud on the part of the plaintiff, by having knowledge of, and fraudulently concealing, the alleged defects, knowing that they were latent and could not be discovered within 30 days from the first use of the apparatus, (and in fact they were not discovered until afterwards,) would be a defense to the action, to the extent, at least, of the partial failure of consideration occasioned by the fraud. There can be no doubt that it is a fraud for manufacturers of machinery to fill it with latent defects not discoverable in 30 days, and then sell it as good, but warranting the same only as against defects actually discovered within 30 days; they knowing that the existing defects are not discoverable within that time, and concealing both the defects and their knowledge of them. To do this would be practicing deceit and committing actual fraud. Those who commit actual fraud cannot protect themselves against answering therefor by any form of warranty, or any limitations which they may introduce in the terms of the warranty. Fraud in the principal contract, the contract of sale, is not to be answered by setting up a collateral contract which was as much the offspring of the fraud as was the principal contract itself. The special plea, as finally shaped by the plea of fraud, should not have been stricken; and in striking the same, and in afterwards directing a verdict for the plaintiff, the court erred. Judgment reversed.

BROWN v. LATHAM.

(Supreme Court of Georgia. July 17, 1893.)

PLEADINGS—COMPLAINT.

There being abundant moral obligations set out in the petition, and it not being certain, in view of the great age of the defend-

ant's father, and the alleged influence of the defendant over him, that there was any moral turpitude on the part of the father in yielding to the son's advice to convey property to the latter for the purpose specified, there was no error in overruling the demurrer to the petition. The petition is not multifarious, the object of the same being to settle and adjust the rights of the parties in respect to their father's estate as a whole.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by Mrs. Q. V. Latham against W. J. Brown, Jr., to determine the rights of the parties in the estate of their deceased father. From a judgment overruling a demurrer to the petition, defendant brings error. Affirmed.

Adamson & Jackson and W. F. Brown, for plaintiff in error. J. M. McBride, for defendant in error.

BLECKLEY, C. J. The petition in this case was filed in July, 1891; consequently it is governed by the law of pleading and procedure as shaped by legislation up to that time. If the petition is good either as a legal or as an equitable action, it should be upheld. The plaintiff and defendant are sister and brother, the daughter and son of a father who died intestate in 1886, leaving these parties and his widow as his only heirs at law. According to the allegations of the petition, the defendant has more than his due share of the assets of the father's estate, consisting of certain lands. It does not appear that any administration upon the father's estate has been granted, or that there is any impediment to an accounting and settlement between these parties as equitable tenants in common touching these lands, and as contracting parties in respect to the same. The points insisted upon as impediments are: First. That the petition shows on its face that, the father having in his lifetime conveyed the land to the defendant for the purpose of defrauding a creditor of the father, a court will not aid the sister of the defendant, any more than it would the father, to recover the lands, or any portion of them, from the defendant; consequently, that the lands are not to be treated as a part of the father's estate. Secondly. That this being so, there was no consideration for the alleged contract by the defendant with the plaintiff to account to her for the lands, or any part of their value. Third. That the petition is multifarious; and, fourth, that it is barred by the statute of limitations. Other grounds are mentioned in the demurrer, but they are of no consequence.

Treating the action as getting its standing in court not alone from the respective rights of the parties as heirs of their father, but partly from the contract between them which is alleged, it does not affirmatively appear that as much as four years had expired from the time this contract was to be performed

until the action was brought. The time appointed for performance was when the claim case was settled, and it does appear inferentially that that occurred some time in the year 1887 or sooner, for in that year a payment was made upon the contract. The day and month of this payment were not stated, and whether it was earlier or later than July cannot be ascertained from anything disclosed by the declaration; hence it does not affirmatively appear that the action was barred.

With respect to turpitude in the agreement between father and son it may be said that, if a fraud was intended, the son concocted it; and on account of his influence over the father, and the age and weakness of the latter, there is no certainty that the father, of his own free will, participated in the fraudulent intention, or was in pari delicto with the son. The petition certainly endeavors to throw all the blame of that transaction upon the son, and nothing is disclosed inconsistent with the theory that the father was led into it by the undue exertion of the son's influence over him.

Touching the contract which the parties made after the father's death, there was ample moral consideration to uphold it if the petition be true; for, even if the son was in a position to protect himself against reconveying to the father, he could waive that protection, and upon his moral obligation to share the lands with his sister in proportion to her interest as a coheir with himself could contract with her to retain both her interest and his own in some of the lands, convey to her the balance, and pay her a money compensation besides. It is true, another coheir, the widow, might have reason to complain at this, and she might be a proper, if not a necessary, party to the present action; but no objection on account of her not being a party was made. We think the moral duty of the defendant to account to his sister for her interest in the land, although it may not have been a legal interest, or one that could be enforced, would be a sufficient consideration to uphold the contract between them.

The point made in the demurrer that the father had not complained of the conveyance in his lifetime has no force, because the time for a reconveyance agreed upon had not arrived when he died. Until that time arrived the son was to retain the title to the property, and before it arrived he contracted with his sister to convey some of the property to her, and retain the balance himself. To refer again to the widow, it may be that all this was satisfactory to her. She may have acquiesced in it without complaining, and if she did no one else has a right to complain.

The objection that the petition is multifarious is not sustainable, because, under our present system of pleading, contract rights, though they may relate to separate

and distinct subject-matters, may all be enforced in one and the same action. Here the object is to settle up the claims of these parties, and adjust their rights in respect to their father's estate in this land as a whole, and the contract between them covers the whole. It may be that a decree or judgment should be rendered for the plaintiff only on terms, such as that she execute a relinquishment to the defendant as to all the lands which he by the contract was entitled to retain. If she gets a conveyance from him of some of the lots, it may be that it would be equitable, under the spirit of the contract, for her to relinquish or release to him all her claim to the other lots. On the points presented in the demurrer, we think there was no error in overruling it. Judgment affirmed.

CURRY v. GEORGIA MIDLAND & G. R. CO.

(Supreme Court of Georgia. July 17, 1893.)

INJURIES TO PASSENGER—BOARDING TRAIN—NEG-
LIGENCE.

Where the conductor of a freight train having a cab attached thereto for the accommodation of passengers announced distinctly in the hearing of persons assembled at a place where the train did not usually stop to receive passengers that they would not get aboard there, but that the train would move out and stop for them elsewhere, a person who did not hear the announcement was not entitled to have the train remain standing at the place where the announcement was made until he got aboard. If he was injured while attempting to board the train at that place, neither the conductor nor any other person engaged in moving the train or controlling its movements being aware that he was endeavoring to board it, and the cause of his injury was the starting of the train before he had passed from the platform of the cab to the inside of the vehicle, his injury was not attributable to any fault of the company, and he has no cause of action against the company for compensation. On the facts in evidence the plaintiff was not entitled to recover, and any errors committed by the court in charging the jury were immaterial and harmless. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Spalding county; J. S. Boynton, Judge.

Action by J. M. Curry against the Georgia Midland & Gulf Railroad Company to recover for injuries received while trying to board defendant's car. There was judgment for defendant, and plaintiff brings error. Affirmed.

Bryan & Dicken, for plaintiff in error. Goetchius & Chappell and Beck & Cleveland, for defendant in error.

BLECKLEY, C. J. The conductor of the train, which was a freight train having a cab attached for the accommodation of passengers, announced distinctly in the hearing of persons assembled where this injury occurred that passengers would not get aboard there, but the train would move on, and stop

for them at another place. This announcement was made to a collection of persons assembled at a place where the train did not usually stop to receive passengers. On this occasion it stopped there for another purpose, and the conductor took the precaution to proclaim that persons were not to board it there, but at a designated place near by. The plaintiff did not hear this announcement, but that was his misfortune. It was distinctly made, and was heard by others. Under these circumstances it could not have been the duty of the company to keep the train standing at that place, which was not a usual place for passengers to get on, so as to afford the plaintiff opportunity to board the train there. It is manifest from the evidence that neither the conductor nor any other person engaged in moving the train or controlling its movements was aware that the plaintiff intended to get aboard, or that he was endeavoring to do so, at the time he sustained the injury. His complaint is that the train started while he was upon the platform of the cab, and before he could pass or had passed from thence to the inside of the vehicle. If the place had been one at which the train, or such trains, usually stopped to take on passengers, the plaintiff would have been warranted in taking it for granted that it had stopped for this purpose on the occasion in question. But this place was not a passenger station, and the conductor proclaimed that it was not to be used at that time, and was not aware that the plaintiff or any one else was under any misapprehension afterwards. The injury was due to a misunderstanding by the plaintiff of the object for which the train was stopped at that place, and the company had no agency in producing that misunderstanding, but used the most natural and appropriate means to prevent it, which was to warn the crowd there assembled that they must not get on at that place, but at another. The verdict was correct upon elements of fact which controlled the case absolutely, and if errors were committed in charging or refusing to charge the jury they were immaterial and harmless; consequently they would afford no cause for granting a new trial. Judgment affirmed.

JONES v. LAMON.

(Supreme Court of Georgia. July 17, 1893.)

WRONGFUL ATTACHMENT OF PROPERTY — LIABILITY OF CLIENT FOR CONDUCT OF ATTORNEY — DAMAGES.

1. The attachment under which the levy was made having been sued out by the attorney of the plaintiff in that case, and the facts and circumstances showing beyond question that there was no reason to believe that any property was or would be within reach of the attaching officer, except the horse and buggy on which the levy was made, and the attorney having been present when the levy was made, and not having said or done anything to forbid or dis-

prove the act of the levying officer, it is a necessary inference that the act of the officer in seizing the particular property was as much the result of the attorney's conduct as it would have been if the latter had expressly pointed out the property, and directed the officer to seize it under the attachment. The levy should therefore be treated as having been made by direction of the attorney, and with authority from his client, the property, at the time of the levy, being in the possession of the defendant in attachment.

2. As the property in fact belonged, not to the defendant in attachment, but to his daughter, if the attorney knew, or had reasonable grounds for believing, it did belong to her, he was chargeable with notice of the daughter's title, and notice to him would be notice to his client. On this ground the client would be liable in an action by the daughter for the actual damages sustained by her in consequence of the levy, and might, in the discretion of the jury, be subject also to exemplary or punitive damages, if, either in the act or the intention, the tort was attended with circumstances of aggravation.

3. If the attorney was ignorant of the daughter's title, and believed in good faith that the title was in the defendant in attachment, as his possession indicated, and if he caused the levy to be dismissed without any unreasonable delay upon being informed of her title, the client would be liable to the daughter for actual damages only.

4. Actual damages recoverable for the wrongful seizure of personal property embrace the necessary expenses incurred in regaining possession, together with reasonable hire for the property during the time it was withheld from the owner. A part of the expense would be the loss of time, if any, by the owner, in giving necessary personal attention to the business.

5. Though the court may have committed some errors, yet, in view of the evidence and the small amount of the verdict, there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Action by Belah Lamon against Rufus Jones for wrongful seizure of property. Plaintiff had judgment, and defendant brings error. Affirmed.

The following is the official report:

Belah Lamon sued Rufus Jones for damages, alleging that defendant, in the name of Jones Bros., wrongfully, maliciously, and without probable cause procured an attachment to be sued out from a magistrate, naming him, in favor of Jones Bros. against John Lamon, and, having done so, maliciously and out of mere vexation, and without any reasonable or probable cause, procured and caused the attachment to be by a lawful constable, naming him, levied upon a horse and phaeton, at the time in petitioner's possession and her property; and the constable, being thus made the tool to carry out the malicious and wicked purpose of defendant, stopped petitioner and the horse and phaeton upon the public streets in Columbus, and took them from her, in the presence of a great multitude, etc. Defendant demurred upon the ground that the plaintiff did not allege that the levy was made by the order or direction of defendant, or that he was at the time present aiding and abetting

the officer therein, or that the same was afterwards ratified by him, or that he had any knowledge thereof, before or at the time of the levy, of the officer's intentions and purposes, actings, and doings. The jury found for plaintiff \$37. Defendant moved for a new trial, and the motion was granted, unless plaintiff would write off \$2 from the verdict. This plaintiff did, and defendant excepts.

The motion contained the grounds that the verdict was contrary to law, evidence, etc., and so contrary to law and evidence as to shock the moral sense. Also, because the court erred in charging: "Mind you, gentlemen, you must first see whether or not Mr. Jones, either by himself or by his agent or attorney, (if you believe he had an attorney,) placed this claim in the hands of this bailiff, and instructed him to make the money out of this man, and that in pursuance of those instructions he went ahead and levied upon the property against which the attachment was issued. If you believe that from the testimony, then the plaintiff in this case would be entitled to recover the amount of actual damages she sustained in recovering her property back." Error in charging the second sentence of the following paragraph: "Before you can find the defendant in this case liable, you must believe that he stood by, knowing that it was being done, or that he ratified it by some act afterwards. [Here comes error.] If you believe that Jones, or his attorney who was acting for him by his authority, stood by when this property was being levied on, notwithstanding he may not have instructed the bailiff to levy on it,—he stood by and saw him levying on it, and knowing it to be the property of the plaintiff in this case,—he would be just as liable as if he had instructed him to seize it." Error in charging: "If, on the other hand, you believe from the testimony that he ordered the levy made, and stood by and ratified the act, thinking the property belonged to John Lamon, and not Miss Belah Lamon, then she would be entitled to recover whatever actual damages she sustained,—the expense she was put to in the recovery of her property. If you believe, furthermore, that, even though they levied on the property of the plaintiff in this case, they believed it to be the property of John Lamon, they would not be liable except for the sum that she was put to in the recovery of her property,—actual damages. If you believe that Jones placed the claims into the hands of an attorney with instructions to sue it and make the money out of it, and the attorney acted upon these instructions, and proceeded to collect the claim, the attorney would be his acting agent. If he did not instruct him to do it, and he went ahead on his own commission, of course Jones would not be liable, and I so charge you. Gentlemen, I give you this in charge in regard to punitive damages, and not as actual dam-

ages." Error in charging the second sentence of the following paragraph: "If you believe from the testimony that John Lamon and his daughter lived together, and that Mr. John Lamon was in possession of this property,—actual possession of it,—it would be a circumstance that you might consider in saying whether or not there was any malice in having this levy made. [Error here.] I charge you, gentlemen, that, if he was in possession of it, that would not excuse him from actual damages she sustained in the recovery of her property, if wrongfully levied upon. Under the law, the presumption is that if a man is in possession of the property it belongs to him." Error in giving the following,—the concluding language of the charge: "You can look to the testimony. It is exclusively in your power to say whether or not there was any malice or want of probable cause. Look to the testimony, and say whether or not there was any malice in the case." Error in overruling the demurrer. Error in refusing a nonsuit, moved upon the ground that it had not been shown that Mr. Owens was the attorney of Jones Bros., who sued out the attachment for them, nor that they or defendant directed or ordered the levy made by himself, agent, or attorney, or that he had any knowledge of its having been made, or that he ratified it afterwards; also, upon the ground that the evidence showed defendant in *fi. fa.*, John Lamon, to have been in the sole and exclusive possession of the horse and buggy when the levy was made, and because the evidence showed that plaintiff was John Lamon's daughter, and, when the levy was made, was living with her father, and not in possession of the property, in which event the law presumed that everything on the place belonged to her father. Error in refusing to charge upon the following pertinent subjects, after having asked counsel if they had any requests to make, upon which defendant's counsel requested the court orally to charge substantially as follows: "To charge the jury as to the presumption of law where the daughter lives with her father. Also, to charge the law as to circumstances, such as the dismissing of the case afterwards; as to whether or not there was satisfaction of the levy. Also, to charge that if the attorney at law exceeded his authority, and was not authorized by Jones to direct or order a levy upon this particular piece of property, to wit, the horse and buggy, and if he did so order and direct the bailiff to levy upon the horse and buggy, and such direction or order was given without the knowledge of Jones, and without thereafter ratifying it, then Jones would not be liable."

Miller & Miller, for plaintiff in error.
Thornton & McMichael, for defendant in error.

PER CURIAM. Judgment affirmed.

**AMERICAN MORTG. CO. OF SCOTLAND,
Limited, v. HILL.**

(Supreme Court of Georgia. July 17, 1893.)

**EXECUTION—PROPERTY SUBJECT—EVIDENCE—LOST
RECORDS—PRESUMPTIONS.**

1. The minutes of the superior court applicable to a suit determined more than 20 years ago being lost or destroyed, the presumption is, nothing to the contrary appearing, that a verdict which should have existed as the foundation of a judgment which has been preserved, and is now produced, did in fact exist, and was duly entered on the minutes, or that the judgment itself was entered on the minutes, if that was necessary to give it validity without a verdict, a sale of land having taken place by virtue of an execution based on the judgment, and this sale having been acquiesced in by the parties concerned for 15 or 20 years after it was made. In the present case, treating the title of the defendant in execution as derived through the sheriff's sale, the property should have been found subject.

2. The defendant in execution having, while in possession of the premises, conveyed the land in dispute to his creditor as security for the debt now sought to be collected, and having an estate for life in the land under the will of his mother, which can be enjoyed by him or his assigns without interfering with the trust estate in remainder which the will creates in behalf of his wife and children, the court certainly erred in finding for the claimant, (the trustee,) so far as the life estate was concerned. The finding should have been that the property was subject as to the life estate, but not subject as to the remainder, if the present case is to be controlled by the terms of the will, and not by the sheriff's sale under the judgment.

(Syllabus by the Court.)

Error from superior court, Quitman county; J. H. Guerry, Judge.

Action by the American Mortgage Company of Scotland, Limited, against W. M. Tennille. There was judgment for plaintiff, and execution thereof levied. To the property thus seized William A. Hill, trustee, interposed a claim. From a judgment for claimant, plaintiff brings error. Reversed.

The following is the official report:

An execution against W. M. Tennille was levied on land which was claimed by W. A. Hill, as trustee for Mary J. Tennille et al. By agreement the case was submitted to the judge without a jury. He held the property not subject to the execution, and afterwards denied a new trial, and the plaintiff excepted.

(1) Two of the assignments of error are upon the ruling of the court that an estate in remainder passed under the will of Lucinda M. Tennille, the mother of W. M. Tennille, to his wife and children, and that the land in dispute could not be subjected to the execution; and upon the allowance to the claimant to introduce in evidence, over plaintiff's objections, a certified copy of the will of Lucy M. Tennille, and the petition and order under which the claimant was appointed as trustee for Mary J. Tennille and others; the objections being that this evidence was illegal and irrelevant, it being apparent from the will that no estate passed thereunder to the

wife and children of W. M. Tennille, but the title to the property in dispute passed to him; and that Hill had no right to be appointed trustee under the will, nor to hold or control the property as trustee. Before the introduction of the evidence objected to, the claimant introduced a marriage contract between W. A. Tennille and Lucinda M. Fort, afterwards Tennille, dated October 10, 1842, and recorded January 6, 1843, wherein all her property is preserved as her separate estate, and an express permission is made authorizing her to dispose of all her property by will. It was admitted that she was the mother of W. M. Tennille, who was the only child of the marriage alluded to; that at the time of her death she was the owner of the land in dispute, which was included in the marriage settlement; and that she died on August 11, 1864, and her husband died on October 21, 1864. The will in question was dated February 13, 1863, and was admitted to probate on February 6, 1865. It directs that her executors shall keep up and cultivate her plantation with her slaves thereon for the purposes hereafter mentioned, but that, if the business shall become unprofitable for reasons to be judged of by the executors, they may sell and dispose of the whole of her estate, both real and personal, in such manner as they shall judge will best contribute to the interests of her estate, and invest the proceeds of sale in interest-bearing securities. In the next item she gives \$1,000 to the son of her brother, and further gives the same amount each to three named females, in trust for their sole and separate use and benefit during their lives, and at their deaths to be equally divided among their children, and, should they die without children, these legacies should go to their brothers and sisters. These legacies are directed to be paid from the property and in come from the plantation, without interest whenever the executors see proper and can conveniently spare the money. Under this item, an absolute estate of \$500 each is given to one Armstrong and his brothers, to be paid in the same way. The next item gives to Tennille Patterson an unconditional legacy of \$2,000. The next gives certain negroes to the children of her brother, and certain lands in Alabama then in his possession, with the direction that the lands and negroes be used and possessed by her brother and his wife during their lives as a home for themselves and children, the annual income and profits thereof to be applied to the support and education of their children and themselves during their lives, and at their deaths to be divided in equal shares between their children. The next item is in these words: "I give and bequeath to my beloved son, William Meigs Tennille, all the rest and residue of my estate, whatever character the same may be, to have and to hold to him, his heirs and assigns, forever, subject, however, to the following incumbrances,

conditions and provisions, to wit: That my beloved husband shall have the control and management of my whole estate for and during his life, with the power and authority to plant and gather the crops and control the slaves and other property, sell and dispose of the crops, and receive the proceeds arising from the sale during his life, in trust for my said son, without accountability for the use of the same, so that no unnecessary waste shall be committed; nor shall the same be taken for any debts or liabilities against him at the date hereof. And I do hereby appoint him as my testamentary guardian of my said son during his minority, not doubting that my said beloved husband, from his age and experience, will manage and control said estate for the best interest of our said son before and after his majority, for and during the life of my said husband. And if my said son shall die before his said father, my said husband, he shall continue to manage my said estate in connection with my other executor, Francis A. Tennille, my husband's brother, who shall manage the same together in the same way and manner aforesaid, provided my said husband, from his age or debility, shall at any time require his said brother's assistance, taking and receiving to himself, however, the proceeds arising from my said estate for his support and in trust for my said son, and preserving the corpus of the property in case of his, my son's, death, for the benefit of the wife and children of my said son, if any he should have at his death, or, in default thereof, for the benefit of the bequest hereinafter made." The tenth item gives certain special money legacies, to be paid in the manner specified by the executors or the legal representative having the estate in charge, upon the contingency that the son of the testatrix should die without wife or child living at the time of his death, and after the death of the husband of testatrix; and in such contingency the residue of the estate is given to the next of kin of her son. The last item appoints her husband, W. A. Tennille, and his brother, Francis A. Tennille, as her executors, and W. A. Tennille as testamentary guardian and trustee of W. M. Tennille. The petition of Mary J. Tennille, which was joined in by her husband, W. M. Tennille, was filed in the superior court for the benefit of herself and their minor children, and of other minor children of W. M. Tennille by a former wife, for the appointment of a trustee to keep and preserve the trust estate created under the will of Lucinda M. Tennille, and in place of W. A. Tennille, the former trustee, deceased. On this petition W. A. Hill was appointed trustee for such purpose. The filing of the petition and the order of appointment were of the same date, February 11, 1890. It was agreed that neither of the executors named in the will ever qualified as such, and that Delaware Morris was appointed adminis-

trator with the will annexed, at the March term, 1865, and was discharged at the May term, 1870, of the court of ordinary.

(2) The other special assignments of error are upon the ruling of the court that a judgment rendered at the November term, 1868, of the superior court, in favor of E. S. Bryan against Delaware Morris, administrator with the will annexed, etc., was void, for the reason that it was signed by plaintiff's counsel, and not rendered by the court; and upon the ruling that a sheriff's deed to W. L. Burnett and W. M. Tennille to the land in dispute, besides other land, in pursuance of a sale under an execution in favor of E. S. Bryan against Delaware Morris, as administrator, etc., issued from said judgment, was also void. In evidence was the original declaration in the case of E. S. Bryan against Delaware Morris, administrator, which was in statutory form, filed on April 26, 1867, being a suit upon a promissory note for \$130.50, signed by the testatrix, dated January 1, 1860, and due one day after date. No verdict appeared on the declaration, and no order of the judge authorizing a judgment. The judgment entered thereon was for the amount of the principal of the note, with interest and costs, to be levied on the estate of the testatrix, and was signed by the plaintiff's attorney. The sheriff's deed embraced the land now in dispute and other parcels, in all 1,300 acres; was dated February 3, 1870, and recorded February 15, 1870; and expressed a consideration of \$1,000. It recited that the land was levied on under an execution from the superior court in favor of E. S. Bryan against D. Morris, as administrator with the will annexed, etc., and was sold as decedent's property on the first Tuesday in February, 1870, at public outcry. It also contained the usual recitals of due advertisement. The plaintiff proved by the sheriff and the clerk of the superior court that the execution in favor of Bryan against Morris, administrator, was not in their office, and could not be found, and then introduced a transcript from the execution docket of the superior court, showing an entry of the case, with the amounts of principal, interest, and costs set out in the judgment above stated. The clerk testified that the minutes of the superior court containing the proceedings at the November term, 1868, were not in his office, and had not been since his term as clerk, and could not be found, and so as to the docket of said court for the April term, 1867, down to 1869; and that he knew of no pleadings in the case of Bryan against Morris, administrator, except the declaration. The claimant's counsel testified that he, with the clerk, searched the clerk's office for the papers connected with the suit mentioned; found no paper while the clerk was with him; and, after the clerk left, continued search, and found the declaration, but could

find no other paper connected with the suit. W. L. Burnett testified he was one of the purchasers of the lot of land in dispute, together with other lands, at the sheriff's sale. The sheriff put him in possession after the sale. In a year or two thereafter, he and W. M. Tennille had a division of the land purchased by them at said sale, and the lot in controversy was a part of the land that W. M. Tennille got and took possession of under that division. Witness was at the sheriff's sale when the lands were sold, and bid them in. Does not remember what he paid at the sheriff's sale, but knows he paid for them twice. He had purchased a half interest in these lands of W. M. Tennille about a year before the sheriff's sale, for which he agreed to pay him \$4,000. He does not know who caused the Bryan *f. fa.* to be levied, but he did not. The land was put up and sold in bulk thereunder. When he bought the half interest of Tennille, he did not know of the existence of the Bryan *f. fa.*, and, not knowing how many more executions might be outstanding, he allowed the land to sell, believing it would be for his protection from other executions. He does not know whether the property was worth \$8,000 or not at the time it was sold by the sheriff, but he would not give that for it now. He did not sell his half interest for over \$4,000, but does not remember for how much. Does not know now what the 1,300 acres are worth. W. M. Tennille testified he became of age December 27, 1868. The 1,300 acres of land were worth ten or twelve thousand dollars when sold by the sheriff, and witness thinks it worth that sum now. Is of the opinion that at no time since the sheriff's sale it was not worth \$8,000. Shortly before the sheriff's sale, witness sold Burnett one-half undivided interest in this land, together with half of the mules and corn on the place, for \$6,000. The sheriff's sale came about thus: There was a debt or two hanging over the estate, which the administrator would not pay. Bryan sued and got an execution against the estate, and Burnett suggested to let the whole thing sell, and get a sheriff's title. The sheriff's sale occurred after the estate had been turned over to witness. The Bryan execution was never paid by the administrator. Witness does not recollect the circumstances of the sale. Burnett attended to the business, and witness had nothing to do with it. Some of the legacies were not provided for, and the legatees afterwards sued the estate. Burnett knew of these legacies, and thought the sheriff's sale would defeat them as well as all other debts overhanging the estate. His suggestion to sell the land under the Bryan *f. fa.*, was made some time after witness sold him the half interest. The attorney for Bryan had the levy made, and Burnett then suggested that we let them sell. Delaware Morris, the administrator, put witness in possession of the

whole of these lands as his own property; but, after being discharged as administrator, witness went along and held the property as his own, and sold Burnett one-half interest. In letting the land sell they were trying to defeat the legacies mentioned, and the debts overhanging the estate. Witness held the land from the time it was turned over to him until he sold a half interest in it to Burnett. They held the land together until, after the sheriff's sale, they had a division. Witness then held his part, including the lot in controversy, from that time until the claimant took possession. Does not know whether Morris put him in possession as against the will or under it.

The evidence further shows that on May 3, 1883, W. M. Tennille made to one Sherwood a deed to the land in dispute under Code, § 1969 et seq., to secure a loan. On the next day Sherwood conveyed the same land to the plaintiff, subject to the right of Tennille to have a reconveyance on payment of the loan. The plaintiff obtained judgment against W. M. Tennille on March 12, 1889, and on October 12, 1891, for the purpose of a levy, filed and had recorded a deed conveying the land to him. The sheriff testified that W. M. Tennille was in possession of the land in 1882, and so remained until the claimant took possession. Witness is cultivating the land this year. Rented it from W. M. Tennille and the claimant both. Consulted both, but gave neither any obligation for rent.

W. E. Simmons and W. C. Morrill, for plaintiff in error. W. D. Kiddoo, for defendant in error.

BLECKLEY, C. J. The ultimate question in the court below was whether the premises levied upon by virtue of an execution in favor of the mortgage company against W. M. Tennille were subject to sale as his property, as against a claim thereto interposed by Hill, as trustee for Tennille's wife and children. At the death of Tennille's mother, in August, 1864, these premises belonged to her, and she died testate, leaving him her residuary legatee, he being her only child. Her husband and her husband's brother were nominated in the will as executors, but they never qualified. Her husband died in October, 1864, and in the next year one Morris was appointed administrator with the will annexed. He obtained letters of dismission in 1870. W. M. Tennille arrived at majority in 1868. The administrator put him in possession of all the lands of the estate as his own property. He sold one-half interest in them to one Burnett. Thereafter, in February, 1870, all these lands were sold at sheriff's sale as the property of Mrs. Tennille's estate, by virtue of an execution based on a judgment rendered by Quidman superior court at November term, 1868, in favor of Bryan against Morris, as administrator with

the will annexed of Mrs. Tennille, and the sheriff conveyed the whole to Burnett and W. M. Tennille as the purchasers at that sale. He put Burnett in possession, who held the premises now in controversy until a voluntary partition of the whole lands was made between him and W. M. Tennille. By that partition Burnett's interest in these premises ceased, and from thenceforth Tennille had and held the exclusive possession up to the year 1890, if no longer. While thus in possession, he conveyed the premises by absolute deed as security for a loan of money; this deed being made under section 1969 of the Code. The ownership of the debt created for the loan, and title to the premises held as security therefor, passed from the lender into the mortgage company, which obtained judgment against Tennille for the amount of the loan in March, 1889. After revesting title in Tennille, as provided for by section 1970 of the Code, the premises were levied upon as his property in July, 1892, by virtue of an execution founded on this judgment, and a claim was interposed by Hill, as trustee for Tennille's wife and children. By consent of parties this claim was tried by the presiding judge without a jury. His finding was in favor of the claimant, and a motion made by the mortgage company for a new trial was overruled. The contention by the mortgage company is: First, that by virtue of the sheriff's sale, and the conveyance thereunder to Burnett and Tennille, and the subsequent petition between these two, Tennille had absolute fee-simple title to the property levied upon; second, that if he acquired no title by the sheriff's sale, he has title, by virtue of his mother's will, to at least a life estate in the premises, and that that estate, if no more, ought to have been found subject to sale under the execution; third, that no trust in behalf of Tennille's wife and children was created by the will, and therefore that the appointment of Hill as trustee, which occurred in February, 1890, was without any validity.

1. Several objections were made to the sheriff's sale and to the title of Tennille in so far as it depends upon the deed made by the sheriff in pursuance of that sale, but only one of them was passed upon by the trial court. The others, not having been adjudicated, will be left for determination on a future trial. The objection ruled upon was that the judgment on which the execution was founded was entered up and signed by the plaintiff's attorney, and no verdict was produced or proved on which such a judgment could have rested, nor did it appear that the judgment itself had been entered on the minutes of the court so as to make it good as a judgment of the court rendered without the verdict of a jury. The judgment was more than 20 years old, and the minutes of the court applicable to the term at which the judgment was rendered were lost or destroyed. There was no proof tending to

show that a proper verdict was not entered on the minutes, or, if no verdict, that the judgment itself was not so entered. Had it appeared affirmatively that the minutes contained no verdict, and no entry of the judgment, then the execution might possibly be held as having had no legal judgment to support it; but without showing these things affirmatively the presumption is, and ought to be, after such a lapse of time, that the minutes contained what they ought to have contained,—that is, either a verdict on which a judgment signed by the plaintiff's attorney could properly be based, or a copy of that judgment and the signature of the judge to the minutes of the day's proceedings on which the entry took place. To invoke such a presumption for upholding a sale made under an execution based on the judgment, which sale was acquiesced in by the parties concerned for some 20 years before any attack was made upon it, would be to rightly use the doctrine of presumptions, and to treat with proper deference a judgment which the parties to it and the officers of court in acting upon it must have regarded as legal and binding, and which for more than a score of years has stood without any proceeding to reverse or set it aside. Rather than rip up a judgment and a sale under it, both of them so old, any presumption should be indulged which it is legally possible to invoke. The action in which the judgment was rendered was based on a promissory note made by the testatrix, Mrs. Tennille, and at the trial of the present case none of the papers connected with that action could be found except the declaration and the judgment as entered up thereon and signed by the plaintiff's attorney. It did not appear whether any issuable defense had been filed on oath or not. The docket on which any defense would have been noted, according to regular practice, was lost or destroyed. If no such defense was filed, the case was one in which, under the constitution of 1868, judgment should have been rendered by the court without the intervention of a jury. The judgment produced, though not signed by the presiding judge, would be a compliance with that requisite of the constitution if it was entered on the minutes of the court. This has been heretofore ruled. *Odom v. Causey*, 59 Ga. 607; *Jones v. Word*, 61 Ga. 26; *Tharpe v. Crumpler*, 63 Ga. 273. What we now rule is that, under the circumstances of this case, a presumption that it was so entered is to obtain, the ground of this presumption being that it ought to have been so entered if no issuable defense on oath was filed. The only possible alternative is that such a defense was filed; and, if it was, then there ought to have been a verdict, and that verdict ought to have been entered on the minutes of the court. The principle of the foregoing presumption covers this alternative, for if a jury ought to have passed upon the case, and their finding ought to have

been entered on the minutes, these things should be presumed, in favor of the judgment of a court of general jurisdiction, to have been done; the same, on the hypothesis involved, being necessary prerequisites to the rendition of the judgment. It follows, we think, manifestly, that, as against the one objection to the judgment which we have considered and discussed, the premises levied upon should have been found subject.

2. But conceding that the case is to be tried by the terms of the will of the defendant's mother, the will gives him an estate for life which could be enjoyed by him or his assignees without interfering with the trust estate in remainder which the will creates in behalf of his wife and children. This being so, the court certainly erred in finding for the claimant, the trustee, so far as this life estate was concerned. The administrator with the will annexed put Tennille in possession, and while in possession he conveyed the land in dispute as security for the debt now sought to be collected. If he has a life estate in it, and not the whole fee, why should not this life estate be devoted to the payment of the debt? He is a grown man, and has no need of a trustee to manage and control his life interest in the property. If he can use and enjoy it without interfering with the trust in remainder, why may not his assignee or vendee do so too? And if his own assignee or vendee could do it, why could not one who comes in as a purchaser at a judicial sale? According to the true spirit of our law at present, whatever a man can enjoy himself as property can be sold for the payment of his debts, unless it be exempted from levy and sale in the manner pointed out by the homestead and exemption laws. The material terms to be noticed in the will are that the residuary clause gives to Tennille the whole residue, "to have and to hold to him, his heirs and assigns, forever, subject, however," to certain specified incumbrances, conditions, and provisions. Among these was that the income of the whole estate was to be received by the husband of the testatrix during his life without accountability for its use. Another was that the husband was to preserve the corpus for the benefit of the wife and children of the son, if any the son should have at his death; or, in default thereof, for other beneficiaries, afterwards specified. The husband having died in 1864, his interest terminated, and this extinguished his interest in the income, together with the trust for the son as to the income, which was a personal trust without accountability; but the trust as to the corpus survived. That trust, however, did not interfere, certainly as to realty, with full and complete enjoyment of the property by the son during his own life. No trust as to him, apart from the office of executor, appears to have been contemplated by the testatrix, except a personal one in her husband, which was to

continue for his lifetime only. As the terms of the will relevant to this litigation are set out in the official report, there is no need to transcribe them in this opinion. The court certainly erred in finding nothing whatever subject to sale under the levy and claim in controversy. Judgment reversed.

HOGG v. SAVANNAH, A. & M. RY. CO.
(Supreme Court of Georgia. July 17, 1893.)

FIRST NEW TRIAL.

There was no abuse of discretion in granting a first new trial in this case.

(Syllabus by the Court.)

Error from superior court, Stewart county; W. H. Fish, Judge.

Action for personal injuries by Z. T. Hogg against the Savannah, Americus & Montgomery Railway Company. Plaintiff obtained a verdict, and from a judgment granting a new trial he brings error. Affirmed.

The following is the official report:

This was a suit by Hogg against the railroad company for damages resulting from an injury to his hand, which he sustained by the collision of a lever car (or hand car) with the rear end of a passenger train. The jury found for the plaintiff \$1,750, and the court, on motion of the defendant, granted a first new trial, to which ruling the plaintiff excepted. The grounds of the motion were that the verdict was contrary to law and evidence, and to several portions of the charge of the court, and that it was excessive. The plaintiff's declaration showed that he was in the employment of the company as a laborer, under the supervision and control of a foreman, on the railroad track. Late in an afternoon, he and other workmen under the same foreman were returning home, as was their custom, on a lever car. The foreman left this car, and got on the rear end of a passenger train which was ahead, and going in the same direction, ordering the plaintiff and the others on the lever car to follow close behind the passenger train. While so following, the time being about 8 o'clock at night in February, the passenger train stopped, and the lever car ran against it, and plaintiff's hand was caught between one of the handles of that car and the bumper of the passenger coach, breaking and bruising the same. The plaintiff alleged that he was without fault, and unable to get off the car or to avoid the collision; that, as soon as he saw that the passenger train had stopped, he called out to the other laborers to put on brakes, so as to stop the lever car as soon as possible; and that the laborer at the brakes put them on with all his power, but they failed to have any effect on the car, or to impede its progress, because they were defective, although properly manipulated. The specifications of negligence were that the defendant furnished to the plaintiff and his fellow servants a lever car with brakes so defective that they

would not operate so as to stop the car, and failed to notify plaintiff of such defect, and that the defendant's agent stopped the passenger train suddenly at an unusual place, at the bottom of a steep grade, without giving any signal, and with knowledge that the lever car, with plaintiff and the other workmen on it, was following close behind. The evidence was conflicting on the material issues.

Hinton & Cutts, for plaintiff in error. B. P. Hollis and E. A. Hawkins, for defendant in error.

PER CURIAM. Judgment affirmed.

WIGGINS v. MAYER et al.
(Supreme Court of Georgia. July 17, 1893.)

DIRECTING VERDICT—LACHES OF COUNSEL.

1. The suit being based on promissory notes and an account, and the defendant having been personally served, and the case, according to the judge's docket, being in default, and no plea having been filed, it was not error for the court to apply section 3457 of the Code, and direct a verdict for the plaintiff without proof of the account; the notes sued on and the open account being introduced in evidence by the plaintiff.

2. On the showing made, the court could consider counsel for the defendant below as in laches in not looking to the state of the docket, and seeing in due time whether his name was marked thereon or not.

3. There was no error in overruling the motion for a new trial.

• (Syllabus by the Court.)

Error from superior court, Wayne county; J. L. Sweat, Judge.

Action by Mayer & Ullman against William M. Wiggins to recover on promissory notes and an open account. The court directed a verdict for plaintiffs, and denied a new trial. Defendant brings error. Affirmed.

G. B. Mabry and Stewart Johnson, for plaintiff in error. Crovatt & Whitfield and Harrison & Peeples, for defendants in error.

BLECKLEY, C. J. 1. As the action was not based exclusively on unconditional contracts in writing, but included, with the promissory notes, an account, the case was not one for rendering judgment by the court without a jury. According to the bench docket it was in default; no counsel was marked for the defendant, and in point of fact no plea was filed. There had been personal service of the petition and process on the defendant. The Code, in section 3457 provides that in all cases of suits on open accounts, where there has been such service, and no defense is made, either in person or by attorney, at the time the case is submitted for trial, it shall be considered in default, and the plaintiff shall be permitted to take judgment as if each and every item were

proved by testimony. In the present case, personal service was equivalent to proving the account, and the notes declared upon were introduced in evidence with the account, and thus the whole cause of action was established, and there was no error in directing a verdict.

2. There was no motion to open the default and make defense instant, but counsel contended that there was in fact an appearance and a verbal answer to the case when it was called on the docket at the appearance term, and by his own testimony and that of his client showed that this was true in fact; but the court disregarded this parol evidence, and decided to abide by the docket. We cannot say that this was error. A good reason for abiding by the docket might be that counsel for the defendant was in laches in not looking at the state of the docket, and seeing in due time whether his name was marked thereon or not. Six months had elapsed from the time this docket was called and the entry of default made. Certainly, that entry would not have been made if the court had heard counsel answer orally at the call of the case. The Code provides that the general issue shall be considered as filed in all cases which are answered to at the first term. Code, § 3458. But the appropriate evidence of a case being answered to at the first term is an entry made at that term on the bench docket, the usual entry being the word "Answered," or an abbreviation of it, together with the names of counsel making the answer, these names being commonly put on the margin of the docket opposite the statement of the case. Here the usual evidence of answer was wanting, and no writing whatever, either plea or entry, was produced to vouch the fact. Inasmuch as answer is to be a substitute for a written plea, the fact of answer ought to be matter of entry on the docket; and it could well be regarded as laches on the part of counsel in not looking at the docket and having the proper entry made, if not at the appearance term, as soon thereafter as was practicable.

3. There was no error in denying a new trial on any of the grounds taken in the motion. Judgment affirmed.

SOUTHERN MEDICAL COLLEGE et al. v. THOMPSON et al.

(Supreme Court of Georgia. July 17, 1893.)

INTERLOCUTORY INJUNCTION.

There was no error in denying the interlocutory injunction.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Action by the Southern Medical College and others against John S. Thompson and others for an injunction. From a judgment denying an interlocutory writ, plaintiffs bring error. Affirmed.

The following is the official report:

A petition was brought by "the Southern Medical College, the Southern Dental College, the faculty of the said Southern Dental College, and the board of trustees of the Southern Medical College," against five individuals, praying for an injunction to restrain them from procuring a charter, for which they had applied to the superior court, incorporating them under the name of the Southern Dental College, and from conducting the business contemplated by the proposed charter under that name. The defendants demurred and answered; and, on conflicting evidence, the injunction was denied, and the plaintiffs excepted.

It appears that in 1887 an amendment to the charter of the Southern Medical College was granted, whereby it was constituted a dental college, in addition to its powers as a medical college; the application for the amendment, and the order granting the same, containing no statement as to change or modification of name. The plaintiffs make the following allegations: As soon as the same could be done, the dental faculty provided for in said amended charter was elected, and the Southern Dental College, as authorized by its charter, was organized under that name as a department of dentistry, and has been in successful operation ever since, teaching the science of dentistry, etc., and carrying into effect, in good faith, the objects and purposes of said corporation. The said Southern Dental College contracted in its said name, advertised therein, became and was known thereby in Georgia and other states of the Union. It has prospered, and its standing is high among the dental colleges of the state, and it has the confidence of the people. It is now about to reap the reward of the labor of its founders. Said dental college is not only named by necessary implication from the recitations of the charter as granted, and the right to the said name is asserted to the same, but it has had the business thereof advertised therein, has used said name, with the knowledge and consent of the defendants, for six years, has contracted for a large sum of money in the name of the faculty thereof, in the said name binding the defendants by their consent to the payment thereof in the name of the Southern Dental College, as a department of dentistry of the Southern Medical College, and has done and carried on its business in said name for six years, and still does so, of all of which the defendants have full knowledge, and have given their consent to the same, they themselves having been professors and lecturers and teachers therein. Plaintiffs have a right to the name from long use as a trade-name, and any infringement upon it is in violation of their rights. Two of the defendants have resigned from the faculty of said college, not in good faith, but in order to injure and damage plaintiffs, and have combined and con-

federated with the other defendants to defraud, injure, and oppress plaintiffs, as hereafter stated. The defendants seek to be incorporated as the Southern Dental College, the identical name given to and used by plaintiffs and some of defendants for the college started as aforesaid, and used for six years. The defendants propose, in their application for charter, to do business in the city of Atlanta, which is the place of business of plaintiffs' college. There will arise, and has already arisen, confusion in their correspondence, and the public will be confused and misled into the belief that the colleges are the same. Business intended for the present college will be attracted to the new in the following manner: The law and custom of the said dental colleges is that students will be and are required to attend three sessions of the college before graduation, and the students of the present college will be and are now being induced to attend the new college for graduation, on the idea that it is the same college, and being conducted by some of the same professors, and in the same name, inquiries having been made with that impression; and the new students will be imposed on, by being induced to believe that the new college, if incorporated, will be the true one, while the present one is an impostor, notwithstanding the defendants are responsible for its name. have assisted in getting it in debt, and have resigned and left it to break it up, by getting a charter for another of same name, in said city, and for same purposes. The acts threatened by defendants, and now being done, in procuring the charter and in organizing and establishing the same under the name of the Southern Dental College, and in running the same in that name in Atlanta, and in canvassing the students of the present college, are contrary to equity and good conscience, under the circumstances, and will and have already injured and damaged the plaintiffs, who are remediless by the strict rules of law, there being no provision in law for objections to the grant of the charter.

The demurrer by the defendants was on the grounds that there is a misjoinder of parties, and there is no law authorizing actions in the name of the trustees or faculty or dental college in the charter of said medical college; that there is no cause of action set out, nor any sufficient reason for injunction or other relief; that there is no charge that defendants are not able to respond to any action that might be brought by plaintiffs; that the petition, on its face, showed that the corporate name, and the only one in which petitioners are authorized to conduct business by virtue of their charter, is the Southern Medical College; and that there is no law authorizing objection to the granting of a charter in the manner in which plaintiffs attempt to object.

The answer sets forth the following: It is

not true that any charter has ever been obtained by any one, and especially the Southern Medical College, by amendment or otherwise, authorizing them to use the name of the Southern Dental College, nor that said name was adopted or used by the Southern Medical College; but the name so adopted and used under and by virtue of its charter was the Dental Department of the Southern Medical College, under which name it has awarded diplomas, made advertisements, used an official seal, and done all of its official acts. Said college is not now advertised, known, or conducted as the Southern Dental College. There is no charter or law authorizing it to conduct business under that name, but it is controlled by the privileges named in its charter, wherein the official name is given as the Southern Medical College. It is true that three of the defendants were in the faculty of the dental department of the Southern Medical College until February, 1893, when they tendered their resignations. Before this, two of defendants, and L. D. Carpenter, one of the plaintiffs, held frequent consultations as to the organization of a dental college in Atlanta, and Carpenter took an active and leading part in said conferences, accompanied respondent to the office of an attorney, and employed the attorney to file application for charter as the Southern Dental College. The purpose of organizing said college was to better advance the science of dentistry, dignify the profession, and protect the public against unskilled operators. At all of said meetings the objects and purposes were fully discussed. Carpenter was present, and joined in and advocated establishing said Southern Dental College, and agreed and did become one of the faculty therein, when the charter should be obtained. He well knew that there was no disposition by respondents, or any of them, to injure or damage the plaintiffs. He sent in his resignation at the same time at which defendants tendered theirs, and co-operated with them in all the movements to establish the Southern Dental College; one of the ideas being to have a dental college separate and apart from any other institution, deeming it advantageous to the profession as well as to students. It is absolutely false that any of defendants have attempted to injure, damage, or oppress any of plaintiffs; but defendants have acted in the utmost good faith, and have everywhere stated and advertised that the Southern Dental College had no connection with any medical college. It is well known that each of them stand high in the dental profession, and would do nothing contrary to the ethics thereof, or to good conscience. They are at a loss to account for the conduct of Carpenter, who made affidavit to the facts set out in the petition; and, in view of his previous knowledge and conduct, defendants say that he could not truthfully subscribe to the affidavit, and must have signed it without reading it. Plaintiffs are

endeavoring to place every obstacle in the way of defendants, to prevent them from establishing the dental college, and their motive is that of breaking down competition. It is not true that plaintiffs have the right to use the trade-name of the Southern Dental College. There is no disposition or desire on the part of defendants to make the public believe that the colleges are the same. They have expended a large amount of money in advertising, making contracts, and in said name have done many things in a business way, anticipating the granting of their charter by the court. New students are not required to attend three courses at the same college, but can attend two or one course at any college, and afterwards complete their course at any other colleges. The Southern Medical College has several departments, and all of them are conducted under style of departments, and are so advertised, to wit, the Law Department of the Southern Medical College, Pharmaceutical Department of the Southern Medical College, and Dental Department of the Southern Medical College, and this is the only manner in which plaintiffs are authorized to advertise and conduct their business. They have never conducted the college, or any department thereof, in separate and distinct names, and they are not authorized to conduct the dental department under the style of the Southern Dental College.

The nature of the evidence at the hearing is indicated by the foregoing report.

Thos. W. Latham, for plaintiffs in error.
W. R. Brown, for defendants in error.

PER CURIAM. Judgment affirmed.

FELTON et al. v. STATE.

(Supreme Court of Georgia. April 17, 1893.)

RECOGNIZANCE—BREACH.

When a bail bond in a criminal case is conditioned for the appearance of the principal at the county court to answer a bill of indictment, the bail is not bound to produce his principal until a bill of indictment has been found, although, when the obligation was entered into, there was pending in the county court an accusation for the offense, made out after the accused had waived indictment. If it was the purpose of the officer to take an obligation for appearance to answer the pending accusation, that purpose was not signified by taking an obligation to answer to a bill of indictment; a county court accusation not being a bill of indictment, but something different therefrom, both in form and substance.

(Syllabus by the Court.)

Error from superior court, Sumter county; W. H. Fish, Judge.

Action by the state of Georgia against Adam Felton and others to forfeit a recognizance. There was judgment for plaintiff, and defendants bring error. Reversed.

J. A. Hixon and E. H. Outts, for plaintiffs in error. L. J. Blalock and O. B. Hudson, Sol. Gen., for the State.

BLACKLEY, C. J. County courts can deal with two classes of misdemeanor cases, the one class being indictments originating in and transferred from the superior court, and the other being accusations originating in the county court. Can bail, who obligate themselves in their contract to produce their principal in the county court to answer a bill of indictment, be required to produce him there to answer a county court accusation? We think not. A case triable on indictment is not a case for accusation, and a case triable on accusation is not one for indictment. An accusation, it is true, could be abandoned by the state, and an indictment for the same offense procured, or an indictment might be abandoned and an accusation preferred; but, where bail enter into an obligation to have their principal forthcoming to answer an indictment, they do not violate that obligation by failing to produce him to answer something which is not an indictment, either in name or in fact, but something which the statutes of the state themselves distinguish from it. In this case the bail is not concerned with the fact that, at the time he contracted touching the indictment, there was an accusation for the offense pending in the county court, and that this was made out after the accused had waived indictment. This state of facts would not indicate that the bail meant to waive indictment, but rather the contrary, for what he undertook was to produce his principal to answer to an indictment, and the better supposition would be that the state meant to abandon the accusation, procure an indictment in the superior court, and have it transferred to the county court. At all events, no purpose to have the accused present in the county court to answer an accusation was signified by taking an obligation to have him there to answer a bill of indictment. The bail is entitled to stand on his contract according to its terms, and, no indictment having been found, his obligation has not been broken. Judgment reversed.

WOLF et al. v. KENNEDY.

(Supreme Court of Georgia. Oct. 3, 1893.)

CONVERSION—PLEADINGS—MISTATING TITLE OF COURT—DESCRIPTION OF PROPERTY—FORM OF BOND.

1. It is no cause for setting aside a judgment rendered by the city court of Atlanta that the court was characterized in the plaintiff's petition as the city court of Fulton county, the process correctly describing it as the city court of Atlanta, which court is the only city court held in Fulton county, and its jurisdiction extending to all residents of the county; nor is it any cause for setting the judgment aside that the property alleged to have been converted was vaguely and loosely described in the petition, and that some of it was stated therein to be the clothes of plaintiff's father.

2. That the same inaccuracy in designating the court was also in the bail bond is no ground for setting aside the judgment; nor is the omis-

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sion to date the bond, or the failure therein to describe the property, the bond fully identifying the action in which it was given.

3. The bond given in this case corresponded substantially with that prescribed in section 3419 of the Code, and the judgment was properly entered thereon against the principal and surety for the amount of the recovery in the action. It was not incorrect to designate the surety as such in the judgment, although he was not expressly described as surety in the bond, and did not add the word "surety" or "security" to his name in executing the same. In an action for the conversion of personal property, the election of the plaintiff to take a money verdict is sufficiently apparent from the mere fact of the rendition of such a verdict, together with entering up judgment thereon payable in money only.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Laura C. Kennedy against H. Wolf and another for conversion. Plaintiff had judgment, and defendants bring error. Affirmed.

The following is the official report:

A statutory action for the recovery of certain personal property was brought by Miss Kennedy against H. Wolf. A verdict and judgment in favor of the plaintiff were rendered on May 22d, and, on June 1st, motions were made and sworn to by Wolf and by Barwald, the security in the bail bond, to set aside the judgment. On the hearing the motions were overruled, and the movants excepted.

The grounds of Wolf's motion are as follows: (1) The verdict and judgment were taken by default, in the absence of defendant and his counsel, who had a good and meritorious defense to the suit, and was prevented from appearing and defending by inadvertence and mistake. As soon as defendant was served, he consulted his counsel, and employed them to prepare his defense and defend him in the suit. The copy of the petition and process which was served on him was accidentally mislaid, and he did not therefore show it to his attorneys, but informed them of it, and both he and they then supposed the case was in the superior court, as the clerk of the superior court is also the clerk of the city court, and the papers, process, and wrappers used in both courts are very similar, if not precisely alike, in size, style, shape, color, and general appearance. Defendant never once thought of the city court, and it was not once suggested in any of his consultations with his attorney, who advised him that it was only necessary for him to appear or plead at the first term of the superior court, which would not convene until March, 1893, and would continue in session until about the 1st of July, and promised to enter appearance by writing their names for him in the trial docket of the superior court before the adjournment of the first term, which is still in session, it having been the intention of the attorneys so to enter their names, and file pleas, if necessary, before adjournment, not once supposing the

case was in any other court. Meanwhile, defendant was procuring his witnesses, and his defense was being prepared. His counsel informed him that, on account of the crowded condition of the docket of the superior court, it would necessarily be over a year before the case could be reached for trial in that court. The matter was in that shape when the case was called in the city court of Atlanta, which recently had but two terms a year, but, by a change of the law which went into operation since defendant was served, now holds six terms a year; and on May 22, 1893, in the absence of any appearance or defense of defendant or his attorneys, the verdict and judgment were rendered for the full amount alleged to be the value of the goods sued for, and execution was immediately issued, and levied on property of Barwald as security, and defendant then heard of it for the first time; and now at the first opportunity, and during the same term of the city court of Atlanta, he makes this motion, and shows that he has the following good and meritorious defense to the suit, (setting forth a number of alleged facts, including the statements that he never did have possession of the property sued for, or any of it, that no demand was ever made on him therefor, and that the affidavit of the plaintiff to the suit was false.) Said suit and verdict are a fraud on defendant, and, if allowed to stand, will do him unconscionable injustice. (2) The verdict and judgment are void because the declaration is addressed "to the city court of said county," and prays process to the "city court for Fulton county," there being no such court in existence or authorized by law; and because process was issued by the clerk of the city court of Atlanta in the name of the judge thereof, and was attached to the petition, and a copy served on defendant. (3-5) The verdict and judgment are void on their face, because they do not show that the plaintiff elected what kind of verdict and judgment she would take, and because no alternative is given, allowing the defendant to return the property; but they are a simple verdict and judgment as in case of *assumpsit*. (6) The verdict and judgment are void because the petition does not describe the property with sufficient certainty, or identify it, to render a verdict or judgment on it, or for defendant or his security to return it, or the sheriff to receive it. For instance, the petition mentions: "One carpet of the value of \$20; one oilcloth of the value of \$5; four family pictures of the value of \$50; two volumes of encyclopedia of the value of \$15; one lot of books of the value of \$5; several ladies' dresses of the value of \$12; several doll chairs of the value of 50 cents; several pairs of nice gloves, and a great many other keepsakes, that money could not have bought, of the value of \$10; one small sack of old family papers, containing two morocco pocket

books filled with valuable family papers, at a small valuation of \$200; one lot of petitioner's father's clothes of the value of \$100; heirloom jewelry of the value of \$5,"—without further description; and yet all and each of said articles are included in the amount of the verdict and judgment, with many more equally as badly described, and none of the articles in the petition are described with sufficient certainty. (7) The verdict and judgment are void because the petition includes the item of "one lot of petitioner's father's clothes of the value of \$100," without alleging that they were then the property of petitioner, but showing, on the contrary, that they were not her property. (8) The verdict and judgment are void because the obligation of the bond is that defendant shall produce the property, and have it forthcoming to answer the judgment, and the verdict and judgment are silent as to that, and do not allow it. (9) The judgment is void because the property is not described in the bond, and the bond is not dated, and because the bond recites that it is based on a suit in the city court of Fulton county, and is returnable to that court, when there is no such court created or authorized by law.

Barwald, the security, sets forth in his motion the following grounds: (1) The judgment and execution describe him as security, when he is not named at all in the bond, either as principal or security, his name being simply signed to it with Wolf, who is named in the bond as principal, without naming anybody as security in the body of the bond. (2) Neither the bond nor the approval thereof is dated. (The bond as shown by the record is dated this —, 1892, and refers to the suit as returnable to the next January term, 1893, of the city court for the said county. Following the bond is an affidavit by Barwald "that he is security on the within bond," and that he owns property to a certain amount, which affidavit is dated December 16, 1892.) (3) The property is not described in the bond. (4) There is no such court as the city court of Fulton county. (5) The verdict and judgment are not in the alternative, and do not allow the defendant or his security to produce the property in accordance with the condition of the bond. (6, 7) There is no pleading on which to base the verdict and judgment. (8) Variance between the petition and process, as alleged in the motion of Wolf. (9) Insufficient description of the property in the petition. (10) Some of the property sued for is shown by the petition not to belong to the plaintiff, with no averment showing her right to recover it.

Lewis & Green, for plaintiffs in error. M. H. V. Jones and Hulsey & Bateman, for defendant in error.

PER CURIAM. Judgment affirmed.

NEW SOUTH BLDG. & LOAN ASS'N v. WILLINGHAM et al.

(Supreme Court of Georgia. Oct. 3, 1893.)

RECEIVERS—APPOINTMENT—EVIDENCE.

Neither the petition nor the answer of the debtors being verified in positive terms, and the hearing having taken place without any evidence, by affidavit or otherwise, establishing the facts alleged in the petition, the judge erred in appointing a receiver and granting an injunction, as against the rights and over the objection of the plaintiff in error.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Suit by Willingham & Co. and others against the New South Building & Loan Association for the appointment of a receiver. Judgment for plaintiffs. Defendant brings error. Reversed.

Ulysses Lewis and John L. Hopkins & Sons, for plaintiff in error. King & Anderson, J. M. Slaton, Simmons & Corrigan, and Arnold & Arnold, for defendants in error.

PER CURIAM. Judgment reversed.

JACKSON v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

CRIMINAL LAW—NEW TRIAL—RULINGS ON EVIDENCE.

1. It not appearing from the motion for a new trial or the bill of exceptions that the bills of indictment were objected to when offered and received in evidence, or that any motion was made to rule them out, it was not error to deny a new trial because of their admission, and because the solicitor general was allowed to comment upon the same in his argument to the jury.

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

John Jackson was convicted of assault with intent to murder, and a new trial was denied. Defendant brings error. Affirmed.

The following is the official report:

John Jackson was convicted of assault with intent to murder, and excepted to the overruling of his motion for a new trial. The motion contains the general grounds, and alleges that the court erred "in admitting in evidence three other indictments then standing against the defendant, he never having been tried thereunder, and the defendant's character not having been put in issue by himself;" and "in allowing the solicitor general to comment to the jury on other indictments against defendant, introduced in evidence over defendant's objection." This is all the motion discloses on this subject. The brief of evidence recites that the solicitor general tendered in evidence the bills of indictment in which Jackson and Hall were jointly indicted, and in which Hall had

pleaded guilty; that defendant's counsel objected to the indictment as against Jackson, because the state could not put his character in issue; and that the court ruled them in. The evidence also shows that Hall was introduced as a witness by the defense. In the charge of the court appears the following: "Certain bills of indictment have been put in evidence here as against Hall, and against Hall and Jackson combined, and as against Jackson combined with the others. Hall has pleaded guilty to these indictments; and if he has pleaded guilty to save others, and he has sworn on the stand that he is entirely the guilty person in this case, and that he was entirely the guilty person in the several other cases, that I have a right to say to you, because it is conceded by the defense, the position of the state is that the state claims before you that Hall is not sincere in these pleas of guilty; that for some purpose of his own—that he has done so for some motive of his own—he has done this for the purpose of relieving Jackson of this and the other indictments. Now, if those indictments have been put in here for the purpose to enable you to judge of Hall's credit,—of his relation to the case,—if Hall did not stand before you in the way he does, these indictments would not go in against this defendant,—they would not be evidence against him; and in themselves they are not evidence against him, but they are only evidence for the purpose of enabling you to judge Hall's testimony. And if you, gentlemen of the jury, believe that Hall swore the truth in spite of all the other evidence in the case, why, this defendant would not be guilty. You could not find him guilty, because Hall says this defendant is not guilty, and he is the only one that is guilty; and hence this is, as I said to you, to enable you to dispose of Hall's testimony, to believe it or not to believe it, as you may see fit."

Haralson & Gowdy, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

SNYDER v. VIGNAUX.

(Supreme Court of Georgia. Oct. 3, 1893.)

APPLICATION FOR CERTIORARI—NOTICE.

A letter addressed to and served upon the defendant in certiorari, in the following words: "I have been waiting for an answer from you, as to whether you will agree to set aside the judgment in the Vignaux case. The certiorari has been granted, and returned to the J. P. court. I have also paid the judge the costs which have accrued to date, and, of course, the jury fee paid out by you will be given back. I think, in view of all the circumstances, that you will be none the loser to set this aside, and let us have a final trial before a jury. I saw Mr. Rosser, and submitted the matter to him, and I am certain he is in favor of it. We can try it to-morrow before a jury, or next month, just as you

please. Please answer,"—is not a sufficient compliance with section 4059 of the Code, which requires written notice to the defendant, not only of the sanction of the writ of certiorari, but also of the time and place of hearing, at least 10 days before the sitting of the court to which the same is returnable.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by L. Snyder against Bernard Vignaux. Judgment for plaintiff. Certiorari granted. Plaintiff brings error. Reversed.

Rosser & Carter, for plaintiff in error. Simmons & Corrigan, for defendant in error.

PER CURIAM. Judgment reversed.

JACKSON v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

LARCENY—PROOF OF OWNERSHIP—SUFFICIENCY OF EVIDENCE.

1. Where an employe of a corporation enters its service and performs labor for it in a business which it conducts under a name other than its corporate name upon certain premises, and he commits a larceny from the house in which such business is conducted and in which his services are performed, on being indicted for the larceny the ownership of the house may be laid in the name which the corporation has assumed and he has recognized, and proof of such ownership will uphold the indictment in that particular. Reg. v. Atkinson, 2 Moody, *278, *283.

2. The evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

John Jackson was convicted of larceny from a house, and, his motion for a new trial having been denied, he brings error. Affirmed.

The following is the official report:

The indictment is not a part of the record in this court. From the judge's charge to the jury it appears that the defendant was indicted for committing a burglary on the place of business of the Commercial Oil Company, and stealing therefrom money, etc. The plaintiff in error was found guilty of larceny from the house. He moved on the general grounds for a new trial. The motion was denied, and he excepted. The theft of the property was proved, and a witness testified that it was the property of the Commercial Oil Company, which is a branch of the Peerless Refining Company of Cleveland, Ohio, a corporation, while the Commercial Oil Company is not incorporated, has no president, but has a general manager. In another part of his testimony the witness states that it was the property of "the firm," and was in charge of the manager. The defendant was a watchman for the Commercial Oil Company's premises, and had keys which gave him access to the build-

ing. There was testimony tending to show a confession by him of the larceny, corroborated by the finding of some of the property at or near the spot where he said it was to be found.

Haralson & Gowdy, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

WHITE v. OFFIELD.¹

(Supreme Court of Appeals of Virginia. Dec. 7, 1893.)

CLAIM AGAINST ADMINISTRATOR—PRESUMPTION OF PAYMENT—LIMITATIONS.

1. Where, on the settlement of an administrator's accounts, a balance found in his hands is ordered to be divided proportionally among creditors, a creditor cannot, 21 years thereafter, assert his claim in a lien creditor's suit against such administrator, instituted by other creditors of the estate.

2. The lapse of 21 years after an order directing an administrator to distribute the assets of the estate among creditors raises a presumption of payment.

Appeal from circuit court, Green county

Petition by R. M. White for leave to file a claim against the estate of James Offield. From a decree denying the prayer of petitioner he appeals. Affirmed.

D. Harman, Jr., for appellant. John E. Roller and Duke & Duke, for appellee.

LACY, J. This is an appeal from a decree of the circuit court of Green county, rendered at its June term, 1890. The appellant, R. M. White, filed his petition in the circuit court of Green county, in the cause therein of Davis v. Offield, seeking to have a certain debt claimed to be due to him by James Offield's estate paid out of the funds in the hands of the court, arising from the sale of the said lands in a creditor's suit against Offield. He sought to have his petition filed in June, 1889. His claim is that his brother William W. White had died in October, 1865, leaving a considerable personal estate, and that James Offield had qualified as the administrator of his estate in the same month, in the county court of Green. At the February term following, in 1866, of the said court, an order was entered, requiring the said Offield to settle his accounts before a commissioner, and, in pursuance of said order, his accounts were settled, and it was found that there was in his hands as administrator a net balance of \$922.36 for distribution among the creditors of said William W. White's estate. The debts were in excess of the assets, and the amount was apportioned by the court, and the interest of each creditor ascertained, and the report confirmed March, 1868. In 1887 the said pe-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

petitioner, R. M. White, filed his bill in chancery, seeking to establish his claim against White's estate against Offield and his sureties, and make it out of the latter, regarding the former as insolvent; but his bill was demurred to, demurrer sustained, the bill never amended, and that suit was dismissed. That in that suit the court decided that he had a judgment against the said Offield by reason of the said proceedings in the county court, and was barred by the statute of limitations. The petitioner asked leave to file his petition in the lien creditor's suit in the said court in the style of Davis v. Offield, and the other cases consolidated with it, and that his debt might be declared the first lien on the land, and paid first out of the fund. At the June term, 1889, of said court, Offield demurred to and answered the said petition. He denied that he owed anything to the creditors of W. W. White. That, many years before, he had settled his accounts, and returned his vouchers to the clerk's office; and that by reason of the lapse of so great length of time, or by reason of some unknown cause, they had been misplaced and lost in the clerk's office, and had not yet been found. That the recited orders of the county court in 1868 were not, in his opinion, judgments; but, if so, still they were obtained March, 1868, more than 20 years before, no execution had ever issued on them, and they were barred; and that the demand is stale, by reason of the laches of the creditor, and ought not to be enforced in a court of equity; and, moreover, the said petitioner, at the March rules, 1887, filed his bill against him and his sureties on his official bond as administrator of W. W. White, for the purpose of enforcing his supposed judgments, and at the June term the court decided that he had no valid claim, and dismissed his bill, and he went out of court. That the said bill raised the same questions as those now raised by the petition, and the decree dismissing the said bill was never appealed from, and has become final and irrevocable. That in that suit, by that decree, were settled all the questions involved in that suit actually decided, and all such as might properly have been decided, therein, or were involved therein, and therefore the questions now raised are the same questions raised again between the same parties, and are *res adjudicata* and cannot be again heard or decided, and the petition ought to be dismissed, which was done, accordingly, by the court. The circuit court decided that these were judgments, or had the effect of judgments, and were liable to the rules of law applicable to judgments, and were barred by the statute of limitations, no execution having been issued nor *scire facias* sued out thereon within 10 years, and dismissed the petition, with costs, whereupon the petitioner, the appellant, applied for and obtained an appeal to this court.

This decree is plainly right. There is no ground upon which any other could have been placed. (1) The judgments were barred after the lapse of 10 years. (2) The great lapse of time raises the presumption of payment, and the laches of the parties in asserting their claims are fatal. (3) The questions having been decided and the suit dismissed, and no appeal taken, the question is *res adjudicata*, and cannot be again raised. *McCormick v. Wright*, 79 Va. 533; *Campbell v. Campbell*, 22 Grat. 665; *Insurance Co. v. Clemmitt*, 77 Va. 366; *Miller v. Cook*, Id. 808; *Hutcheson v. Grubbs*, 80 Va. 251; *Rowe v. Bentley*, 29 Grat. 756; *Fleming v. Dunlop*, 4 Leigh, 338; *Brown v. Butler*, 87 Va. 626, 13 S. E. 71. For the foregoing reasons, the decree appealed from must be affirmed.

ALLEN et al. v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Dec. 7, 1893.)

BAIL BOND — VALIDITY — SCIRE FACIAS PROCEEDINGS.

1. Under Code, § 4100, providing that no action or judgment on a recognizance shall be defeated or arrested by reason of any defect in the form of the recognizance, it is no objection to the issue of a *scire facias* on a bail bond given by one accused of felonious assault that the condition of the bond was that defendant should appear "to answer the charge against him," instead of "to answer the felony whereof he stands charged."

2. A recognizance conditioned that the prisoner appear "on next Friday to answer the charge against him, and not to depart without leave of the court," is broken if the prisoner appear on said Friday, and, the trial having been commenced and adjourned to the next day, fail to appear on said next day.

Fauntleroy, J., dissenting.

Error to Loudoun county court.

The defendants, sureties on a certain recognizance for the appearance of one Allen, having had judgment against them on a *scire facias* issued on said recognizance, sue out a writ of error to this court. Affirmed.

John M. Orr, for plaintiffs in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

HINTON, J. At the April term, 1892, of the county court of Loudoun county, Benjamin Allen, one of the appellants, was indicted along with Benjamin Allen, Jr., for a felonious assault upon one Johnson Furr. At the September term of said court the said Benjamin Allen "appeared," as the record recites, in obedience to his recognizance, and entered into a new recognizance in the sum of \$500, with Elizabeth Payne and John Allen his sureties in the like sum of \$500, conditioned for his "personal appearance before the judge of this court on Friday next, to answer the charge against

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

him, and not to depart without the leave of the court," etc. On the said Friday, September 16, 1892, he appeared, and pleaded not guilty. The evidence was partly heard, and the case adjourned over to the next morning. When the jury was brought into court on the 17th day of September, 1892, the prisoner failed to appear, whereupon a scire facias issued against the said Benjamin Allen and his sureties, returnable to the first day of the next term of the court. On the 10th day of October, 1892, this scire facias was, on the motion of the defendants, quashed, and the scire facias which is assailed in this case issued. This scire facias is in the usual form, and states the condition of the recognizance to be "that, if the said Benjamin Allen should personally appear before the judge of the county court for the said county, at the courthouse thereof, on Friday, September 16, 1892, to answer as of a felony whereof he stands accused, and should not depart without the leave of the said court, then the said recognizance was to be void." At the December term the defendants demurred to the scire facias, pleaded nul tiel record, and answered. Each of these contentions having been determined against them, they obtained a writ of error to this court, and urge the same objections here.

Now, was the recognizance of September 13, 1892, insufficient and void? We think not. The record would perhaps have been more formal had it stated that the condition of the recognizance was that the defendant Benjamin Allen should appear before, etc., "to answer the felony whereof he stands charged," instead of "to answer the charge against him," etc. But the difference is not material. Code 1893, § 4093, has prescribed no set form of words to be adopted when the parties are recognized in open court, and section 4100 specially enacts that "no action or judgment on a recognizance shall be defeated or arrested by any defect in the form of the recognizance if it appears to have been taken by a court or officer authorized to take it, and be substantially sufficient." The language of the Code is: "The condition when it is taken of a person charged with a criminal offense shall be that he appear before the court, judge or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offense with which such person is charged, * * * and * * * shall not depart thence without the leave of the court." Here the language of the order of the court,—for in practice the recognizance is not usually written out in full when it is merely a renewal recognizance taken during the term of the court,—while certainly general, is sufficiently definite, as it points to the only offense with which the prisoner stood charged. *Archer v. Com.*, 10 Grat. 627; *Bolanz v. Com.*, 24 Grat. 31.

These observations will also dispose of the next assignment of error,—that there was no such record. The variance between the language of the recognizance and the scire facias must be regarded as immaterial.

The third and last assignment of error is, the prisoner fulfilled the condition of the recognizance by merely appearing and pleading, and that the recognizance was thenceforth void and of no effect. But this has been so often decided the other way that it cannot be necessary to do more than to cite some of the adjudged cases where the subject is fully discussed. *Com. v. Ross*, 6 Serg. & R. 427; *Dennard v. State*, 2 Ga. 138; *Com. v. Teevens*, 143 Mass. 211, 9 N. E. 524; *State v. Stout*, 11 N. J. Law, 133; *Glasgow v. State*, (Kan.) 21 Pac. 253. The provision in the recognizance that he shall not depart thence without leave of the court is inserted for the express purpose of having the party forthcoming and ready to answer the charge then preferred against him, and any other information that may be exhibited against him before he receives his discharge; and from this liability he cannot discharge himself and his sureties by any mere act of his own. We see no error in the judgment of the county court of Loudoun, and the same is affirmed.

MALLORY v. TAYLOR et al.¹
(Supreme Court of Appeals of Virginia. Dec. 7, 1893.)

APPEAL—WHEN LIES—NONSUIT—REVIEW—SETTING ASIDE VERDICT.

1. The setting aside of a verdict and the ordering of a venire de novo cannot be reviewed when no facts or evidence are certified to the supreme court.

2. A nonsuit entered by plaintiff is not a final judgment from which an appeal lies.

Error to circuit court, Orange county.

Action by one Mallory against one Taylor and others. A nonsuit was entered by plaintiff, and he brings error. Writ dismissed.

J. C. Gibson, J. W. Morton, and A. R. Blakey, for plaintiff in error. Rixey & Barbour, for defendants in error.

LACY, J. This is a writ of error to a certain ruling of the circuit court of Orange county rendered herein on the 3d of March, 1893. There appears to be no final judgment in the case to which a writ of error can lie. There was a verdict and judgment in this case on the 7th day of October, 1890. But this verdict and judgment were first suspended, and then set aside, and a venire de novo ordered, whereupon the plaintiff excepted; and there is a bill of exceptions to this action of the circuit court, showing that the plaintiff (plaintiff in error here) excepted to this action of the court against

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

him, but no facts are and no evidence is certified, and we have nothing in the record upon which we can review the action of the circuit court and consider whether it be erroneous or otherwise. Upon the calling of the case upon the new trial, and the evidence being heard, but not recorded herein, the defendants demurred to the evidence of the plaintiff, and the plaintiff joined therein; whereupon the plaintiff asked to be allowed to enter a nonsuit, which leave was granted, and, the plaintiff being nonsuited and required to pay the costs, the defendants waived the five dollars damages. So there was an end of that suit upon the motion of the plaintiff, the effect of which was that the plaintiff retracted his suit without prejudice (by that action of retracting his suit) to his right to bring another suit when so advised. But this is not a final judgment, and does not come within any provision of section 3454 of the Code of Virginia, and no writ lies thereto. A nonsuit is not a final judgment, but the opposite. 4 Minor, Inst. pp. 859, 229; Tucker v. Sandridge, 82 Va. 535. Mr. Minor says: "In Virginia all employ the word 'nonsuit' to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at the trial or any other time. So that it includes not only the idea of a nonsuit proper, but also of a non prosecutor and of a nolle prosequi, (non pros. and nol. pros. as they are respectively called.) The effect of the nonsuit in this comprehensive sense is to put an end to the pending suit without precluding another for the same cause of action. The nonsuit is resorted to in our practice when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when he is not ready or for any other reason. By our statute a nonsuit (that is, any voluntary abandonment of the cause) must be suffered, if at all, before the jury retires from the box." Code, § 3387; 4 Minor, Inst. p. 783. The writ of error, therefore, in this case, must be dismissed as improvidently awarded.

KING v. LYNN, Penitentiary Superintendent.¹
(Supreme Court of Appeals of Virginia. Nov. 23, 1893.)

CRIMINAL LAW—INCREASING SENTENCE—PREVIOUS IMPRISONMENT—CONSTITUTIONALITY OF STATUTE.

Code 1887, §§ 4179–4182, provide that if a person sentenced to the penitentiary and received therein shall have been before sentenced to like punishment, and the record of his conviction does not show that he was sentenced under sections 3905 or 3906, requiring a sentence for an increased term in such cases, the superintendent of the penitentiary shall file an information in the circuit court of Richmond to require the convict to say whether he is the per-

son formerly convicted and sentenced; and if he remain silent, or deny such identity, a jury of bystanders shall be summoned to try the issue thus raised, and upon a verdict against the prisoner the court shall sentence him to such further confinement as is prescribed by chapter 190 in case of a second or third conviction. *Held*, that such provisions are constitutional, as such prisoner is not in the position of one charged with a crime for the first time, with all the presumptions of law in favor of his innocence.

Petition by Scott King, alias John Walker, for a writ of habeas corpus. Petitioner, having been sentenced to the state penitentiary, was brought before the circuit court of Richmond to be resented, (Code 1887, §§ 4179–4182,) as having before received a like punishment. He was tried under said sections, and resented. Writ denied.

R. Carter Scott and W. R. Booker, for petitioner. R. Taylor Scott, Atty. Gen., for respondent.

HINTON, J. Section 4179 of the Code of 1887 makes the circuit court of the city of Richmond the court for the trial of all criminal proceedings against convicts in the penitentiary. Section 4180 provides that "when a person convicted of an offense and sentenced to confinement in the penitentiary is received therein, if he was before sentenced to a like punishment and the record of his conviction does not show that he has been sentenced under sections 3905 or 3906, the superintendent of the penitentiary shall give information thereof without delay to the said circuit court of the city of Richmond whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment." Section 4181 provides that "the said court shall cause the convict to be brought before it and upon an information filed, setting forth the several records of convictions and alleging the identity of the prisoner with the person named in each shall require the convict to say whether he is the same person or not." Section 4182 provides that "if he say he is not or remain silent, his plea or the fact of his silence shall be entered of record and a jury of bystanders shall be impaneled to inquire whether the convict is the same person mentioned in the several records." Section 4183 provides that "if the jury find that he is the same person, or if he acknowledge in open court after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter 190, on a second or third conviction as the case may be." In pursuance of these provisions of the Code, the convict, Scott King, alias John Walker, was brought on the 5th day of February, 1892, before the circuit court of Richmond, and there tried upon an information framed in accordance with the statute, adjudged identical with John Walker, and sentenced to five years additional confinement in the penitentiary, to commence from the expiration

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

of his then term of confinement therein. Thereupon he was brought before this court by writ of habeas corpus, alleging that he is illegally imprisoned, and praying to be discharged therefrom. And the judgment of the circuit court has been assailed upon various grounds, which have been urged with earnestness and ability by the counsel for the prisoner, all of which are bottomed upon the assumption that the prisoner stands in the position of a person charged with a crime in the first instance, who is presumed to be innocent until he is proved to be guilty, for whose protection the law has provided certain safeguards and formalities which must be absolutely observed on the trial, or the trial will be vitiated. But manifestly this case has no analogy to that, and therefore we shall not examine them. Here it cannot be denied that there had been two trials and two convictions in due course of procedure and in accordance with the forms of law. The only question is whether the prisoner is the person convicted in each case. It is therefore a mere question of identification, and it cannot be doubted that the course prescribed by the act of assembly to judicially ascertain this fact is all that could be expected or required. By the information he is notified of the records of the several convictions alleged against him, and is charged with being the person convicted in each case. He is allowed to answer, and of course to offer any evidence he may have to disprove the fact, and the fact is tried by a jury. This seems to us all that is required by justice or the circumstances of the case. The case of *Tuttle v. Com.*, 2 Gray, 505, is not in point. In that case the effort was made, under an indictment containing seven counts, each charging the sale of one gill of intoxicating liquor without license, and without alleging any previous conviction of the same offense, or even a finding of that fact by a jury, to sentence the prisoner to an increased penalty. This the supreme court of Massachusetts held could not be done. Manifestly what was said in that case can have no application to this. Upon a careful examination of the case, we think that the provisions of the Code which have been set out in this opinion are constitutional and valid, and that the prayer of the petitioner must be denied. Writ denied.

CLARK v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Dec. 7, 1893.)

MANSLAUGHTER—EVIDENCE—SELF-DEFENSE—JURY—SUMMONING FROM ANOTHER COUNTY.

1. Where, in a criminal case, a venire facias is ordered to be directed to the sergeant of another county to summon jurors, under the authority of Code 1887, § 4024, it is not necessary that a list be furnished such officer, as is

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

required by sections 4018 and 4019 when jurors are summoned from the county in which the case is tried.

2. An entry by the clerk on the minutes or order book that defendant excepted to a certain ruling will not supply the place of a bill of exceptions.

3. If one willfully inflict on another a dangerous wound, calculated to endanger and destroy life, and death ensue therefrom within a year and a day, he is not relieved of responsibility for the result by the fact that deceased might have recovered, but for the aggravation of the wound by unskillful treatment.

4. During an election, defendant accused the deceased of fraud, whereupon a fight ensued; and two days thereafter deceased published a card in a paper edited by him, relating this occurrence, and applying opprobrious epithets to defendant. The latter, when informed of this, stated to several persons his intention to get even with deceased, saying that they could not both live in the same town a day longer; and less than three hours before the shooting he stated that the deceased would have to leave town, "the quicker the better." Defendant, seeing deceased in an office which he had entered, went out, going up the street; and the deceased soon after left the office, and went up the same street, where he met the prisoner, and was shot by him. In a dying declaration, deceased said that he did not have a pistol, and had made no assault on the prisoner before the firing commenced. Four shots were fired, and four chambers in defendant's revolver were found empty. Defendant was found to be shot in the wrist, and declared that deceased did it, whereupon the latter denied that he had a pistol, and no weapon could be found on him. *Held*, that a verdict of manslaughter was justified.

5. The prosecution is not bound to call all the witnesses present at the time of the commission of a homicide, or named on the indictment.

6. A witness present at the commission of a homicide, and named on the indictment, if called by the court of its own volition, is not a witness for or against defendant.

7. Where death ensues on a sudden provocation or quarrel without malice prepense, the killing is manslaughter; and, to reduce the offense to killing in self-defense, the accused must prove that before the mortal blow he retreated as far as he could with safety, and that he killed the deceased through the necessity of preserving his own life, or to save himself great bodily harm.

Error to corporation court of Danville.

One Clark was convicted of manslaughter, and brings error. Affirmed.

Berkeley & Harrison and Teatross & Harris, (James T. Harrison, of counsel,) for plaintiff in error. R. T. Scott, Atty. Gen., and Col. W. R. Aslett, for the Commonwealth.

LEWIS, P. The prisoner was indicted in the corporation court of Danville for the murder of J. R. Moffett, was found guilty of manslaughter, and sentenced, in accordance with the verdict, to five years' confinement in the penitentiary.

1. The first point made in the petition for the writ of error, and insisted upon in the argument here, is that the jury that tried the prisoner was not a lawful jury. One of the grounds of this objection is that, after an unsuccessful attempt had been made to obtain a jury in Danville, the court ordered a venire to be directed to the sergeant of

Lynchburgh, commanding him to summon 24 persons from that city, which was done, but no list was furnished, of the names of persons to be summoned. It is contended that such a list ought to have been furnished, and the same point was made before the jury was sworn. The trial court, however, overruled the objection, and in this there was no error. Authority to direct jurors in a criminal case to be summoned from another county or corporation than that in which the trial is to be is conferred by section 4024 of the Code, and there is no requirement that a list, in such a case, shall be furnished. Sections 4018 and 4019 apply only to the summoning of jurors in felony cases from the county or corporation in which the trial is to be; and the reason, no doubt, of the difference between those sections and section 4024, in respect to furnishing a list, is that in the former case the court or judge is presumed to have the means and information essential to intelligent action in the matter, but not so in the latter case. At all events, there is nothing in the statute to support the prisoner's contention, and we cannot, without assuming legislative authority, interpolate into the statute a requirement which the legislature has not seen fit to insert in it.

Objection is also made to the exclusion from the panel by the court of Hirsh and Vernon, after they had been sworn on their voir dire, and accepted as qualified jurors. As to this matter, the transcript recites that, after Hirsh and Vernon had been thus accepted, the attorney for the commonwealth moved to be allowed to re-examine them on oath as to their fitness to serve as jurors, and to introduce witnesses to prove that the said Vernon had on one or more occasions after the death of the deceased, said the prisoner ought not to be convicted of the murder charged, "which being done," it is further recited, "they were excluded from the panel, to which action of the court the prisoner, by counsel, excepted." No formal bill of exceptions, however, was taken, and the entry by the clerk on the minutes or order book that the prisoner excepted cannot supply the place of a bill of exceptions. *Improvement Co. v. Karn*, 80 Va. 589; *Fry v. Leslie*, 87 Va. 299, 12 S. E. 671, and cases cited. The point therefore, is not presented by the record proper, and hence cannot be considered here. It is not improper, however, to say that, were it regularly presented, we would have no hesitation in holding that it is altogether without merit.

2. The next assignment of error is that the court misdirected the jury upon the law. No reasons, however, are urged in support of this general assignment of error; and it was virtually conceded in the argument that the action of the court in regard to the instructions was without error, as it unquestionably was. The ninth instruction given for the commonwealth, and the only one we deem it necessary to specially mention or

consider, is as follows: "If the jury believe from the evidence that the prisoner willfully inflicted upon the deceased a dangerous wound,—one that was calculated to endanger and destroy life,—and that death ensued therefrom within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered, but for the aggravation of the wound by unskillful or improper treatment." The prisoner shot the deceased in the abdomen, with a pistol, on the street in Danville, inflicting, according to the evidence for the commonwealth, a mortal wound, from which death resulted in less than 36 hours afterwards. An attempt was made on behalf of the prisoner to show that death resulted from improper surgical treatment, but without success, and it was to meet the evidence on this point that the instruction just quoted was given. In *Com. v. McPike*, 3 Cush. 181, it was ruled that where a surgical operation is performed in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will nevertheless be responsible for the consequences. Lord Hale states the same principle thus: "If a man give another a stroke, which it may be is not in itself so mortal but that with good care he might be cured, yet if he die of the wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled. * * * If a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so, consequently, is causa causati." 1 Hale, P. C. 428. To the same effect is *Com. v. Hackett*, 2 Allen, 136, where, after a review of the authorities, the court, speaking by Chief Justice Bigelow, declared the rule to be that if the wound was a dangerous wound,—that is, calculated to endanger or destroy life,—and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter, as the case may be, and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical op-

eration rendered necessary by the condition of the wound. "A different doctrine," it was added, "would tend to give immunity to crime, and to take away from human life a salutary and essential safeguard." See, also, *Com. v. Green*, 1 Ashm. 289; *State v. Bantley*, 44 Conn. 537; *State v. Morphy*, 33 Iowa, 270. In the case in 44 Conn. the deceased was shot in the arm, and died 11 days thereafter of lockjaw. The prosecution claimed that death resulted from the wound; the accused, that it resulted from the treatment of the case by the attending physicians. The wound was dressed in the first instance by one surgeon, and afterwards, to the time of death, by another. These differed radically as to the manner in which the case should have been treated. The accused was convicted of manslaughter, and the conviction was held good. "There is no such defect in the law," it was said, "as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either the carelessness or ignorance of his victim, or shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case." In conformity with these authorities, Greenleaf lays it down that "if death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged the party died, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for, if the wound had not been given, the party had not died." 3 Greenl. Ev. § 130.

3. The law having been correctly pronounced to the jury, the remaining question is whether the verdict was warranted by the evidence, upon which question the prisoner occupies in this court the position of a demurrant to evidence; the evidence, not the facts, being certified. That is to say, he must be considered as admitting the truth of the commonwealth's evidence, and all just inferences which the jury could properly draw therefrom, and as waiving all his own evidence in conflict therewith, and all inferences from his own evidence which do not necessarily result therefrom; and unless, when viewed in this light, the verdict be plainly wrong, it is our duty to affirm it. Code, § 3484; Acts 1891-92, p. 962; *Gaines' Case*, 88 Va. 682, 14 S. E. 375; *Read's Case*, 22 Grt. 924; *Gravely's Case*, 86 Va. 396, 10 S. E. 43.

The evidence in the case is voluminous, but its salient points may be briefly stated: The deceased was a Baptist preacher, and an ardent Prohibitionist. He was also the editor of a paper called "Anti-Liquor." The prisoner was a lawyer, and an ardent Demo-

crat. Both were young married men, in the prime of life. During the progress of the presidential election, on the 8th of November, 1892, both seem to have been actively engaged at the polls in what is called North Danville, when the prisoner accused the deceased of attempting to perpetrate a fraud by having bogus Democratic tickets printed. At this the deceased struck the prisoner a blow, whereupon they were separated, and both were afterwards fined. Two days thereafter, the deceased published a card in his paper relative to the disturbance on election day, in which he spoke of the prisoner as "a contemptible whiskeyte," and also as "a one-horse lawyer" who had been doing the dirty work of the liquorites for two years, and who, during a wet and dry campaign, had proposed to the liquor men to buy a lot, and settle a nigger on it, next to Mr. Moffett, the deceased. The prisoner was absent from Danville at the time of this publication, and did not return until the evening of the next day, when he was informed of it. The day before the publication, however, (i. e. the day or the evening after the election,) in conversation with several gentlemen on the street relative to his difficulty with the deceased, he declared his purpose to "get even with him," and that they both could not live in the same town 24 hours longer; and within less than three hours before the shooting he declared, in the presence of several witnesses who testified for the commonwealth, that the deceased would have to leave town, and the quicker he left the better it would be for him. It appears that just before the shooting, and soon after being informed of the above-mentioned publication, the prisoner went into the office of the Danville Register in search of a copy of the paper. When he reached the office, however, he observed the deceased in conversation, standing with his back to the door, and immediately turned and went out. This was between 8:30 and 9 o'clock in the evening. Upon coming out of the Register building, the prisoner walked up the street, and in a little while the deceased came out, and walked up the same street. In a few minutes they met, when the prisoner shot and mortally wounded the deceased. The latter, in his dying declaration, said: "I left the Register office, and walked up Main street. I met a man approaching me. He seemed to be coming straight, so I stepped aside to give him room. He was four or five yards from me when he commenced firing upon me. I endeavored to secure his weapon, but was not successful in doing so until Mr. Green Williams, chief of police, came up, and separated us." His assailant, he said, was the prisoner, though he did not recognize him until he commenced firing; and, in answer to questions, he further stated that he had no pistol, and that he made no assault on the prisoner before the firing commenced. There were four shots fired, and upon examination of the prisoner's

pistol, after the parties were separated, four of its five chambers were empty. The fifth contained a loaded shell. The prisoner was found to be shot in the wrist, and he declared that the deceased had shot him, whereupon the deceased denied that he had a pistol, and requested the officer to search him, which he did, without finding any. The prisoner, it seems, had been in the habit of carrying a pistol for a number of years.

Now, if this evidence stood alone, the jury would have been well warranted in finding the prisoner guilty of murder. But there was evidence tending to show that the parties were engaged in a mutual combat before any of the shots were fired; and the jury were, no doubt, influenced by this evidence in finding the prisoner guilty of manslaughter only. The testimony of two of the witnesses, viz. Green Williams, the officer just mentioned, and one Gravely, is very positive on this point. Both claim to have been eyewitnesses of the shooting, and the name of Williams was among those at the foot of the indictment. Accordingly, at the trial, the prisoner moved that these witnesses be called for the prosecution, but the court refused to grant the motion. It did, however, put them upon the stand, with liberty to both sides to cross-examine them, which was done; and it is now contended for the prisoner that their testimony is commonwealth's evidence, but this position is untenable. According to Hill's Case, 88 Va. 633, 14 S. E. 330, the prosecution is not bound to call all or any of the witnesses present at the transaction, in cases of homicide, as in England, but it is for the representative of the commonwealth to say what witnesses he will call, and this discretion ought not to be interfered with. The trial judge, however, may, in his discretion, call any witness who was present at the transaction, or whose name is on the indictment, for cross-examination by both sides; but, as was said in Hill's Case, a witness so called is not the witness of either party. The point, however, is not a very material one, in the present case, because the jury found the accused guilty of manslaughter; and, if we were to consider all the evidence in the record, the result would be the same.

It is a fundamental principle of criminal law that where death ensues on a sudden provocation or sudden quarrel, without malice prepense, the killing is manslaughter, and in order to reduce the offense to killing in self-defense the accused must prove two things, viz. (1) that before the mortal blow was given he declined further combat, and had retreated as far as he could with safety; and (2) that he killed the deceased through the necessity of preserving his own life, or to save himself from great bodily harm, which has not been shown in the present case. In Valden's Case, 12 Grat. 717, it was held that, to make out a case of self-defense, the accused must show to the jury that the

defense was necessary to protect his own life, or to protect himself against grievous bodily harm, and that, with regard to the necessity that will justify the slaying of another in self-defense, the accused must not have wrongfully occasioned the necessity, for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself. The prisoner was examined as a witness in the present case, and testified that when he met the deceased the latter caught him by the coat, and pushed him back several steps, at the same time drawing a pistol from his hip pocket; that he (the prisoner) knocked his hand down, and then drew his own pistol and fired. But the assertion that the deceased had a pistol is positively disproven. He denies it in his dying declaration. He denied it in the presence of the prisoner, immediately after the shooting, and when, at his request, he was searched by the police officer, no pistol was to be found. It is perfectly clear from the record that he had no pistol, and that the prisoner's sworn statement on the subject was fabricated. In short, there is no element of self-defense in the case, and the verdict, so far from being without evidence to support it, is remarkable for its mildness. The judgment is affirmed.

ZUMBRO v. STUMP.

(Supreme Court of Appeals of West Virginia.
Nov. 25, 1893.)

REVIVING JUDGMENT—DISCHARGE IN BANKRUPTCY —REVIEW ON APPEAL.

1. In a proceeding to revive a judgment by *scire facias* the *scire facias* must pursue the terms of the judgment, and a judgment on a writ of *scire facias*, awarding an execution in favor of different parties, for a different sum of money than that recited in the *scire facias*, will be set aside by the court on motion made at the same term at which it is rendered, and a new trial will be awarded.

2. A discharge in bankruptcy may be set up in a state court to stay the issue on an execution on a judgment recovered against the bankrupt after the commencement of the proceedings in bankruptcy and before the discharge, although the defendant did not before the judgment ask for a stay of proceedings, under Rev. St. U. S. § 5106.

3. When the defendant moved the court to set aside its finding and grant him a new trial, which motion was overruled, and he failed to except to the opinion of the court and procure the court to certify all the facts proven at the trial, if the finding is substantially sufficient, generally the appellate court will presume that the opinion and judgment of the court in overruling the defendant's motion was right and proper, the contrary not appearing.

(Syllabus by the Court.)

Error to circuit court, Calhoun county.

Action by William A. Zumbro against Salathiel Stump to revive a judgment. From a judgment vacating the judgment rendered and granting a new trial, plaintiff brings error. Affirmed.

Linn & Hamilton, for plaintiff in error. R. F. Fleming, for defendant in error.

ENGLISH, P. On the 22d day of December, 1882, one William A. Zumbro sued out of the clerk's office of the circuit court of Calhoun county a writ of scire facias against Salathiel Stump for the purpose of reviving a judgment which was recited in said writ as having been recovered on the 23d day of October, 1878, by the judgment of said court against said Salathiel Stump for the sum of \$230.77, with interest thereon from that date until paid, and his costs by him about his suit in that behalf. More than two years have elapsed since the date of said judgment, yet execution of the debt, interest, and costs, aforesaid, remains to be made. On the 24th day of February, 1883, the parties appeared by their attorneys, and the defendant tendered a plea in writing, to the filing of which the plaintiff objected, and the court took time to consider thereof until the next term. On the 21st day of June, 1883, the parties appeared by their attorneys, and the defendant tendered his plea No. 2 in writing to the plaintiff's action, to the filing of which the plaintiff objected, which objections to said pleas numbered 1 and 2 were overruled, and the court permitted the said pleas to be filed. Said plea No. 1 averred that before suing out of the clerk's office of this court the said writ of scire facias, to wit, on the 23d day of August, 1878, he, the said Salathiel Stump, became a bankrupt on the petition of himself, and that he, the said Salathiel Stump, was on the 23d day of August, 1878, to wit, in the district court of the United States for the district of West Virginia, at Clarksburg, in said district, upon the petition of himself filed in said court on said last-mentioned day, duly adjudged a bankrupt, and a certificate was awarded him, available for all purposes as a protection to him in bankruptcy, and thereby said Salathiel Stump became a bankrupt within the true intent and meaning of the act of congress of the United States of America, and called the "United States Bankruptcy Act," passed March 2, 1867, and in force on said 23d day of August, 1878, at said district, at Clarksburg, aforesaid; and that the said supposed judgment in said writ of scire facias mentioned, if any such there be, was predicated upon a debt contracted by said Stump to said Zumbro, and said debt did accrue to said plaintiff before said Salathiel Stump so became a bankrupt, as aforesaid, to wit, on the 21st day of January, 1875; and defendant, Stump, alleged that his said petition was still pending and undetermined in said United States district court for the district of West Virginia, at Clarksburg, and of this he put himself upon the country, etc. Plea No. 2 reads as follows: "And the said defendant, Salathiel Stump, comes and defends the wrong and injury, when," etc., "and for further plea,

says that on the 23d day of August, 1878, defendant resided in the county of Calhoun, in the state of West Virginia, and within the district of West Virginia, and was then owing debts not contracted in consequence of defalcation as a public officer, nor while acting in any fiduciary capacity, and was then and there a bankrupt within the time, intent, and meaning of the act, and entitled to all its benefits. That on the 23d day of August, 1878, he presented his petition to the United States district court for said district of West Virginia, at Clarksburg, setting forth truly, according to his best knowledge and belief, a list of his creditors, their places of residence, and the amount due each, together with an accurate inventory of his property, rights, etc., of every name and description, and the location and situation of each and every portion thereof; also setting forth the inability of him, said defendant, to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and praying for the benefit of the act of the congress of the United States entitled 'Bankruptcy,' which petition was duly verified by his oath. That upon the presentation of said petition such proceedings were had thereon that defendant afterwards, to wit, on the 28th day of February, 1883, was duly ordered and decreed to be a bankrupt; and further, that in pursuance of said act, to wit, on the 28th day of February, 1883, in the district aforesaid, a certificate of discharge was granted to said defendant, and a final discharge and certificate were granted to him in and by said court, which discharge and certificate are in the words and figures following, to wit: 'District of West Virginia—sa.: District court of the United States for the district of West Virginia. In bankruptcy. In the matter of Salathiel Stump, bankrupt. Whereas, Salathiel Stump, in the county of Calhoun and state of West Virginia, has been by this court duly adjudged a bankrupt under the act of congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and appears to have conformed to all the requirements of the law in that behalf, it is therefore ordered by the court that said Salathiel Stump be, and he hereby is, forever discharged of and from all debts and claims which by said act are made provable against his estate, and which existed on the 23rd day of August, 1878, on which day the petition for adjudication was filed by him, the said Stump, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of said district court at Clarksburg, in the said district, this the 28th day of February, A. D. one thousand eight hundred and eighty-three. J. J. Jackson, Judge of the District Court of U. S. for the District of West Virginia. [Seal of Court.] And the

said defendant avers that the promissory note filed in the said plaintiff's declaration, upon which said judgment in said scire facias mentioned was and is predicated and founded, if any such promissory note was made, was made and accrued before the presenting of said petition of said defendant to be declared a bankrupt, and was provable under the act aforesaid. Also that the supposed debt in said scire facias and declaration mentioned was not created in consequence of any defalcation of the defendant as a public officer, or as an executor, etc., or while acting in any other fiduciary capacity. And the said defendant avers that such discharge and certificate were a full and complete discharge from all liability on account of said supposed judgment," etc., "and this he is ready to verify," etc. "Salathiel Stump. By Counsel. Levi Johnson and Henry C. Flesher, for Deft."

On the 20th day of June, 1889, the plaintiff moved the court to strike out of the cause said special pleas No. 1 and No. 2, which motion was overruled, and the plaintiff replied generally to each of said pleas. These were the only pleas interposed, and on the 18th day of February, 1890, the parties waived a jury, and submitted the whole matters of law and fact to the court, and the court rendered a judgment upon said scire facias in favor of William A. Zumbro and George S. Smith, late partners trading under the firm name of Zumbro & Smith, against said Salathiel Stump, and awarded execution against the defendant for the sum of \$432.40, with interest from the 20th day of June, 1882, till paid, and \$10.45 costs, together with the costs of said writ. On the 20th day of February, 1890, the defendant moved the court to set aside the judgment given against him, and the plaintiff, by his attorney, stated that the order entered on the 18th day of February, 1890, was a judgment in favor of Zumbro & Smith against Salathiel Stump, and that there was nothing in the record which would justify such an order, and that said order should be set aside; and the plaintiff moved the court to enter the judgment to which he claimed he was entitled upon the said scire facias; and thereupon the court refused to enter the said judgment, but ordered the same to be set aside, and awarded the defendant a new trial; to which action and ruling of the court in refusing to enter the said judgment and in granting a new trial of the said cause the plaintiff excepted, and prayed the court to certify all the evidence on the said trial and on the motion for a new trial, and the court did accordingly certify as follows: That on the trial before the court in lieu of a jury the plaintiff read in evidence a judgment in favor of William A. Zumbro and George S. Smith, partners trading under the firm name of Zumbro & Smith, against Salathiel Stump,

rendered by said court at the June term thereof, 1882; and also an execution book, showing the entry of the said judgment therein, a copy of which judgment is made part of the bill of exceptions, and is for the sum of \$432.40, with interest thereon from the 20th day of June, 1882, and costs. The transcript from the execution book was also made a part of the bill of exceptions, and shows a judgment for the same amount, with interest from the same date, and \$9.70 costs. And the defendant, to maintain said pleas Nos. 1 and 2, filed by him, offered and read in evidence a certificate of protection in bankruptcy, showing that he was on his own petition on the 23d day of August, 1878, duly adjudged a bankrupt, and also his final discharge in bankruptcy, dated the 28th day of February, 1883, both of which papers are set forth in and made part of said bill of exceptions. And it was stated on said trial of the scire facias that the judgment of Zumbro & Smith v. Salathiel Stump was the judgment relied on by the plaintiff; and the defendant's attorney, being asked if he had any further evidence to offer, replied that he had not, whereupon the court found for the plaintiff upon the issues joined, and awarded execution in favor of said Zumbro & Smith against said Salathiel Stump for the sum of \$432.40, with interest thereon from the 20th day of June, 1882, until paid, and costs, \$10.45, and the costs of said writ; and on the 20th day of February, 1890, the defendant moved the court to set aside said judgment, and grant him a new trial, which was done. On the 21st day of June, 1890, the cause was again submitted to the court in lieu of a jury to try the same; and the court, having fully heard the evidence and argument of counsel, found for the defendant upon the issues joined, and gave judgment for costs against the plaintiff, and on the same day the court certified that before rendering judgment for the defendant the plaintiff moved the court to set aside the finding of the court for the defendant, on the ground that it was contrary to the law and evidence, and also because of the matters set forth in bill of exceptions taken at a former term, which motion the court overruled, and the plaintiff obtained this writ of error.

The only pleas interposed in the case were those designated as Nos. 1 and 2, and the defendant moved the court on the first trial to strike out these pleas, and when the court overruled his motion he replied generally thereto. The first question, then, is, did these pleas constitute a good defense to the scire facias? Now, if either of these pleas was good, and constituted a bar to the scire facias, it should have been filed; and as, in our opinion, there can be no question that plea No. 2 was a good one, the circuit court committed no error in allowing it to be filed. Said plea No. 2 avers that on the 23d day of

August, 1878, the defendant resided in the county of Calhoun, in the state of West Virginia, and was then owing debts not contracted in consequence of defalcation as a public officer nor while acting in any fiduciary capacity, and was then and there a bankrupt, within the true intent and meaning of the act, and entitled to all its benefits, etc. The plaintiff moved to strike out both of these pleas, but his motion was overruled, and said pleas were filed, and the plaintiff replied generally thereto. The effect of a motion to strike out stands upon the same footing as a demurrer thereto, so far as it operates as an admission of the truth of all matters of fact which are sufficiently pleaded. These facts, however, were put in issue by the general replication. Upon the question as to whether said plea constituted a good defense if the averments therein contained are to be taken as true, we refer to the case of *Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 981, where it was held that "a discharge in bankruptcy may be set up in a state court to stay the issue of an execution on a judgment recovered against the bankrupt after the commencement of the proceedings in bankruptcy, and before the discharge, although the defendant did not, before the judgment, ask for a stay of proceedings under Rev. St. § 5106." The judgment in the case under consideration, as in that case, was rendered between the date on which the defendant was adjudged a bankrupt on his own petition and the date on which he obtained his final discharge. Justice Miller, in the case of *Boynton v. Ball*, supra, in commenting on the case of *Dimock v. Copper Co.*, 117 U. S. 559, 6 Sup. Ct. 855, says, among other things: "The principle on which the case was decided was that, while the discharge in bankruptcy would have been a valid defense to the suit if pleaded at or before the time judgment was rendered in the Massachusetts court, it had in that respect no more sanctity or effect in relieving Dimock of his debt to the company than a payment or a receipt or a release, of which he was bound to avail himself by plea or suggestion of some kind as a defense to the action in proper time; that, showing no good reason why he should not have presented that discharge, and permitting the judgment to go against him in the Massachusetts court, without an attempt to avail himself of it there, the judgment of the court was conclusive on the question of his indebtedness at that time to the copper company. That case, so parallel in its circumstances to the one now before us, would be conclusive of the latter if Boynton had had his certificate of discharge, or if the order for it had been made by the bankruptcy court before the judgment in the state court. But, as we have already seen, the judgment in the state court was rendered more than a year before the order of discharge in the bankruptcy court, and Boynton therefore had

no opportunity to plead a discharge which had not been granted as a defense to that action." In the case under consideration we find the judgment recited in the *scire facias* was obtained on the 23d day of October, 1878, and the judgment in favor of Zumbro & Smith, which was offered in evidence by the plaintiff, was rendered on the 20th of June, 1882, while the said final discharge of Salathiel Stump bears date the 28th day of February, 1883, so that said discharge could not have been pleaded at the date of either of said judgments, and the ruling of the supreme court of the United States in the case of *Boynton v. Ball*, supra, shows that plea No. 1 could only have been made available if pleaded, at the proper time to obtain a stay of proceedings until the discharge was obtained, which might have then been pleaded *puls darein continuance*. A valuable note upon the questions involved in this case may be found in *Clark v. Rowling*, 53 Amer. Dec. 297, where it is said that the great preponderance of authority holds that, "where a judgment is recovered against a bankrupt or insolvent between the petition and discharge for a provable debt existing at the time of the petition, whether the discharge be under a state insolvent law or under the bankrupt act of 1841 or that of 1867, the judgment does not merge the original cause of action, so as to constitute a new debt, but is merely a new security for the old debt; and, the former debt being barred by the discharge, the judgment is also barred including costs;" citing numerous authorities. See, also, *Lackey v. Steere*, 121 Ill. 598, 13 N. E. 518.

That the court committed no error in setting aside the judgment on said *scire facias* rendered on the 18th day of February, 1890, is manifest for the following reasons: In the first place, the execution is awarded for nearly double the amount recited in the *scire facias* as the amount of the judgment; second, the execution is directed in favor of a firm by the name of Zumbro & Smith, when the judgment recited in the *scire facias* is described as being in favor of William A. Zumbro; and because both plaintiff and defendant conceded that the judgment was erroneous, and the court pursued the proper course in setting aside the judgment and awarding the defendant a new trial. Foster on *Scire Facias* (57 Law Library, [N. S.] p. 54) says: "The *scire facias* must pursue the terms of the judgment, and a variance from it is error, as if it mistakes the sum." And Barton, in his *Law Practice*, (volume 2, p. 1016,) says: "The function of these cases of the *scire facias* is not to render a new judgment, but it only awards an execution on the judgment originally rendered." Upon the second trial, which was had on the 21st of June, 1890, the cause was again heard by the court in lieu of a jury, and, having fully heard the evidence and argument of counsel, it found

for the defendant; and, before rendering judgment for the defendant the plaintiff moved the court to set aside the finding of the court for the defendant on the ground that it was contrary to the law and evidence, and also because of the matters set forth in the bill of exceptions taken at former term, which motion the court overruled. The plaintiff, however, took no bill of exceptions to the ruling of the court upon his motion for a new trial, and, as a matter of course, did not set out the facts proven upon the last trial. It is true that the certificate of the court shows that the motion to set aside the finding was based upon the alleged ground that it was contrary to the law and evidence, and also because of the matters set forth in the bill of exceptions taken at the former term. We cannot, however, well see how a bill of exceptions setting forth the facts proved at a former term upon a former trial can be looked into to determine the correctness of the ruling of the court upon the last trial, for at the time the bill of exceptions referred to was taken and saved it may have contained all of the facts then proved; but how can we say it contains all the facts proved when the second trial was concluded? Barton, in his new Law Practice, (volume 1, p. 659,) says: "The facts stated in one bill of exceptions, however, cannot be noticed by an appellate court in considering another, unless the first bill is referred to in the second, and adopted as part of it;" citing *Crawford v. Jarrett's Adm'r*, 2 Leigh, 639; *Perkins v. Hawkins*, 9 Grat. 649; *Brooke v. Young*, 3 Rand. (Va.) 106. The difficulty in the case under consideration is that no bill of exceptions setting out the facts proved in the last trial was taken, and in consequence we have no certificate of all the facts proved. In the case of *Campbell v. Hughes*, 12 W. Va. 184, this court held that, "when the defendants moved the court to set aside the verdict of the jury and grant a new trial, and the court overruled the motion, and the defendants failed to except to the opinion of the court, and procure the court to certify all the evidence given or facts proven at the trial, if the verdict is substantially sufficient, generally the appellate court will presume that the opinion and judgment of the court in overruling the defendant's motion was right and proper, the contrary not appearing." Again, this court has frequently held that, "where a bill of exceptions taken to the opinion or ruling of the court below does not set forth sufficient facts, matter, or evidence to show whether the court erred or not, the presumption will be that the court was right." See *Wise v. Postlewait*, 3 W. Va. 453; *Bank of the Valley v. Bank of Berkeley*, Id. 386; *Fawcett v. Railway Co.*, 24 W. Va. 755; *Todd v. Gates*, 20 W. Va. 464. Under these rulings, then, as we are, in the case under consideration, unable to determine what evidence was be-

fore the court at the second or last trial, we must presume that the rulings of the court complained of were right, and for these reasons the judgment complained of is affirmed, with costs and damages.

GIBSON v. CITY OF HUNTINGTON.

(Supreme Court of Appeals of West Virginia.

Nov. 11, 1893.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS— NEGLECT—BURDEN OF PROOF.

1. A municipal corporation is absolutely liable for injuries caused by its failure to keep in repair the streets, alleys, sidewalks, roads, and bridges. *Chapman v. Milton*, 7 S. E. 22, 31 W. Va. 385.

2. A municipal corporation is liable for injuries sustained by the negligent management of its corporate property, to the same extent that private individuals are liable for the same character of negligence.

3. A municipal corporation is liable for injuries caused by its negligence in the discharge of, or failure to discharge, such duties as are purely ministerial, and not governmental or discretionary.

4. A municipal corporation is not liable for injuries caused by the negligence of its agents and officers in the discharge of, or omission to discharge, duties which are purely governmental or discretionary.

5. When the injury sued for is alleged to have been caused by the defendant's negligent use of its corporate property, or in the discharge or omission to discharge of a ministerial duty, the burden of proving negligence is on the plaintiff; and if the jury, by its determination, finds that the facts are not sufficient to sustain the charge of negligence, the court cannot disturb the verdict, even though it be of a different opinion. To do so would be a denial of the right of trial by jury guaranteed by the constitution of this state.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action by Eustace Gibson, administratrix of the estate of Mary Lewis, deceased, against the city of Huntington, to recover for the death of decedent. Defendant had judgment, and a new trial was denied. Plaintiff brings error. Affirmed.

Gibson, Hutchinson & Gibson, for plaintiff in error. Campbell & Holt, for defendant in error.

DENT, J. Mary Lewis, an infant four years and five months old, while playing on the side of a road in the city of Huntington on the — day of May, 1892, was killed by the falling of an embankment which had been left along the street or road as a barrier to keep travelers along the highway from driving into the adjacent creek. This embankment had been undermined to some extent by persons digging out sand and gravel, and was in a dangerous condition, as the death of the child bears witness. The street commissioner, after some excavating had been done, (how much, the evidence does not disclose,) put up a notice forbidding the taking of sand and gravel from this place; but afterwards (how long does not appear,

nor how long before the accident) a man by the name of Brown excavated sand and gravel, and hauled it away; for what purpose, is not revealed, but, so far as the evidence shows, it was without the knowledge of the municipal authorities. The jury were taken to view the place of the accident.

It is now firmly established, by a long line of well-considered decisions, that a municipal corporation is liable for injuries occasioned by its negligence in the following three classes of cases: (1) Failure to keep its streets, alleys, sidewalks, roads, and bridges in repair, under the statute. (2) In the discharge of ministerial or specified duties, not discretionary or governmental, assumed in consideration of the privileges conferred by charter, even though there be the absence of special rewards or advantages. (3) As a private owner of property, to the same extent as individuals are liable. It would be impracticable to cite all the authorities settling these propositions, but the following are referred to as leading cases: *Mendel v. City of Wheeling*, 28 W. Va. 233; *City of Richmond v. Long's Adm'rs*, 17 Grat. 375; *Orme v. City of Richmond*, 79 Va. 86; *Mackey v. City of Vicksburg*, 64 Miss. 777, 2 South. 178; *Barnes v. District of Columbia*, 91 U. S. 540. In the first class of cases, negligence is presumed, and notice of defect is not required. In the second and third classes, negligence must be alleged and fully proven. *Chapman v. Milton*, 31 W. Va. 335, 7 S. E. 22; *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51.

This suit is not proper under the first class, or statutory provision, because it was not caused by any defect or obstruction in the roadbed; but it can be maintained under the two latter classes, because it is made the ministerial duty of the municipality, by law, to protect the public and individuals from anything dangerous, and the embankment that caused the injury was maintained by the city as its property, in lieu of other barrier along and within the boundaries of a public highway. The city has no more right to erect or keep within or along a public highway an unnecessarily dangerous structure, even though it be for some public purpose, than an individual. It is true that the city did not erect this embankment, but, as the witness said, it was placed there by nature, and the city adopted and maintained it as a barrier to prevent travelers from driving into the creek. Had there been an artificial structure so rudely constructed of stone, wood, or iron as to fall of its own weight, and crush this child, the liability of the city would not have been questioned; and it certainly ought to make no difference whether the city builds or adopts one already there, even though nature was the original builder. It was its ministerial duty, neither governmental nor discretionary, to see that it was not dangerous to any one lawfully using the road, or any part thereof.

By leaving the embankment there as such barrier, the council fixed the limits of the road, and any one using it had the right to lawfully use it, up to the limit so fixed, whether it was the traveled part of the road or not.

Was the child using the road for a lawful purpose? Children are not responsible for the choice of their parents, nor the place or condition of their birth. God decides these for them when he breathes into them the breath of life. Poor parents are unable to provide a place of healthful exercise and play for their children, but it requires all their earnings to clothe, feed, and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others; and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the dark ages of barbarism, when children were subjected to inhuman and diabolical punishments, and their lives were at the mercy of those having charge over them. It is the only commons they now have, and to confine them in the narrow limits of their cheerless tenement houses would be cruel, unjust, and oppressive, blight their young lives, and render their bodies weak, sickly, scrofulous, and vile; and, if they could manage to escape the long list of contagious diseases so fatal to their kind, they would grow up to adult age morbidly despising laws so tyrannous and unworthy a civilized and liberty loving people. It is a right they have immemorially enjoyed, and should continue so to do as long as the public fails to provide them other free commons, where they can have the pure air, bright sunshine, and sportive exercise so necessary to the healthful growth of their sensitive bodies. Horses, cattle, hogs, dogs, and other domestic animals, are all at large in the streets, unless prohibited by special ordinance, and why not children? The public highways can be put to no better use. So I am clearly of the opinion the child had the right to be there, even though out of the beaten path, and only for play. Neither was it old enough to realize the danger it was in, or the dangerous condition of the embankment, and could not possibly be guilty of contributory negligence.

The most troublesome question is that of negligence. In all cases where the remedy is not given by statute, but the common law, negligence must be proved by the party alleging it. Where the facts are indisputable, and there can be no fair difference of opinion as to whether the inference of negligence should be drawn, the question becomes one of law alone, and the court may decide it, if appealed to for this purpose. But, even where the facts are not disputed, if there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or as to whether the facts

sustain the charge of negligence, the jury are the sole judges, and their verdict cannot be disturbed, although the court may be of the opinion that the facts do not sustain it. The litigants have the constitutional right to a trial by a jury of fair and impartial men under the rules of law. Having demanded and had it, they have no right to complain, and the court has no right to interfere. It is a tribunal of their own choosing. It has been held in cases of this character, "that notice to the corporate authorities, either express or implied, must be shown. If the defect causing the injury had existed for such length of time that proper diligence would have discovered it, then no notice need be proven; but if the defect arise otherwise than from faulty structure, or the direct act of said authorities or other agents, and be a recent defect, it is generally necessary to show that the town authorities had knowledge thereof a sufficient time before the injury to have, by reasonable diligence, repaired it, or that they were negligently ignorant of it." *Curry v. Town of Mannington*, 23 W. Va. 14. The embankment was on the side of the road, in a remote part of the city. The authorities had the right to leave it there as a barrier, provided it was not dangerous to the lawful users of the road. There is no evidence tending to show that it was dangerous when left there, but the evidence shows it afterwards became dangerous by reason of the excavations made under it. The street commissioner, when he found that persons were removing the sand and gravel, posted a notice warning them from so doing, not because he regarded it dangerous, but to prevent it from being destroyed as a barrier,—the city's property. After this notice was put up (how long, the evidence does not disclose, nor how long before the accident, except as a mere conjecture) a man by the name of Brown, without the knowledge or permission of the authorities, and against the express notice posted as aforesaid, did further excavating of sand and gravel, and hauled it away, which, presumably, was the excavating that rendered the bank dangerous. It is not shown that the authorities had notice of this last excavating. On the contrary, it appears from the evidence that they had no notice of it. The witness Brown, for some unexplained reason, is not introduced to show when or by what authority he did the excavating. It is true the street commissioner says he passed along there frequently, but it does not appear that he passed there after Brown had done his work, nor does it appear that there was anything to indicate to him that the embankment was in danger of falling; and none of the plaintiff's witnesses testify that they had any knowledge beforehand of the dangerous character of the embankment that produced the injury, and one of his principal witnesses says: "I considered it dangerous from falling on top. I didn't know

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it would cave down on them." From this evidence the jury certainly had a right to conclude that the structure was not rendered dangerous by the direct act of the city authorities; that they had no notice of its dangerous character a sufficient time before the injury to have, by reasonable diligence, repaired it; and that they were not negligently ignorant of it. While we might have found a different one, we have no right to disturb their verdict. Their decision is supreme and final. But, even if this did not conclude us, there is another question that would; and that is the jury were taken to view the spot and its surroundings. The counsel deemed it necessary. What effect this had on the minds of the jury in reaching a conclusion, this court cannot say, but that it was material cannot be doubted. The remoteness of the place, the situation and character of its surroundings, and the nature and condition of the embankment, would obviously all be taken into consideration in making up a verdict. None of these things are before this court; and the settled rule is that this court will not disturb the finding of a jury unless all the material evidence touching the matter at issue that was considered by the jury is before it, as the case, as presented to the two tribunals, would be materially different.

No instructions were asked, and no points of law raised; and, there having been a fair hearing before an impartial jury, this court is legally powerless to interfere, and the judgment of the circuit court must be affirmed.

MAXWELL v. MILLER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

PRINCIPAL AND SURETIES—RIGHTS OF SURETIES.

Where a defaulting, insolvent ex-sheriff, with the proceeds of taxes collected by him, has taken up a large number of county orders, and, instead of having them credited as payments on his arrearage, is engaged in secretly selling and transferring them to various persons, who are trying to collect them again from the county, at the instance of the sureties of such ex-sheriff a court of equity will interfere, and compel the application of such orders to the relief of such sureties.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; Joseph T. Hoke, Judge.

Bill by W. B. Maxwell against M. V. Miller, the county court of Tucker county, and others, for an accounting, an injunction, and for other relief. Plaintiff had decree, and the county court and others appeal. Affirmed.

A. B. Parsons, for appellant county court. Dayton & Dayton, for appellant Tygart's Valley Bank. C. W. Dailey, for appellee.

DENT, J. M. V. Miller was sheriff of Tucker county for the term of office from

January 1, 1885, until the 31st of December, 1888, and as such sheriff executed a general bond in the penalty of \$30,000, with the plaintiff, W. B. Maxwell, and the defendants William H. Lipscomb, Levi Lipscomb, E. Harper, John R. Loughery, and John J. Adams as sureties therein; and also a school bond in the penalty of \$10,000, with the defendants A. C. Minear and John H. Deetz as his sureties. Said Miller was also made trustee in a deed of trust executed by Robert Geisberger, and as such was required to execute a bond in the penalty of \$5,000, which he did, with the plaintiff, W. B. Maxwell, and A. C. Minear and F. S. Pifer as sureties. At the expiration of his term of office the settlements of said Miller showed he was in arrear to the state to the amount of \$1,470.46, to the county court of Tucker county to the amount of \$3,207.49, to the several boards of education to the amount of \$2,256.98; aggregating the sum of \$6,934.46. As trustee for said Geisberger he owed the sum of \$2,305.21. To secure these several sums he executed a deed of trust or assignment of certain property to A. J. Valentine, trustee, but insufficient in amount to pay them. Maxwell, Harper, and Adams, sureties, were compelled to pay the amount due the state, and Maxwell paid the amount due on the Geisberger trust deed. The county court and the several boards of education instituted suits at law against said sureties, and the latter recovered judgments. The amount of money realized by said trustee Valentine was in his hands undischarged. And so matters stood, when one of the sureties, the plaintiff in this suit, learned that said Miller had a large amount of county and district orders, taken up by him with the public funds in his hands, which he was selling and transferring to other parties, who were trying to get payment of them out of the present sheriff, A. H. Bonnielield. He immediately filed his bill setting up these facts, and asking the aid of the court in compelling said Miller to disclose the amount of these orders, and to whom he had transferred them, and asking that they be applied as a credit on the indebtedness of said Miller to the county, and also praying that A. H. Bonnielield, sheriff, be enjoined from paying any of them. He afterwards filed two amended bills, making the assignees of certain of these orders parties, and praying that the county court be stayed in its suit at law until these matters could be properly heard and determined, and that Miller be stayed from dismissing certain certiorari proceedings instituted by him to obtain credit for certain judgments against the county which had been paid by him. The circuit court heard all these matters, overruled the demurrers to the bills, refused to dissolve the injunction on motion of the county court, referred the case to a commissioner, and on the coming in of his report overruled the exceptions to it, confirmed it, and entered

a decree settling the various matters between the parties, ascertained the balance due the county court, which was promptly paid by the sureties.

The county court, the only appellant, relies on the following assignment of errors. to wit: "First. The court erred in overruling petitioner's demurrer to said bill and amended bills. Second. The court erred in not dissolving said injunction at the November term, upon petitioner's motion. Third. The court erred in referring said cause to said commissioner. Fourth. The court erred in overruling said petitioner's exceptions, and each of them, to said commissioner's report, as well as overruling the numerous exceptions of other defendants in said action. Fifth. The court erred in pronouncing said final decree in said cause at the March term, 1892, in this: that said court had no right to offset the demands of the county court with orders or drafts aggregating the sum of \$1,031.31, with interest thereon to the amount of \$168.62, aggregating in all \$1,199.93, claimed to have been taken up by M. V. Miller, late sheriff, after his term of office had expired, and after his last final settlement, which said orders and drafts had been indorsed by A. H. Bonnielield, sheriff of Tucker county, the agent of the county court. Said circuit court had no right to decree against petitioner \$244.09, the judgment in behalf of Miller and other parties in the mandamus case lately pending in the supreme court of Miller against said county court, and also in certain certiorari proceedings pending on the law side of the circuit court of Tucker county, which certioraris were improvidently awarded, two years having elapsed before the same were granted, and more. Sixth. The court erred in decreeing costs against petitioner. Seventh. The court erred in ousting the jurisdiction of the law side of said court in the notice against Miller and his sureties and the certiorari proceedings by assuming jurisdiction of them in chancery in this cause, without authority of law, and by enjoining further proceedings there at law. Eighth. The court erred in entering said decree either for or against any of the boards of education of said county, none of said boards being parties to said suit. And your petitioner, by its attorney, further represents that said orders and decrees are in other respects uncertain, informal, and erroneous."

As to the eighth assignment of error, there is nothing in it. The boards of education were not necessary parties, because no relief was sought against them. The seventh is unfounded, because the court had the right to control the proceedings at law for the furtherance of justice. The sixth there is nothing in, as the defeated defendant, who interposes a vigorous defense unnecessarily, should pay the costs. Fifth. The county court ought not to complain on account of its own just orders being credited up against

the amount due it, even though held by other parties by assignment, if the latter make no complaint. As to the \$244.09 aggregate of judgments against the county, paid by Miller, the record evidence shows that this credit was proper, and no effort was made to defeat it. The fourth assignment is but a repetition of the matters contained in the other assignments, and raises the same points for consideration. The determination of them determines it. Third. The court having jurisdiction of the cause, and there being matters of account to be settled, the cause was properly referred to a commissioner. Second. The temporary injunction, so far as the county court was concerned, was probably unnecessary, as the circuit court could on mere motion stay the proceedings on the law side thereof until the chancery cause could be heard; but the county court was not injured by it, and has, therefore, no cause of complaint. First. The real merits of this controversy arise on the demurrers to the bills, and that is whether they stated a sufficient cause for equitable jurisdiction, or unlawfully interfered with the appellant in the discharge of its legal duties, contrary to public policy and public justice. The bills to invoke equity jurisdiction charge in substance that a defaulting insolvent ex-sheriff, for whom the plaintiff is surety, has taken up with the public funds a large number of county orders, and, instead of having them applied on his indebtedness to the county, is engaged in secretly selling and transferring them, to the prejudice of the rights of his sureties, to third parties, who are seeking to collect them off of the county again, the number, amounts, and purchasers of which orders are unknown to the plaintiff; and he therefore asks the assistance of the court to ascertain these matters, to stop the illegal transfer of the orders, and to have them credited as payments on the balance due the county. This certainly states a good cause for equitable interference. It has been well said: "There are a great variety of circumstances where equity steps in for the reason that the law affords no adequate redress, and prevents impending or threatened injury;" that a "surety occupies ground peculiar to his own relation, and is favored in both legal and equitable tribunals;" that "there is no adequate remedy at law, when the principal debtor is insolvent, by which his effects and credits in the hands of others can be made to be applied for the benefit of the surety." *McConnell v. Scott*, 15 Ohio, 403; *Brandt*, Sur. §§ 223, 224. The appellant, being the creditor, was a proper party to any bill filed by the surety regarding the indebtedness; and the court, having once assumed jurisdiction for any just cause, should proceed to do exact justice between the parties. The staying of the proceedings at law could not injure the appellant, and was not done for the purpose of delay, but to secure as

credit payments made by the principal, who was endeavoring to secretly dispose of them, and get them beyond the reach of his sureties, and securing some of his sureties to the prejudice of others. If the sureties as well as the principal had been insolvent, the appellant would have been insisting that these orders, having once been taken up by the sheriff with public funds, were paid in the manner the law contemplates their payment, and therefore should be canceled. The sureties have the right to make the same claim, and the appellant has no reason to complain; on the contrary, it should have joined hands with the sureties, and endeavored to save them harmless, as far as possible, instead of lending its aid to sustain the wrongful designs of the defaulter.

M. V. Miller, the delinquent sheriff, does not appeal, but filed a brief, relying on the same errors substantially as the appellant. Having answered one, answers both, but, in addition, he adds: "It is insisted that the defendant Miller assigned for the benefit of his said sureties property more than amply sufficient to pay all of his indebtedness mentioned in said assignment, and especially his indebtedness to the state, county, and various boards of education of the various districts of the said county. If the plaintiff and the said trustee had gone on and sold the said property, and applied the proceeds thereof according to the stipulation of the said trust deed, without the costs of this suit, the proceeds would have been sufficient to pay said indebtedness." No evidence to show anything of this kind was before the commissioner, and therefore it is useless to make such allegations here. The court is governed by the matters shown in the record, and not by assertions made in the briefs, unsustained by evidence. There appears to have been a full and careful hearing of this cause in the circuit court, and the decree entered is fair and just to the appellant. It is therefore affirmed, with costs.

STURM v. CHALFANT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

FRAUDULENT CONVEYANCES—EVIDENCE OF FRAUD.

1. J. C., an insolvent debtor, against whom litigation has been pending for years in the name of A. P. Sturm and others, being aware that an account is pending before a commissioner to ascertain the rents and profits due from said J. C. to said Sturm for a certain tract of land for which he is claiming a decree against said J. C., and on the day after said commissioner's report was returned and filed in the clerk's office, finding that over \$4,000 was due from said J. C. to said Sturm, said J. C. acknowledges and delivers for record a deed for 127 acres of land to his son-in-law, in trust for a weak-minded son, which deed is dated nearly two years anterior to its acknowledgment and delivery for record, and leaves the grantor with insufficient means to pay his indebtedness, which deed purports to have been made in consideration of \$4,000 cash in hand, but which the evi-

dence shows was made in consideration of an account claimed by said son against his father for work done on the farm which was barred by the statute of limitations, and for the proceeds of cattle and sheep sold by said son, when the evidence fails to show he owned such stock, and it appears that several of the items charged in said account which is claimed to have been made out at the date of the deed in 1884 did not accrue, if they ever did, until some time thereafter, and when it is shown by the testimony of the wife of said son that he had no means with which to make the payment of the purchase money, and by other witnesses that he declared that his only means of paying for the land was out of the timber which had been expressly reserved in the deed by the grantor for the use of the farm, and by said son's own frequent declarations that, if he had \$900 out of the land he had put into it, the land might go, these circumstances clearly indicate that the pretended consideration was fraudulent, and that said conveyance was made with intent to hinder, delay, and defraud the plaintiff, Sturm.

2. Fraud may be deduced from deceptive assertions, and from incidents and circumstances evincing a fraudulent intent.

3. Fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with intent to hinder, delay, and defraud existing or future creditors.

4. The fact that the account for labor sought to be charged as a part of the consideration for the tract of land was barred by the statute of limitations at the date of the deed is a circumstance which may be weighed in determining the bona fides of the transaction.

(Syllabus by the Court.)

Appeal from circuit court, Harrison county; J. M. Hagans, Judge.

Action in the nature of a creditors' bill by Asbury P. Sturm against John Chalfant, Jeremiah M. Chalfant, and Melville B. Bartlett, trustee. Plaintiff had decree, and defendant Jeremiah M. Chalfant appeals. Affirmed.

B. Wilson, (J. Philip Clifford and M. G. Sperry, of counsel,) for appellant. John Bassel, for appellee.

ENGLISH, P. On the first Monday in April, 1890, Asbury P. Sturm filed his bill in equity in the circuit court of Harrison county against John Chalfant, Jeremiah M. Chalfant, and Melville B. Bartlett, trustee, in which he alleged that on the 1st day of October, 1886, he obtained a judgment or decree in said court in the case of himself against Solomon S. Fleming, John Chalfant, and others, against said John Chalfant for the sum of \$4,083.16, with interest thereon from said date and costs; that said sum was adjudged to him against said Chalfant on account of rents of two certain tracts of land of complainant held by said Chalfant from the year 1805 to the year 1885, inclusive, the suit in which said decree was rendered having been instituted by complainant in the year 1873; that no part of said decree has been paid by said Chalfant or by any one for him, the whole thereof remaining unsatisfied; that said Chalfant was insolvent, and had no other property than

that therein mentioned to which complainant could resort for satisfaction of said decree; that on the 1st day of April, 1884, said John Chalfant, by deed of that date, conveyed to one Melville B. Bartlett, who was then and still is the son-in-law of said Chalfant, a tract of land containing 127 acres, lying on the waters of Robinson's run, in said county, in trust for the use and benefit of Jeremiah M. Chalfant, a son of said grantor, which conveyance was made by said John Chalfant with the intent on his part, and with the like intent upon the part of said Melville B. Bartlett and Jeremiah M. Chalfant, to hinder, delay, and defraud the creditors of said John Chalfant, and especially the plaintiff; that while said deed upon its face recites that it was made in consideration of the sum of \$4,000 in hand paid by said Jeremiah, it was utterly untrue, and that nothing was paid by him, for the reason that he had no money or means wherewith to make such a purchase; that said conveyance was wholly without consideration deemed valuable in law, and was made on the part of said John Chalfant and Jeremiah M. Chalfant to hinder, delay, and defraud the creditors of said John,—and he prayed that said deed might be canceled as to the plaintiff's decree, and said land be sold to satisfy the same. The defendant Jeremiah M. Chalfant appeared at rules, and demurred to the plaintiff's bill, and on the 27th day of May, 1890, said demurrer was considered by the court and overruled, and thereupon the defendant Jeremiah M. Chalfant filed his separate answer to the plaintiff's bill, putting in issue the material allegations of the plaintiff's bill, denying that in the purchase of the 127-acre tract of land in the bill mentioned there was any intent on his part, or on the part of any one connected with the transaction, to hinder, delay, or defraud any creditor of said John Chalfant, and claiming that there was no intent to hinder, delay, and defraud the plaintiff in the collection of his said decree. He also alleged that he paid to John Chalfant a full and adequate consideration for said land, amounting in the aggregate to \$4,000 at least, as recited in said deed, which amount he claims he had been accumulating since he was 21 years of age. He also denied that he had any knowledge of any such intent on the part of any of his codefendants. The bill was taken for confessed as to the defendants John Chalfant and Melville B. Bartlett, trustee. Depositions were taken and filed by both plaintiff and defendants, and on the 28th day of January, 1892, a decree was rendered in the cause, holding the deed made by the defendant John Chalfant to said Bartlett as trustee for Jeremiah M. Chalfant, dated April 1, 1884, fraudulent as to the decree of the plaintiff against the said John Chalfant for \$4,083.16, with interest from October 1, 1886; and it was decreed that as to said debt the said deed be

set aside and annulled, and directed that, unless the said debt was paid to the plaintiff in 30 days, a commissioner thereby appointed should advertise and sell said 127-acre tract of land upon the terms therein prescribed; and from this decree the said Jeremiah M. Chalfant applied for and obtained this appeal.

The action of the circuit court in holding said deed of conveyance from John Chalfant to M. B. Bartlett, trustee, for Jeremiah M. Chalfant, to be fraudulent, and setting the same aside and decreeing it to be sold in satisfaction of plaintiff's decree, is assigned as error. Now, in order that we may seek satisfactorily the intent which actuated the defendant John Chalfant in making this conveyance, it is necessary that we should inquire into the business relations which existed between the parties anterior to the transaction, and to the circumstances which surrounded them about the time the conveyance was made. The allegation that the defendant John Chalfant was insolvent, and had no property other than the said 127 acres of land, is taken for confessed as to the defendants John Chalfant and M. B. Bartlett, and is not denied by Jeremiah M. Chalfant in his answer. When we look to the pleadings and exhibits filed therewith, it is apparent that the litigation between the plaintiff and defendant which resulted in the decree sought to be enforced in this case against the land conveyed as above stated by John Chalfant is not of recent origin. It appears that during the war, and while said Sturm was beyond the lines, judgments were rendered against him, and his lands were decreed to be sold in satisfaction thereof, and at the sales of said lands by special commissioners said John Chalfant became the purchaser, and remained in possession thereof for many years; and that on the 25th day of January, 1885, in the chancery cause of *Sturm v. Fleming et al.*, a decree was rendered declaring void as to the plaintiff said judgments, and also the decrees under which said lands were sold, restoring said Sturm to the possession of said lands, and directing a commissioner to ascertain and report what amount, if any, had been paid upon said judgments out of the proceeds of the tract of land sold under the decree of said court in the case of *Lucas* against the plaintiff Sturm and others, together with any other matters that said commissioner might deem pertinent, or that might be required by the parties thereto. On the 4th day of January, 1886, said commissioner returned and filed in the clerk's office his report in pursuance of said decree, in which he ascertains, among other things, the amount due A. P. Sturm from John Chalfant to be \$4,157.08; and when we refer to the deed made by John Chalfant to Melville B. Bartlett, trustee, for the use of the defendant Jeremiah M. Chalfant, a copy of which is filed with the defendant's answer, it appears

that although said deed bears date on the 1st day of April, 1884, it was not acknowledged and admitted to record until the 5th day of January, 1886, the next day after said commissioner's report was returned and filed in the clerk's office. The said John Chalfant, in his answer to plaintiff's bill, claims that he considered it impossible that rents and profits could be recovered in that suit without a specific claim being made therefor, and that the result reached by the commissioner could not be reasonably anticipated by said John Chalfant. Be this, however, as it may, the result had been reached by the commissioner, and more than \$4,000 had been ascertained to be due from said John Chalfant to A. P. Sturm. The report had been filed in the clerk's office, and said Chalfant, being a party to the suit, actively engaged in its defense, had the opportunity of knowing, and it must be presumed did know, the result of said commissioner's investigations before he acknowledged said deed on the 5th day of January, 1886, to his son-in-law Melville B. Bartlett, trustee, for his son Jeremiah M. Chalfant. The claim that said John Chalfant could not reasonably expect the result reached by the commissioner is sought to be supported by the fact that there was no specific prayer in the petition for the opening and rehearing of said decree, that the rents, issues, and profits of the tract of land sold under said former decree might be ascertained, and that the plaintiff might recover the amount when so ascertained from the said John Chalfant; but when we look to the concluding portion of said petition we find that said A. P. Sturm prayed that the decrees therein made and complained of might be set aside and reversed, and that restitution of said property or of the proceeds of the sale thereof be made, and for such other further and general relief as the nature of his cause required, and as to equity appertained, etc. And while said John Chalfant himself might not have known what results might have been reached under that and under a decree subsequently rendered in the cause in pursuance thereof, which, among other things, directed the commissioner to ascertain and report any other matters that the said commissioner might deem pertinent or that might be required by the parties thereto, yet the eminent counsel who represented him knew that in the case of *Humphrey v. Foster*, 13 Grat. 653, the court of appeals of Virginia held that "on a bill claiming a share of a tract of land, and asking for a partition and for general relief, the plaintiff's right to partition being established under the prayer for general relief, there may be a decree for an account of rents and profits;" and in the case of *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 15 S. E. 907, this court has recently announced the same doctrine by holding that the general rule is that if the facts be contained in the bill, though the specific relief asked for be refused, the

proper relief which these facts call for under the law may be given under the prayer for general relief.

In searching, however, for the motive that actuated said John Chalfant, it is sufficient to notice the fact that the result was reached by the commissioner which charged him with an indebtedness to A. P. Sturm of over \$4,000, and it is a coincidence which should have peculiar weight in determining the question presented for our consideration in this case, that, on the day following, said Chalfant should convey this valuable tract of land to his son-in-law in trust for his weak-minded son, leaving himself utterly insolvent; and, although he had other lands Solomon Chalfant states in his testimony they were insufficient to pay his debts. In determining the bona fides of this conveyance, let us next look to the testimony, and see whether the purchase money was paid by said Jeremiah Chalfant in the manner he states it was "in stock, in work, in money, like any other man would." The appellant, Jeremiah Chalfant, arrived at his majority in 1872. On the 12th day of March, 1879, he was married, and, according to the testimony of Solomon Chalfant, said Jeremiah moved by himself, and kept house and was doing business for himself. This statement of facts, if it be taken as true, left but seven years in which said Jeremiah Chalfant, by his labor at \$20 per month, was to accumulate the sum of \$3,162.77, the item charged in the account of said Jeremiah against said John Chalfant. Now, if it be conceded that he worked constantly for seven years at \$20 per month, it is not reasonable to suppose that after deducting his expenses he saved more than half that sum, or \$10 per month, or \$120 per annum, which, with interest added, beginning with the end of each year until he ceased to labor, and then on the aggregate for five years, would only amount to about \$1,300; and the fact that this account for labor was barred by the statute of limitations in 1884, when the deed is dated, may be weighed as a circumstance indicative of fraud in determining the bona fides of the transaction. When we look at the other items of the account, and examine the proof, it appears exceedingly indefinite. Solomon Chalfant says the first item is a cow and three heifers, \$90.55. "I know that he had that stock, and that my father got them;" how, or for what consideration, he does not state. As to the next item, three three year old steers, \$112.50, the same witness says, "I know father got the proceeds of these cattle;" and he makes the same statement as to one yearling steer, \$20; one heifer, \$25.25; one lot of sheep, \$68.75; one lot of cattle, \$103; 1 lot of sheep, \$75. Now, all of these statements must be considered in connection with the fact that said Jeremiah Chalfant was living on his father's farm, and laboring for him by the day or month, and are not inconsistent with the fact

that the stock spoken of was raised on the farm, and that John Chalfant was of right entitled to the proceeds. It is true, David Slocum, the father-in-law of said Jeremiah, states that said Jeremiah paid him \$225 for his father, John Chalfant, which was in the shape of a note on said John Chalfant; but the same witness, when asked, "Have you any reason to believe that Jeremiah M. Chalfant had any money of amount to pay on land at all?" answered, "I don't think he had any considerable amount. I am pretty sure that he had not. I give this as my opinion." The same witness states that before this deed was made he went and looked at the land, and said John Chalfant proposed that, if he would buy half of the land for his daughter, (Jeremiah's wife,) he would give the other half to said Jeremiah; that said John gave an option to some one on the coal underlying it which defeated the trade; and said Slocum further states that about the time he was talking about trading for the land (and this was after Jeremiah's marriage with his daughter) he heard Jeremiah say that his father owed him about \$600 for the work he had done, and heard him say that frequently. In connection with this testimony, when we turn to the testimony of Annette Chalfant, (the wife of said Jeremiah,) when asked to state what money or property said Jeremiah had at the time of their marriage, answered: "So far as money was concerned, he had none that I know of. He had two horses; he claimed two horses. After we were married awhile, his father gave him a cow. The other household goods we had to commence housekeeping were given me by my father, David Slocum, except a little that Sol. Chalfant let my husband have." She also stated that said Jeremiah paid some money on said land, but he did not pay any \$4,000. All the money they had when they moved from Robinson's run onto that land was about \$500. That they had considerable expenses for work and other things on the land, and she did not know just how much he did pay, but it was somewhere between two and six hundred dollars. She did not think the amount paid on the land exceeded \$600, etc. That she heard her husband say that after he was 21 years of age he went to visit relations in Pennsylvania, and remained with them some time,—she thought, a year or two. She further states that after they moved upon said 127-acre tract he laid up no money; that he did not make more than his expenses; that his property was levied on for about \$60 of taxes, and she had heard him say often that, if he had the four, five, or six hundred dollars he had in the land out of it, the land might go. In answer to the second question asked the witness Barton Drummond, he states that Jeremiah told him he had five or six hundred dollars in said land, and, if he had it out, the land might go. Again, the witness James B. Fow-

ler states that he had a conversation with said Jeremiah in reference to removing the timber from the 127-acre tract of land, in which said Jeremiah told him that what he was to get for the timber was to help pay for the land, and that he expected to pay for the land from the profits on what he could get off of it. In that connection he understood Mr. Chalfant to say he had not paid a dollar on it; that his father-in-law was to pay about one-half of it,—and in the conversation he asked witness whether Mr. Sturm could sell his land, and informed him that Mr. Sturm was proceeding against his father to recover judgment. And again, the witness C. L. Crile stated, in answer to question 5, that said Jeremiah Chalfant told him that if he had the money out that he had paid into the place it might go; and, in answer to the sixth question, that he told him at the time he came there he had put \$600 in it and his own work, and had paid some little more on it. Samson Harbert also testifies that he heard said Jeremiah Chalfant say to Melville Bartlett, "You know damn well I can't pay for the land unless I sell the timber," when said Bartlett had forbidden him from cutting the timber on the land.

Now, the question is whether these statements and admissions made by said Jeremiah Chalfant as to the amount he had paid on said tract of land can be reconciled with his statement made by him in answer to the second question asked him, as to whether he paid the consideration of \$4,000 recited in the deed for said land, where he says, "I did pay the \$4,000. I paid it in stock, in work, in money, like any other man would,"—and he filed with his answer a statement of the items showing how it had been paid. Among those items is found a judgment of C. J. Lang against John Chalfant, which Solomon H. Chalfant had at some time paid for John Chalfant, when it does not appear. At the foot of said account a memorandum is found, as follows: "Settled by deed for 127 acres of land dated April 1, 1884;" and a copy of a note which reads as follows: "Mannington, West Va., April 1, 1884. \$1,304.78. One, two, three, and four — after date, in equal payments, I promise to pay to the order of S. H. Chalfant thirteen hundred and four seventy-eight hundredths dollars, with interest at 6 per cent. Value received. Negotiable and payable at the — Bank of —, W. Va. No. 172. Due —. [Signed] J. M. Chalfant." Now, although said account was made up and purports to have been settled as of April 1, 1884, by a deed of that date for said 127 acres of land, yet Solomon H. Chalfant, in answer to the fourth question, testifies that he did not intend to say that account showed the items at the 1st of April, 1884, but that it showed the items of account about the time the deed was made, because he knew that part of said

account was paid after the 1st day of April, 1884. Which of said items were so paid he does not state, but it is apparent that on the 1st of April, 1884, an account was made up of items, a portion of which had never been paid, for the purpose of showing a fraudulent consideration for said 127-acre tract of land; and it is just as apparent that on the 5th day of January, 1886, this same false account was used in pretended settlement for the purchase money of said land. As to the C. J. Lang judgment, which forms one of the principal items of said account, it is difficult to reconcile the statement of Jeremiah Chalfant, when asked how he came to owe S. H. Chalfant for said judgment, when he says: "I borrowed it; I borrowed the money of him;" and again, in answer to the seventeenth question on cross-examination, in speaking of said Lang judgment, he replies: "I borrowed the money to pay that of my brother S. H. Chalfant, and gave him my note for it when I paid for this land, when I took possession;" and in answer to the next question he states that he got the money before he got the deed for said tract of land,—with the fact that the note above copied, which was exhibited with said Jeremiah Chalfant's deposition, for \$1,304.78, the exact amount of the Lang judgment, was executed on April 1, 1884, to S. H. Chalfant, and when it appears from the statement of Solomon H. Chalfant, made in answer to question 27, that the last of said judgment, as he was inclined to think, was paid by witness in 1881, at John Gifford's sale on Mudlick; and, if this be true, it cannot be true, as stated by Jeremiah Chalfant, that he borrowed the money from his brother S. H. Chalfant, and paid it to C. J. Lang, or that he borrowed the money to pay said judgment within two or three months before the 1st of April, 1884, the date of the deed. It is apparent, then, that no part of said Lang judgment was paid by Jeremiah M. Chalfant, and while it may be regarded as a brotherly act on the part of said S. H. Chalfant, some three or four years after he paid said judgment for his father, (under what arrangement for reimbursement does not appear,) that he should hand over this judgment to his brother Jeremiah with its accrued interest, to enable him to pay the purchase money for this tract of land the next day after the commissioner had ascertained a liability in favor of A. P. Sturm, yet it cannot be regarded as honest, fair dealing with the creditor of John Chalfant, when taken in connection with the surrounding circumstances, and the repeated declarations of said Jeremiah that he only had about \$600 in the land, and if he had that out it might go, and his further declaration that his only means of paying for the land was the sale of the timber. We can but regard this account, or the principal part of

it, to have been manufactured for the occasion by his ingenious brother, S. H. Chalfant, with intent to hinder, delay, and defraud said A. P. Sturm, a creditor of said John Chalfant, and to assist said John Chalfant in committing a fraud against said A. P. Sturm by making said conveyance to said trustee. The circumstances above detailed, and the question asked the witness J. B. Fowler as to whether A. P. Sturm could sell his land, and his statement to said Fowler that said Sturm was proceeding against his father to obtain a judgment, shows clearly that he had notice of, and was seeking to avoid, the Sturm debt. It is held by this court in the case of *Core v. Cunningham*, 27 W. Va. 206, that, "where the facts and circumstances connected with a fraudulent conveyance necessarily establish complicity of the grantee in the fraudulent intent, it is not necessary by direct proof to show notice of such intent to the grantee." In the case of *Lockhard v. Beckley*, 10 W. Va. 88, (paragraph 9 of the syllabus,) this court held that "fraud is to be legally inferred from the facts and circumstances of the case, when those facts and circumstances are of such a character as to lead a reasonable man to the conclusion that the conveyance was made with the intent to hinder, delay, or defraud existing or future creditors." So, also, in *Goshorn v. Snodgrass*, 17 W. Va. 717, this court held that "the proposition that 'fraud must be proved and not presumed' is to be understood as only affirming that a contract, honest and lawful on its face, must be treated as such until it is shown to be otherwise by evidence, positive or circumstantial;" and also in the same case: "Fraud may be deduced from deceptive assertions, and from incidents and circumstances evincing a fraudulent intent." See, also, *Knight v. Capito*, 23 W. Va. 639, in which case this court held that "If an insolvent grantor, who is justly indebted to a creditor in a small amount, convey to him all his property, or the greater portion thereof, in satisfaction of his debt, for a nominal consideration falsely recited in the deed, and claimed by the grantee to have been in hand paid, equal in value to that of the property conveyed, but largely in excess of the debt actually due such creditor, and he accept the same, such deed is void as to the other creditors of the grantor." Now, when we apply these principles to the discordant and utterly irreconcilable statements made by the parties most intimately connected with the transactions, and take into consideration the near relationship of said parties, the effort to place considerable items in the account of Jeremiah Chalfant against his father in 1884, which S. H. Chalfant, who made out the account, admits did not exist until long afterwards, and combine these facts with the further fact that the circuit court, which was near to, and perhaps well

acquainted with, the witnesses who testified and the parties to the transaction, has found that said deed was fraudulent as to the decree of plaintiff, A. P. Sturm, and when we further consider the manifest difficulty the evidence presents on its face to a reconciliation with honesty and fair dealing on the part of those concerned in the transactions complained of, we must conclude that the decree complained of was not erroneous in holding, as it did, said deed fraudulent as to the plaintiff's decree. The decree complained of is therefore affirmed, with costs.

CRUMLISH'S ADMR v. CENTRAL IMP. CO. et al.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

PAYMENT BY STRANGER — RIGHTS OF PAYOR —
EQUITABLE ASSIGNMENT — FOREIGN JUDGMENT —
FOREIGN CORPORATIONS — RIGHTS OF OFFICERS —
LAW OF PLACE.

1. A stranger, paying the debt of another without request, cannot sustain an action at law against such other unless he has in some way ratified such payment.

2. Such payment by a stranger, if accepted as such by the creditor, discharges the debt, so far as the creditor is concerned, and also as to the debtor, if he ratify it.

3. A stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative; that is, that if the debtor do not ratify such payment the debt may be enforced in his favor, as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor.

4. The stranger, when he pays the debt of another, may take an assignment of it from the creditor, and enforce the debt against the debtor; and if, when he pays, the creditor agrees to assign him the debt, though no assignment in writing be made, the stranger will be, in equity, regarded as the equitable assignee of the debt, and the transaction will be regarded equivalent to a purchase of the debt.

5. It is well settled that the judgment of a sister state must be accorded in this state the same faith and credit it has in the state where rendered.

6. When such judgment is sought to be enforced here, our courts may inquire into the jurisdiction of the court rendering the judgment, and if it appear that the court had not jurisdiction the judgment will be held void here; otherwise, it is valid and binding in this state.

7. A judgment in a court of a sister state, without service of process in any manner, and without appearance, will be held void in this state.

8. Under the law of Pennsylvania, the president of a private corporation created by that state cannot recover from the corporation upon a quantum meruit for official services there rendered, in the absence of any by-law or resolution of the directors allowing compensation. Nor can one who is treasurer and secretary of the corporation, and a stockholder and director, recover on a quantum meruit for his official services without such by-law or resolution. The law of that state raises no promise on the part of the corporation in such cases, and the question whether, in such cases, there is an implied promise, depends on the law of that state.

9. The obligation of a supposed contract made and to be performed in another state is tested by its law.

(Syllabus by the Court.)

Appeal from circuit court, Jefferson county. Action by H. H. Crumlish's administrator against the Central Improvement Company. To a fund for the payment of defendant's creditors, B. K. Jamison & Co. and others filed claims; and, from the decree rendered, Jamison & Co. and others appeal. Affirmed in part.

Barton & Boyd, U. L. Boyce, Wm. M. Stewart, Jr., and Geo. Baylor, for appellants. Frank P. Clark, for appellee.

BRANNON, J. In a suit in equity in the circuit court of Jefferson county of H. H. Crumlish's administrator v. The Central Improvement Company there was a fund for payment of creditors of that company, and then for division among stockholders. A commissioner was directed to ascertain the debts having right to be paid out of the fund. Various demands were presented before the commissioner for audit as debts; and among them was a judgment in favor of B. K. Jamison & Co. against the Central Improvement Company, an account in favor of R. D. Barclay against same company, and an account in favor of John P. Green against same, which three demands having been disallowed by the commissioner and court, Jamison & Co. and Barclay and Green united in this appeal.

The Jamison Judgment.

A judgment was rendered in 1877 in the court of common pleas, No. 3, of the county of Philadelphia, Pa., in favor of B. K. Jamison & Co. against the Central Improvement Company for \$25,168.85 and costs, and afterwards, in 1890, upon a writ of scire facias upon this judgment, another judgment was rendered by the same court for \$26,378.08 and costs. Jamison & Co. and U. L. Boyce and the Fidelity Insurance Trust & Safe-Deposit Company each claimed the right to said judgment before the commissioner; and the Norfolk & Western Railroad Company, being a large owner of stock in the Central Improvement Company, pleaded payment. Jamison & Co. and Boyce having excepted to the report, and appealed, what we have to decide is whether they have any cause to complain of the refusal to allow them the judgment.

Jamison & Co., by process on said first judgment, had attached \$250,000 of second mortgage bonds and \$175,000 of income bonds of the Shenandoah Valley Railroad Company, held in the hands of a third party for the benefit of the Central Improvement Company. The Shenandoah Valley Railroad Company desiring to make a contract for its completion, and make another mortgage to raise money to complete it, and desiring to

cancel and retire the bonds so attached, Boyce, the vice president of the Shenandoah Valley Railroad Company, opened negotiations with Jamison & Co. looking to securing those bonds, and Jamison & Co. expressed their willingness to take any step which would get their money advanced to the Shenandoah Valley Railroad Company represented by said judgment. Boyce made an arrangement with E. W. Clark & Co., bankers,—who were financial agents of the Shenandoah Valley Railroad Company, and wished to obtain said bonds for cancellation, out of the way of a new series,—to furnish the money. Thereupon, on July 12, 1879, Jamison & Co. and E. W. Clark & Co. made a written agreement providing that Jamison & Co. should transfer to Clark & Co. all their right, title, and interest to the bonds aforesaid, as also some others; that Jamison & Co. should proceed to get judgment upon their attachments, levy on said securities, and sell the same so as to pass title to the purchaser; that, if they should not be bid up to a figure above Jamison & Co.'s judgment, Jamison & Co. were to buy them at the sale, and transfer them to Clark & Co.; that "the said E. W. Clark & Co. are to pay B. K. Jamison & Co. the amount of their judgment against the Central Improvement Company, with interest and costs, the amount of said judgment being \$25,168.85, with interest from July 10, 1877, the said payment to be made as follows: \$10,000 in cash, and the balance in the notes of E. W. Clark & Co., drawn in equal amounts," etc. The said bonds were sold to Jamison & Co. under said attachments at \$11,000, which was credited on the judgment, and Jamison & Co. transferred the bonds to Clark & Co., and received from them the \$10,000 cash, and their notes in full payment of the amount of said judgment. By reason of said agreement the commissioner reports the judgment as paid "so far as claimant is concerned;" that is, Jamison & Co. The object of Jamison & Co. being only to get their money, and the language of the writing being, "the said E. W. Clark & Co. are to pay [note the word "pay"] B. K. Jamison & Co. the amount of their judgment," these facts lead me to the conclusion that the parties contemplated it as a payment, so far as Jamison & Co. were concerned. But this payment was made by a stranger, without request or ratification by the debtor, so far as appears. Does it satisfy the judgment? As it seems to me, the answer depends upon whether you mean as to the creditor or debtor. It remains a correct legal proposition, to the present, that one man who is under no obligation to pay the debt of another cannot, without his request, officiously pay that other's debt, and charge him with it. If he ratify such payment, the debt is discharged, and he becomes liable to the stranger for money paid to his use. If he refuse to ratify it, he dis-

claims the payment, and the debt stands unpaid as to him, (the debtor.) In the one case the stranger would, at law, sue the debtor for money paid to his use; in the other, enforce the debt in the creditor's name for his use. If his payment is not ratified, he may go into equity, praying that if the debtor ratify it he may be decreed to repay him, or, if he do not ratify the payment, that the debt be treated as unpaid, as between him and the debtor, and that it be enforced in his favor, as an equitable assignee. *Neely v. Jones*, 16 W. Va. 625; *Moore v. Ligon*, 22 W. Va. 292; *Beard v. Arbuckle*, 19 W. Va. 133.

But how as to the creditor? When a stranger pays him the debt of a third party, without request of such third party, as in this case, can the creditor say the debt is yet unsolved, and enforce it against the debtor, as is attempted to be done by Jamison & Co.? Can he accept such payment, and say, because it was made by a stranger, it is no payment? Is his acceptance not an estoppel by conduct in pais, as to him? There has been a difference of opinion in this matter. The old English case of *Grymes v. Blofield*, Cro. Eliz. 541, (decided in Elizabeth's reign,) is the parent of the cases holding that even the creditor accepting payment from a stranger may repudiate, and still enforce his demand as unpaid. That case is said to have decided that a plea of accord and satisfaction by a stranger is not good, while *Rolle*, Abr. 471, (condition F.) says it was decided just the other way. *Denman*, C. J., questioned its authority in *Thurman v. Wild*, 39 E. C. L. 145. Opposite holding has been made in England in *Hawshaw v. Rawlings*, 1 Strange, 24. Its authority is questioned at the close of the opinion by *Cresswell*, J., in *Jones v. Broadhurst*, 67 E. C. L. 197, as contrary to an ancient decision in 86 Hen. VI., and against reason and justice. *Parke*, B., seemed to think it law in *Simpson v. Eggington*, 10 Exch. 845. It was followed in *Edgcombe v. Rodd*, 5 East, 294, and *Stark v. Thompson*, 3 T. B. Mon. 296. Lord Coke held the satisfaction good. Co. Litt. 206b, 207a. See 5 Rob. Pr. (New,) 884; 7 Rob. Pr. (New,) 548. The cases of *Goodwin v. Cremer*, 83 E. C. L. 757, and *Kemp v. Balls*, 28 Eng. Law & Eq. 498, seem to hold that payment must be made by a third person as agent for and on account of debtor, with his assent or ratification. In New York, old cases held this doctrine. *Glow v. Borst*, 6 Johns. 37; *Bleakley v. White*, 4 Paige, 654. But later, in *Wellington v. Kelly*, 84 N. Y. 543, *Andrews*, J., said that the old cases were doubtful, but had not been overruled, but it was not necessary in that case to say whether it should longer be regarded as law, and the syllabus makes a quære on the point. It was held in *Harrison v. Hicks*, 1 Port. (Ala.) 423, that "payment of a debt, though made by one not a party to the contract, and though the assent

of the debtor to the payment does not appear, is still the extinguishment of the demand." The opinion says that, as between the person paying and him for whose benefit it was paid, a question might arise whether it was voluntary, which would depend on circumstances of previous request, or subsequent, express or implied. This doctrine is sustained by *Martin v. Quinn*, 37 Cal. 55; *Gray v. Herman*, 75 Wis. 453, 44 N. W. 248; *Cain v. Bryant*, 12 Helsk. 45; *Leavitt v. Morrow*, 6 Ohio St. 71; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Harvey v. Tama Co.*, 53 Iowa, 228, 5 N. W. 130. *Bish. Cont. § 211*, holds that, if payment "be accepted by creditor in discharge of debt, it has that effect." See 2 Whart. Cont. § 1008.

It seems utterly unjust, and repugnant to reason, that a creditor accepting payment from a stranger, of the third person's debt, should be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. He has himself, for this purpose, allowed him to make himself a quasi party. He consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? Then, can the stranger recover back? What matters it to the creditor who pays? As the supreme courts of Wisconsin and Ohio, in cases above cited, said, this doctrine is against common sense and justice. It does not at all infringe the rule that one cannot at law, make another his debtor, without request to allow such payment to satisfy the debt as to the creditor; and this court, while recognizing the rule that one cannot officiously pay the debt of another, and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment, makes the payment, in the eyes of a court of equity, operate to satisfy the debtor, and render the stranger a creditor of the debtor. *Neely v. Jones*, supra. I know that in *Neely v. Jones*, 16 W. Va. 625, it is held that, "if a payment by a stranger is neither ratified nor authorized by the debtor, it will not be held to be a discharge of the debt;" but, though this point is general, that was a case of the stranger seeking to make the debtor repay, and the case and opinion intended to lay down the rule at law only as between the stranger paying and the debtor, not as between the creditor and debtor. So I hold that, when *Jamison & Co.* received the money for this judgment, it operated as a discharge as to them.

But it is said that such payment, though a payment, is inoperative, because, after it was made, a writ of *scire facias* issued to revive the judgment, and a judgment was rendered thereon that the plaintiffs recover their debt, and thus such payment amounts to nothing. This judgment is not, as with us, according to common law, a simple award of

execution, but a judgment quod recuperet, as in an original action. Such a judgment would be void here by some authorities. 2 Bart. Law Pr. 1031; *Lavell v. McCurdy*, 77 Va. 763. I have entertained doubts whether it would be void, as distinguished from voidable, though I have not fully examined the subject. But in Pennsylvania a scire facias is a substitute for an action of debt, and the judgment is properly quod recuperet. *Duff v. Wynkoop*, 74 Pa. St. 300; 1 Black, Judgm. § 499. We must, under the United States constitution, give it the same faith and credit here which it has there. *Black v. Smith*, 13 W. Va. 780; *Gilchrist v. Oil Land Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167. If it were a valid judgment, it would nullify the payment above spoken of, on familiar principles. Such would be its effect in Pennsylvania, and it is to its effect there that we look. *Custer v. Detterer*, 3 Watts & S. 28; *McVeagh v. Little*, 7 Pa. St. 279; *Potter v. Hartnett*, 148 Pa. St. 15, 23 Atl. 1007; *Mills v. Duryee*, 7 Cranch, 481. But while a judgment of a sister state, if valid, is given here the same effect it has there, yet, consistently with this rule, we can look into its record to see whether it had jurisdiction of the defendant; and, looking into the record of this judgment, we find no service whatever of the scire facias, personal or by return of nihil, or any appearance, and therefore the judgment is void, as would be a judgment here, for that cause. *Gilchrist v. Oil Land Co.*, 21 W. Va. 115; *Stewart v. Stewart*, 27 W. Va. 167; *D'Arcy v. Ketchum*, 11 How. 165; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gaslight, etc., Co.*, 19 Wall. 88; *Guthrie v. Lowry*, 84 Pa. St. 533; *Steel v. Smith*, 7 Watts & S. 447; *Noble v. Oil Co.*, 79 Pa. St. 354; *Story, Const. § 1297*; 1 Greenl. Ev. § 548. This is a good reason for disallowing the judgment.

Argument is made that, in Pennsylvania, judgment upon two returns of nihil habet is good, and as effective as a return of scire facias. As I find no return whatever of the scire facias, I have not so closely examined this question as otherwise I would have done. There seems some authority for the proposition that two returns of nihil will sustain a judgment in personam. *Compheer v. Anawalt*, 2 Watts, 490. The cases cited by counsel (*Warder v. Tainter*, 4 Watts, 274; *Taylor v. Young*, 71 Pa. St. 85; *Colley v. Latimer*, 5 Serg. & R. 211; *Edmonson v. Nichols*, 22 Pa. St. 74; *Chambers v. Carson*, 2 Whart. 9; *Hartman v. Ogborn*, 54 Pa. St. 120; *Allison v. Rankin*, 7 Serg. & R. 269) were cases of scire facias sur mortgage, as to which the rule of judgment of foreclosure upon two nihils seems established in Pennsylvania. The practice of taking judgment on two returns of nihil is properly, perhaps, confined to scire facias upon a mortgage. The case of *Compheer v. Anawalt*, supra, says, in the opinion, that it

is liable to abuse; and I notice, in the case of *Custer v. Detterer*, 3 Watts & S. 28, (decided only seven years after the former case,) the opinion says that, as a judgment on scire facias is a new judgment, two returns of nihil will not do. I should doubt as to personal judgments. But though such a judgment would be good in Pennsylvania, it does not follow that it would be good here, for the supreme court of Pennsylvania, in *Steel v. Smith*, 7 Watts & S. 447, in an opinion delivered by the eminent Chief Justice Gibson, held that a judgment of Louisiana on attachment of property and summons served on one of the joint owners, which by the Louisiana law was good as to all defendants, was a nullity in the courts of Pennsylvania as to parties not served. The only Pennsylvania statute to which I have access provides that service of process on a corporation shall be on its president or other chief officer, cashier, treasurer, secretary, or chief clerk. No service of any kind appears here. For this reason the judgment was properly disallowed. No plea of nul tiel record was necessary. It is a chancery suit, and concerns the audit of debts on a reference before a master; and, when the judgment creditors presented the judgment, adverse interests could contest it on any legal ground without formal plea. I remark that it was not this scire facias judgment which was considered on the appeal reported in 33 W. Va. 761, 11 S. E. 58, but the original one. But let us suppose that the judgments were valid, and that, treating *Clark & Co.*'s payment simply as a payment, it would be cut off by the judgment so the payment could not now be pleaded. What then? *Jamison & Co.* are no longer its owners, but *Clark & Co.* are assignees of it, and they are not asking its allowance, but *Jamison & Co.* are claiming for their own use. When *Clark & Co.* paid it, the law implied that *Jamison & Co.* would assign it to them, and, without assignment actual, a court of equity treats them as its equitable owners. The case of *Neely v. Jones*, 16 W. Va. 625, in point 4, clearly supports this position. *Boyce's* evidence, uncontradicted, is that *Jamison & Co.* in the agreement they made with him, promised to assign the judgment to him, and their attorney did transmit him a copy of the judgment. Now, if this evidence is not forbidden from consideration by the execution of the writing between *Clark & Co.* and *Jamison & Co.*, then either *Clark & Co.* or *Boyce* have an express agreement to assign, tantamount to an assignment, and, though no actual assignment be made, equity regards it as an equitable assignment; and this is the letter of point 5 in *Neely v. Jones*, supra, and *Beard v. Arbuckle*, 19 W. Va. 135. It may be with some force said that, as between *Jamison & Co.* and *Boyce*, the assignment should go to *Boyce*, and then there would be no ground for saying that the oral

agreement to assign would be excluded by the writing. In fact, Jamison & Co. admit in their petition for the appeal that they assigned it to Boyce; so this court ought not to decree it to them. Thus, I think, law excludes the allowance of this judgment to Jamison & Co., and this conclusion accords with the real justice of the case. Jamison & Co. only wanted the amount they advanced to the Central Improvement Company. They got it. They do not deny, but admit, they received all the company owed them, but they want now to hold it as collateral for a merely personal loan to Boyce.

And now as to U. L. Boyce's claim to said Jamison & Co.'s judgment. He has no title to it, to his own use. Any shadow of interest that may be vested in him was for other use than his own: First. He negotiated for the acquirement of it from Jamison & Co. for Clark & Co. as financial agents of the Shenandoah Valley Railroad Company, whose vice president Boyce was at that very time, and in whose service and interest he acted touching this judgment. Clark & Co. paid for the judgment, and took the contract in their name. Boyce explicitly says as a witness, and in a letter to Doran, that he was to get assignment of it, and transfer it to the parties furnishing the money, and that Clark & Co. furnished the money. Never was a resulting trust more plainly established than that any show of technical right in Boyce was for the use of Clark & Co. And then, further, consider that Clark & Co. were agents of the Shenandoah Valley Railroad Company, and Boyce its vice president. And that he was acting for it, he does not deny, but admits; and a receipt to his company for hotel bill on the trip to acquire the judgment confirms it.

Thus we conclude that neither Jamison & Co. nor Boyce have right to this judgment. It is urged by counsel that the Shenandoah Valley Railroad Company, in a certain answer, stated that a balance was due on this judgment, treating it thus as not paid. If it belonged to the Fidelity Company, under its mortgage, could the Shenandoah Valley Railroad Company, by this admission, prejudice the right of that company? It could not. But, if the Shenandoah Valley Railroad Company owned it, it could say, with entire consistency with the fact that Clark & Co. had paid it as regards Jamison & Co., that a balance was due on it from the Central Improvement Company, as it had never paid it. As assignee, it could say that the Central Improvement Company yet owed a balance.

Barclay's and Green's Demands.

Barclay filed before the commissioner, and asked payment out of the fund, an account for \$10,000, for services for 4 years and 1 month as president of the Central Improvement Company, and Green filed an account for \$6,250 for 2½ years' services as treasurer and secretary. Both these gentlemen

were stockholders and directors of the company. The commissioner rejected the claims. The Central Improvement Company is a Pennsylvania corporation, having its habitat and chief office there, and there the services were performed and were to be paid for, if at all; and, if any contract were implied by law to pay compensation for service of those officers of the corporation, it would be a Pennsylvania contract. Hence, the law of that state operates upon the case specially. We must therefore see whether the law of Pennsylvania would raise an implied contract to pay for such service. *Klinck v. Price*, 4 W. Va. 4; *Stevens v. Brown*, 20 W. Va. 450; *Heflebower v. Detrich*, 27 W. Va. 16. There was no express contract to pay for such services, and, if there can be any recovery therefor, it must be on the theory that the law raises an implied promise to pay for the service. I think the case of *Kilpatrick v. Bridge Co.*, 49 Pa. St. 118, uncontrollably decides against the allowance of these accounts. It holds that "corporations are not liable on a quantum meruit for services performed by their officers. There must be an express contract for compensation, or there can be no recovery." In that case, Sersill claimed for service as president, and Kilpatrick as treasurer, as in this case, and the court held that they could not recover. The court said: "The salary or compensation of corporate officers is usually fixed by a by-law or by a resolution either of the directors or stockholders, but, where no salary has been fixed, none can be recovered. Corporate offices are usually filled by the chief promoters of the corporation, whose interests in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary. Hence, we held in *Association v. Stonemetz*, 29 Pa. St. 534, as a general principle, that a director of a corporation, elected to serve without compensation, could not recover in an action against the company for services rendered in that capacity, though a subsequent resolution of the board, agreeing to pay him for past services, was shown. * * * And the rule is just as applicable to presidents and treasurers and other officers as to directors. * * * It is well the law is so. Corporate officers have ample opportunities to adjust and fix their compensation before they render service, and no great mischief is likely to result from compelling them to do so. But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers." In the later case of *Martindale v. Wilson-Cass Co.*, 134 Pa. St. 348, 19 Atl. 680, it is held: "The

general rule on the subject of compensation to the directors of a private corporation is that they are not entitled to compensation for official services unless it is provided for in the corporate charter or by-laws. In the absence of such provision, a director or president of such corporation cannot recover pay for official services, when no agreement for compensation preceded them, no presumption of such agreement arising from their performance." A by-law of the Central Improvement Company provided that the directors "shall have power to appoint all other officers or agents of the company, and fix the compensation and define the duties of all their officers or agents," but the directors never fixed any compensation. This was a mere power, given to be exercised or not, as the directors might choose, and does not itself give compensation; and the very fact that the directors, having this power, never exercised it, negatives the idea that any compensation was intended. In re Bolt & Iron Co., 14 Ont. 211. So it is clear that, under the Pennsylvania law, these officers can recover nothing.

Though not necessary to go further, my examination has led me to the conclusion that the decisions in Pennsylvania reflect the true rule applicable nearly everywhere, in denying pay without express provision or contract, not only to the president, but a treasurer or secretary, when stockholders or directors. The authorities have led my mind to the conclusion that the law raises no implied promise to pay compensation to directors, president, or vice president of a private corporation, in the absence of provision in by-law or order of the directors. They are trustees charged with the funds, and cannot recover on a quantum meruit. Gridley v. Railroad Co., 71 Ill. 200; Cheeney v. Same, 68 Ill. 570; Association v. Meredith, 49 Md. 389; Bank v. Elliott, 55 Iowa, 104, 7 N. W. 470; Sawyer v. Bank, 6 Allen, 207; Railroad Co. v. Ketchum, 27 Conn. 180; Ogden v. Murray, 39 N. Y. 202; 1 Beach, Priv. Corp. § 208. And that if the treasurer, secretary, or other executive officer be a stockholder or director, no such promise is raised by law in his favor; but, if not, then the law does raise such promise, and presume that pay was intended, from the fact of appointment, and he may get compensation. Smith v. Railroad Co., 102 N. Y. 190, 6 N. E. 397; Holder v. Railroad Co., 71 Ill. 106, 109; Cheeney v. Railroad Co., 68 Ill. 570; 1 Beach, Priv. Corp. § 200; note to Grundy v. Coal Co., 23 Amer. & Eng. Corp. Cas. 616, 9 S. W. 414. Of course, I do not here speak of the mere employes of corporations, they being entitled to compensation. Therefore, so much of the decree of March 2, 1891, as rejects the claim of B. K. Jamison & Co. and U. L. Boyce to said judgment, and the said accounts of R. D. Barclay and John P. Green, is affirmed.

HAYS, Commissioner of School Lands, v. CAMDEN'S HEIRS et al.
(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

JURISDICTION OF INFANTS—ACTION BY COMMISSIONER OF SCHOOL LANDS.

A commissioner of school lands under chapter 105 of the Code (Ed. 1887) files his petition in the circuit court for the sale of certain lands as forfeited, and, in pursuance of the statute, mentions an infant as one of the claimants of said tracts of land, who appears by his guardian and next friend, and excepts to the proceeding on the ground, among others, that he should have had a guardian ad litem assigned him. *Held* error to enter any decree thereafter in the suit affecting his interest without having first appointed a guardian ad litem to such infant.

(Syllabus by the Court.)

Appeal from circuit court, Gilmer county; V. S. Armstrong, Judge.

Action by Samuel A. Hays, commissioner of school lands, against Flora Camden and others. There was decree for plaintiff, and defendants appeal. Reversed.

William E. Lively, for appellants.

HOLT, J. This is a proceeding instituted in the circuit court of Gilmer county on the 1st day of May, 1890, under chapter 105 of the Code, (Ed. 1887,) by Samuel A. Hays, commissioner of school lands of said county, against defendants, Flora Camden and others, to ascertain whether certain lands were forfeited for nonentry, and, if forfeited, for the sale thereof. Such proceedings were had that on the 5th day of February, 1891, the court pronounced a decree in the cause holding certain tracts therein specified to be forfeited to the state, and directing their sale, and from this decree defendants, Flora Camden and others, obtained this appeal.

The first statute on the subject authorizing and directing such proceeding on the part of the commissioner of school lands is found in chapter 105 of the Code of 1868, which took effect on the 1st day of April, 1869. The present constitution took effect from and after the 12th day of August, 1872, and, as touching this subject, see article 13, Const. By the act of 18th November, 1873, chapter 105 of the Code was amended and re-enacted. In McClure v. Maitland, 24 W. Va. 561, it was held that proceedings under the act of 18th November, 1873, (chapter 134, Acts 1872-73,) were not judicial proceedings in the sense that they involved litigation between contesting parties, but were in their character administrative, being simply a mode prescribed by the state for the sale of lands which are her absolute property, and in the sale of which she alone is interested; and that the former owner, having no interest in the land or the proceeds of sale, is not entitled to be a party to the proceedings for the sale in the circuit court.

This led to the amendment and re-enactment of the law into the statute as found in chapter 105 of the Code of 1887, by the Act of 25th March, 1882. By this act it is made the duty of such commissioner to ascertain and report the status in reference to forfeiture of all lands in his county, and, in order to have the same determined judicially, it is made his duty to file his petition in the circuit court praying that the same may be sold for the benefit of the school fund, giving the court all the information he has as to location, quantity, probable value, etc., together with all the facts at his command in relation to the title, the claimant or claimants thereof, and their residence, if known, and, if not known, that fact shall be stated, stating when, how, and in whose name, and for what, it was forfeited to the state. Upon the filing of the petition the court shall direct a summons to be issued by the clerk against the claimants, if any, named in the petition, the person or persons in whose name the same was forfeited, and all unknown parties claiming the land, or any part of them, named in the petition, requiring them to appear before a commissioner in chancery of the court at a time and place to be named therein, and show cause, if any they can, why the said lands shall not be sold for the benefit of the school fund. The summons shall be served on each of the persons named therein if they can be found in the county, and as to such of them as cannot be found in the county, and such unknown parties, it shall be published at least once a week for four successive weeks in some newspaper printed in the county, and, if there be no such newspaper printed in the county, then in some newspaper of general circulation therein, etc.; and such publication and posting, when so made or done, shall be equivalent to the personal service of the said summons on all the parties named therein upon whom it has not been served personally, and on all the said unknown parties. The said court shall also, by a proper decree, refer the said petition to a commissioner in chancery thereof, with instructions to inquire into and report upon the matter therein contained, and such others as said court may think proper to direct, and particularly to inquire and report as to the amount of taxes and interest due and unpaid on each tract, etc. But said commissioner shall not proceed under said decree until the summons aforesaid shall have been served as required by the next preceding section, etc.; and as soon as his report is completed he shall file the same in the clerk's office of the circuit court, and the commissioner of school lands, and any other person interested therein, may file exceptions thereto at any time after such filing in the clerk's office, and before the hearing therein. If there be no exception to such report, or if there be exceptions thereto which are overruled, the

court shall confirm the same, and decree a sale of the lands, or any part of them, therein mentioned, which are subject to sale for the benefit of the school fund, upon such terms and conditions as to the court may seem right. When exceptions are filed to such report which are sustained in whole or in part, the same proceedings shall be had in the case as if it were a suit in chancery. The sale shall be made, conducted, and reported, and such proceedings shall be had therein, in all respects as if such sale had been under a decree in a suit in chancery, etc. Chapter 105 was again amended and re-enacted by the act of 12th March, 1891, (see Acts 1891, p. 281, and chapter 105, Code, Ed. 1891,) and this again was amended and re-enacted by act of 23d February, 1893, (see Acts 1893, p. 57,) which is the present law on the subject; but this proceeding was under chapter 105 in the Code of 1887. The circuit court, by decree entered on the 9th day of June, 1890, referred these matters to Commissioner O. C. McQuain, requiring the summons to be issued and served in pursuance of chapter 105 of the Code of 1887, the substance of which has already been given. The summons was issued on the 1st day of July, 1890, requiring the parties therein named to appear before Commissioner McQuain at the law office of Collins & McQuain, in the town of Glenville, on the 4th day of August, 1890. But it has on it no return of service of any kind or in any way. It does not appear to have gone into the hands of any one for service, or to have been published or posted. But the commissioner published his notice of the time and place of executing the order of reference. Under this notice the commissioner completed his report, which was filed in the clerk's office on the 30th day of August, 1890. On this report G. D. Camden, Flora Camden, and Sprigg D. Camden, by their attorney, indorsed various exceptions to said report on September 1, 1890, with various papers exhibited as part of such exceptions. On the 3d day of October, 1890, these defendants, by William E. Lively, Esq., their attorney, filed all these papers, naming them, a petition to redeem, etc., all of which were ordered to be noted as filed, including said exceptions to Commissioner McQuain's report.

"The defendants, G. D. Camden, Flora Camden, and Sprigg D. Camden, infant, by J. N. Camden, his guardian and next friend, appear to the petition filed against them by the commissioner aforesaid, and the order of the court requiring them to appear before a commissioner in chancery of said court, and except to the petition and report, to the order of the court, and all the proceedings had and taken in the above matter, as follows, to wit: Exception 1: As to the order of the court referring the matter to a commissioner in chancery, the report of S. A.

Hays, commissioner of school lands, should not have been referred to a commissioner in chancery, because it failed to show the local situation, quantity, probable value of each tract, lot, or parcel, and part of a tract, of land therein mentioned, together with all the facts at his command in relation to the title to the same, and to each tract, lot, part, or parcel thereof, the claimant or claimants thereof, and their residence, and stating, also, how and when and in whose name every such tract and parcel and part of a tract or lot was forfeited to the state. Exception 2: That no summons was ever issued by the clerk of the circuit court against the claimants of the lands named in the petition of the commissioner of school lands to appear before the commissioner in chancery of the court at a place and time therein named, to show cause why the said lands should not be sold for the benefit of the school fund, notwithstanding the said parties named in the petition are residents of the state of W. Va., and reside in Clarksburg, Harrison county, and in Parkersburg, Wood county, and well known to the commissioner of school lands. Exception 3: That no summons was served on each of the persons named therein, nor published at least once in each week for four successive weeks in some newspaper printed in the county of Gilmer, nor posted at the front door of the courthouse of Gilmer county, nor at some public place in each magisterial district in said county, as required by the statute. Exception 4: That the lands of the parties named in the petition are not, and never were, forfeited for the nonpayment of taxes thereon at any time, and especially the years claimed by the commissioner of school lands. Exception 5: That Minter Bailey, G. D. Camden, and R. P. Camden owned jointly and were seised in fee simple of large and valuable tracts of land situate on Sand Fork and its tributaries, in Lewis and Gilmer counties; that the larger and most valuable portions of these lands were situated in the county of Lewis, and were by them placed on the assessor's land books of Lewis county in the name of Camden, Bailey & Camden, and were properly assessed with taxes and levies thereon from the formation of the state of W. Va. in 1863, to 1890, inclusive. Exception 6: That they have paid all taxes, levies, and assessments against these lands for each and every year, and no part or parcel of the same have ever been returned delinquent for the nonpayment of the taxes thereon during the entire period of time alleged by the commissioner. [Note. In 1863 these tracts of land were on the assessor's land books in Lewis county in the name of Camden, Bailey & Camden, and remained thereon in their name until 1877, when partition of the lands was made, and each party was assessed separately with the lands allotted to them, that is to say,

for the purposes of partition these large tracts of land were subdivided and laid off in small tracts, and the partition was made by dividing the number of small tracts of land for convenience sake, and to prevent any of the small tracts of land from being dropped from the assessor's books, or the assessor, from negligence, inattention, or mistake, omitting to place those numerous and great number of small tracts of land upon the land books, the parties, with the approval of the assessor, divided the whole number of all the large tracts combined into three parts, and placed on the land books in Lewis county the evidence of the fact as to their act.] Exception 7: That the large tracts of land on the assessor's books in Lewis county, as placed there in 1877, and down to the present time, include the several tracts of land reported by the commissioner of school lands for Gilmer county, and could have been ascertained by him by due diligence and examination therein. Exception 8: That the lands reported and mentioned in the petition, if forfeited at all, must have been forfeited in the name of Camden, Bailey and Camden from 1863 to 1877, inclusive, and from 1877 to 1890, inclusive, in the name of Flora Camden and Sprigg D. Camden, heirs at law of R. P. Camden, dec'd, and G. D. Camden. Exception 9: That Sprigg D. Camden is a minor under the age of 21 years, and should have had a guardian ad litem assigned him before taking proof or sending these proceedings to a commissioner in chancery to settle. None knew this better than the commissioner of school lands for Gilmer county. Exception 10: That the claim of the commissioner of school lands for Gilmer county, if any he has, (acting for and on behalf of the state of W. Va.,) for all the years preceding the five years before filing his petition, is barred by the statute of limitations, and is a stale demand, and should be so declared by a court of conscience and equity. Exception 11: That there is no evidence in the proceedings showing that the lands reported by the commissioner aforesaid are in Gilmer county, and are detached or separated from the large tracts of land belonging to R. P. Camden's heirs or G. D. Camden in Lewis county, but, on the contrary, the map and plat of the Camden, Bailey and Camden lands, which is asked to be read and inspected in connection with this exception, shows conclusively that the lands reported by the commissioner form a part of and help to make up the large tracts of land that are on, and have ever been on, the land books in Lewis county. Exception 12: That the tract of 72 acres, lot No. 222, reported by the commissioner of school lands, was long since sold to Marshall Wiant, of Gilmer county, by Wm. E. Lively, commissioner, appointed by this court in the chancery case of Sprigg D. Camden, by I. N. Camden, his next friend, against Flora

Camden and others, now pending and undetermined in this court, and asked to be inspected when this case is heard, and said Wiant has paid for said land, and been in possession thereof for a number of years, and should be a party to these proceedings. Exception 13: That lot No. 178, containing only 48 acres, instead of 77 a., as reported by the commissioner aforesaid, was sold several years ago to one Charles Collins, of Gilmer county, by said Lively, commissioner as aforesaid, in the chancery cause aforesaid, by a decree of this court as aforesaid, and said Collins is, and has been for a long time, in possession of said land, and should be a party to these proceedings; that it is the duty of the court to protect the purchasers of land, and remove from the same any cloud to the title, if by so doing it does not operate a great hardship and loss to others. Exception 14: That, if any of the Camden, Bailey and Camden lands are sought to be subjected to forfeiture, it was the duty of the commissioner of school lands to have the heirs of M. Bailey, dec'd, living in Lewis county, summoned before the commissioner in chancery, so as to give them an opportunity to defend themselves. Exception 15: The defendants first named except generally to all actions, orders, publications, reports, petitions, and all proceedings in this case not enumerated or set forth in the exceptions above. If the court should differ with the petitioners in relation to the matter and manner of forfeiture of their lands, then they ask and pray that they be permitted to redeem the same, and pay such sums of money as may be right and due from them on the same. G. D. Camden. Flora Camden. Sprigg D. Camden, by Wm. E. Lively, Atty."

On the 7th day of October, 1890, the cause came on to be heard on the report of Commissioner McQuain, the exceptions thereto, and the motion of G. D. Camden and others, supported by affidavit, for continuance; and Commissioner McQuain, without further notice, the parties agreeing thereto, was directed to ascertain and report certain other facts charging the omitted lands with taxes from the year 1869, down to and including the year 1890, and directing other parties to be brought in by summons; and in execution of this order of reference Commissioner McQuain filed his report No. 2 on 31st December, 1890, and Flora Camden and Sprigg Camden filed thereto the same exceptions they had filed to the original report, and John S. Withers, prosecuting attorney, filed exceptions on behalf of the state. On the 5th February, 1891, the cause came on again to be heard on the report of S. A. Hays, commissioner of school lands, filed 1st May, 1890, the report of Commissioner McQuain filed 30th August, 1890, and the evidence therein referred to and accompanying the same, the exceptions indorsed thereon by G. D. Camden, Flora Camden, and Sprigg D. Camden,

by William E. Lively, Esq., attorney, and referred to, marked "Exhibit B" upon the report of Commissioner McQuain filed 31st December, 1890, the state's exception, and exception of Flora Camden and others, and was argued by counsel, upon consideration whereof the court held the following lots of Flora Camden and Sprigg D. Camden as forfeited and liable to be sold for the county and district taxes properly chargeable thereon and the costs of this proceeding, or its proportionate share, viz.: Lot No. 249, of 45 acres; lot No. 221, of 107 acres; lot No. 222, of 72 acres; lot No. 248, of 150 acres; lot No. 138, of 93 acres; lot No. 143, of 37½ acres; the residue of lots No. 178 and No. 182, of 48 acres,—and directed the sale thereof on the terms prescribed by the statute. The record in this case shows that these are parts of a large tract of land of 30,970 acres lying on the waters of the Sand Fork of the Little Kanawha river, for the most part in the county of Lewis, but several thousand acres in the county of Gilmer; that it was owned jointly by R. P. Camden, Minter Bailey, and G. D. Camden, who at an early day had it, for purposes of sale, laid off into lots ranging from 100 to 200 acres, and numbered. Of these they had sold quite a number, amounting to some 8,000 acres, leaving the rest unsold. Minter Bailey departed this life, and his children and heirs at law in 1869, in the circuit court of Lewis county, brought a suit in chancery against R. P. Camden and G. D. Camden for partition. At the May term, 1869, there was a decree for partition, and commissioners were appointed to make it. Under this the commissioners allotted and assigned a certain number of lots to defendant R. P. Camden, a certain number to Minter Bailey's heirs, the plaintiffs, and a certain number to G. D. Camden, and by decree of 13th November, 1869, the partition as reported was confirmed, and thenceforth the parties held their respective lots and parts in severalty. The record does not disclose that the heirs of Minter Bailey, deceased, have now or have had any interest, legal or equitable, in these lots of land, since the decree of partition in 1869, but, if they had, they could intervene and bring their rights before the court, for the summons is general as well as special. The constitution of 1872 (section 6, art. 13) made it the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and cause himself to be charged with the taxes thereon, and pay the same; but if it contained less than 1,000 acres it was not thereby forfeited for omission, for the reason that small tracts are often left off by the fault of others than the owner, and without his fault or even knowledge; but tracts of 1,000 acres or more were forfeited for omission for five years or more, as therein prescribed. It was made the duty of various officers to see that all lands were properly charged. Section 39, c. 117,

approved 9th April, 1873, (see Acts 1872-73, p. 330,) after repeating section 6 of article 18 of constitution of 1872, proceeds as follows: "And when for any five successive years after the passage of this act, the owner of any tract or lot of land, less in quantity than 1,000 acres, shall not have been charged on such books with state tax on said land, then by operation of law and without any proceedings therefor the land shall be forfeited and the title thereto vested in the state," etc., (see Act 1869; section 34, c. 31, Code 1868;) and the same provision was reenacted in section 39, c. 130, of the act of 24th March, 1882, (see Acts 1882, p. 387;) and the same law is found in section 39, c. 31, Code, (Ed. 1887,) p. 226; and this was the law under which these proceedings were instituted. These lands seem to lie wholly in the county of Gilmer, and have never been on the land books of that county, as they should have been, since the year 1869, when the partition of the large tract was made, and would seem, therefore, to be forfeited. The state tax and state school tax thereon having been paid in the county of Lewis, the court, in ascertaining the amount necessary to be paid to redeem them, did not charge these taxes, but only the Gilmer county and district taxes, and of this the adult appellant cannot complain; but she owns jointly with the infant, and no opinion is intended to be hereby given as to the forfeiture of the land of either. For the various statutes on the subject, see Hutchinson's Land Titles, especially chapter 7, p. 187. For proceedings under the act of 18th November, 1873, (Acts 1872-73, p. 449,) see McClure v. Maitland, 24 W. Va. 561. For proceedings under the acts of 30th March, 1887, and 15th March, 1888, see Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. 214. The citation or summons directed to be issued in this proceeding under chapter 105 of Code of 1887, "to show cause, if any they can, why the said lands shall not be sold for the benefit of the school fund," is, in its substance and essential part, exactly like the writ of *scire facias*, like the rule to show cause in equity, or like the monition or citation in admiralty. In all courts it is judicial process, and although at common law a writ, yet it is also an original action, to which the defendant may plead; it is, in fact, our oldest original action. See Glanville, who wrote 1187, (see translation by Beames.) See, also, same thing in Bracton, who wrote in 1263, (see Master of Rolls' Ed. 1883.) The essential part of it is still used in all stages of a suit from mesne process at the commencement, through all intermediary stages and collateral proceedings, down to final fruition of the judgment or decree. The regular form of proceeding in this case would have been for the defendants named, or any intervener to have answered the summons or citation according to the practice in equity of answering or showing cause against orders or rules, such as rules against purchaser

of land under decree, (see Sand. Eq. 558,) or rule against a party in possession to show cause why he should not turn over the possession of the land to the purchaser, etc. These parties did not appear until after Commissioner McQuain had completed and filed his report. On the 3d day of October, 1890, these parties, viz. G. D. Camden, Flora Camden, and Sprigg D. Camden, infant, by J. N. Camden, his guardian and next friend, appeared to the petition filed against them, and to the order of the court requiring them to appear before the commissioner in chancery of said court. In this answer to this summons to show cause, etc., they make 15 points of objection to the petition of S. A. Hays, commissioner of school lands, to the order of reference, the service of the summons, and to the report of Commissioner McQuain, concluding as follows: "If the court should differ with the petitioners in relation to the matter and manner of the forfeiture of their lands, then they ask and pray that they be permitted to redeem the same, and pay such sums of money as may be right and due from them on the same;" and with it they file as exhibits parts of the record of the suit of partition, a map of the land with all the subdivisions, 275 in number, showing quantity, location, to whom assigned, from which it appears that the lots in question lie wholly in the county of Gilmer; also, a certificate showing that all taxes have been paid in Lewis county from 1869 to date, (1891;) that Sprigg D. Camden is a minor under the age of 21 years, and should have had a guardian ad litem assigned before taking proof, etc.; and that none knew the infancy of said defendant better than the commissioner of school lands of Gilmer county."

This brings us to the only point in the case, as far as I can see. The whole scope and tenor of chapter 105 shows it to be a proceeding in chancery, as well as its express language, "the same proceedings shall be had as if it were a suit in chancery." Code 1887, c. 105, § 8. Under section 13, c. 125, Code 1887, it was the duty of the court to have appointed a guardian ad litem to the infant defendant, not because the court was selling the land of the infant, or of any strict construction in this case, but because the law requires it; and so it has been held in many cases, (see McDonald v. McDonald, 3 W. Va. 676; Piercy v. Piercy, 5 W. Va. 199; Myers v. Myers, 6 W. Va. 369; Hull v. Hull, 26 W. Va. 1; Hart v. Hart, 31 W. Va. 688, 8 S. E. 562;) especially as the guardian, as next friend, appeared and suggested such infancy, and virtually asked such appointment. Under such circumstances it would have been done, and would be error not to do, in any court, as far as I know. See Ben. Adm. p. 421, rule 140, where the proceeding is in rem, in personam, or both, as in this case, in which court the pleadings are said to be simple and untechnical. Neither does this record show that the summons was ever served

specially or generally on any party in any way, by copy delivered or published or posted. It is true that the record shows the publication of Commissioner McQuain's notice, but not of the summons; and section 6 of chapter 103 says: "But such commissioner [in chancery] shall not proceed under said decree until the summons aforesaid shall have been served as required by the next preceding section." This is also made ground of exception in the petition of defendants, among others, by the next friend of the infant; and although waived by the adults, as shown by the order of October 7, 1890, recommitting the report to Commissioner McQuain, it cannot be held to have been waived by the infant, who had no guardian ad litem. His guardian, as the next friend, brought him into court, and virtually petitioned the court to appoint a guardian ad litem to answer and show cause why the land claimed by him should not be sold for the benefit of the school fund. This the court failed to do, for some reason not stated. Such error in so fundamental a matter compels a reversal of the decree of 5th February, 1891, complained of.

CRIM v. TOWN OF PHILIPPI et al.

(Supreme Court of Appeals of West Virginia
Nov. 4, 1893.)

ERRONEOUS TAXATION—INJUNCTION—ASSESSMENT.

1. Injunction is the proper remedy to prevent municipal officers from collecting taxes assessed against persons or property which the municipality has no legal right to tax. *Christie v. Malden*, 23 W. Va. 667.

2. Under the assessment laws of this state, property, and the valuation thereof, as ascertained for municipal assessments, in all municipalities of less population than 10,000 inhabitants, should be identical with the property, and values thereof, ascertained for state, county, and district assessments.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county.

Action by Joseph N. B. Crim against the town of Philippi and others to restrain the collection of certain taxes. From an order sustaining a demurrer to the bill, and dissolving the preliminary injunction, plaintiff appeals. Reversed.

Dayton & Dayton and William T. Ice, for appellant. J. Hop. Woods, for appellee.

DENT, J. On the 23d day of November, 1892, Joseph N. B. Crim presented his bill of complaint to the Honorable Jos. T. Hoke, judge of the circuit court of Barbour county, setting out that he was a resident of Elk district, and not a resident of the town of Philippi, in Philippi district, in said county; that notwithstanding this fact the municipal authorities of said town had caused him to be assessed, on the assessment books thereof, with two poll taxes, and notes, money, bonds, and choses in action to the amount of

\$100,000, and levied thereon taxes to the amount of \$1,000; had caused a tax receipt to be issued therefor, and placed in the hands of the sergeant, who was proceeding to enforce collection thereof with all due diligence,—and praying an injunction. A temporary injunction was granted. The town and its sergeant appeared, demurred, and filed answers, and depositions were taken. On the 25th day of January, 1893, at Beverly, in Randolph county, on motion of the defendants, Judge Hoke entered a vacation order sustaining the demurrers to the bill, and dissolving the injunction, from which order this appeal was granted.

The only question now properly presented to this court is, did the circuit court judge do right in sustaining the demurrers? By them the allegations of the bill are admitted to be true, but the right of equitable remedy is denied because of plain, adequate legal remedy; that is, that, although the plaintiff and his property were wrongfully assessed and taxed by said town authorities, a court of equity would not interfere to prevent the consummation of the wrong, and confine the municipality within the limits of its taxing power, as prescribed by law, but that the victim of their oppression must suffer himself to be legally robbed, or apply to a court of law for redress of his grievances. This is clearly not the law, for it has been held by this court: "If municipal authorities tax persons or property not legally taxable, or if they exceed the limit prescribed by the statute conferring their power to tax, their action being ultra vires and void, equity has jurisdiction to grant relief." "No other forum can afford such prompt, complete, and adequate relief." The hand of the would-be spoiler is stayed before it seizes its intended booty. *Christie v. Malden*, 23 W. Va. 671. Of course, it must clearly appear that the municipality is going beyond the line of its authority. The allegations of the bill, if true, plainly show this; and as the circuit court determined the case on demurrer, and not on its merits, this court, in accordance with its established practice, can look no further. It is well, however, that the limit of municipal authority to assess and tax property within its jurisdiction should be clearly defined and understood. Section 49, c. 29, Code, provides that money, credits, and investments shall be listed for taxation in the district where the person resides, and not elsewhere. Section 30, c. 47, as also the charter of the town, limits the right of taxation to personal property within the corporate limits, subject to state and county taxes. Section 100, c. 29, provides that taxes for county, district, and village purposes shall be levied only upon the values of property, ascertained for state purposes, except in cities of more than 10,000 inhabitants. These sections make all municipal assessments, with the exception named, both as to property and its value, subordinate to the

assessment for state purposes; and properly so, because the municipality is but a fractional part of the state, and, if there is any property therein that ought to be taxed for municipal purposes, it also ought to be subject to state taxation; so that, if there is any error either as to property or persons, the correction should be first made in the state assessment, and the municipal assessment made to conform to it. This leads to uniformity, and prevents all such discrimination and litigation as we now have before the court; and the burden of tax litigation, if any there be, is taken off of the municipal, and placed on the county and state, authorities, where it properly belongs. The law affords ample remedies to any citizen or taxpayer to have the state assessment books properly corrected, so as to prevent any person or property escaping taxation, and not only that, but also provides a reward for the person informing on the taxpayer who makes a false and insufficient return of his property. We therefore conclude that the circuit judge erred in the order of the 25th January, 1893, in improperly sustaining the demurrer to the bill and dissolving the injunction; and the order is reversed, the demurrers are overruled, the injunction reinstated, and this cause is remanded to said circuit court to be further proceeded with in accordance to this opinion and the rules of equity.

WATSON v. TOWN OF FAIRMONT.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

TAXATION—PRIVATE BANK STOCK—NONRESIDENT HOLDER.

1. Under chapter 54, Acts 1875, shares of bank stock are only assessable to the holder thereof in the district where he resides, and then only in case they have not been included in the assessment of the capital of the bank in the district or municipality in which it does business.

2. If a municipality in which an incorporated bank does business neglects to assess the capital stock of such bank, as it has the legal right to do, it cannot assess a nonresident shareholder with the value of the shares held by him. (Syllabus by the Court.)

Error to circuit court, Marion county.

Action by Thomas F. Watson against the town of Fairmont to recover taxes paid under protest. From a judgment for defendant, plaintiff brings error. Reversed.

A. F. Haymond and Lee P. Watson, (B. L. Butcher, of counsel,) for plaintiff in error. Jas. A. Haggerty and G. M. Alexander, for defendant in error.

HOLT, J. In the years 1876, 1877, 1878, and 1879, Thomas F. Watson, a resident of Monongalia county, held 50 shares of stock in the Farmers' Bank of Fairmont, Marion county, of the par value of \$5,000.

The capital stock of the bank not being assessed, he listed these shares of stock for taxation under sections 41, 49, c. 54, Acts 1875, in Monongalia county, in the district where he resided for the years aforesaid, and paid all taxes assessed thereon. For the same years, the county assessor of Marion county and the town assessor of Fairmont, having neglected to assess said bank with its capital stock in the manner provided by law, the town authorities of Fairmont assessed the said Watson with the said shares of stock, and compelled him, against his protest, to pay taxes thereon aggregating for the several years the sum of \$82.50. On the 11th day of January, 1882, he brought suit before Thomas A. Fleming, a justice of the peace, for the amount of said taxes, and on the 7th day of February, 1882, recovered a judgment for the taxes and interest, then amounting to the sum of \$99.37. The town appealed from this judgment, and on the 11th day of March, 1891, the circuit court reversed the judgment of the justice, and dismissed the action, at the plaintiff's costs, from which judgment of dismissal a writ of error was granted.

Chapter 54, § 41, Acts 1875, provides that "every person of full age and sound mind shall list for taxation the property belonging to him, including the shares held by him in any national or other bank in this or any other state, except where the same is listed under the provisions of section 64 of this chapter," etc. Section 49 provides that "every person required by law to list personal property shall list for taxation in the assessment district where he resides the money, credits and investments subject to taxation belonging to himself, or under his charge or control, whether the same or the evidence thereof be in or out of the state; but capital, money, and property, (except real estate,) employed in any trade or business, (other than agriculture,) belonging to a company, whether it be incorporated or not, or to an individual, shall be assessed for taxation in the assessment district where the principal office for transacting the financial concerns pertaining to such trade or business is located; or, if there be no such office, then in the district where the operations are carried on." Section 64 provides: "He [the assessor] shall ascertain from the proper officers or agents of all incorporated companies in his district, the actual value of the capital employed or invested by them in their trade or business, and enter the same in his personal property book." It is plain from these provisions that it was the unquestionable duty of both the county assessor of Marion and the town assessor of Fairmont to have assessed the capital stock of the bank, within the town where it did business; but, having neglected to do so, it became the duty of the shareholder, under the same sections, to list his property for taxation, including his shares in this bank, in

the district of his residence. In the one case it would have been assessed to the bank as capital stock. In the other case it is assessed to the shareholder as an investment. If the assessors had done their duty under the law, the shareholder would have been relieved from listing his shares, and paying taxes thereon, in the district of his residence. But, by reason of their neglect of duty, he was compelled by law to take the course he did; and now, having done his legal duty, will the law permit this town assessor to assess him with his shares of stock because they are part of the capital of the bank? Certainly not, because that would make him liable to a double assessment, where he resides and where the business is carried on, because the law does not relieve him from being assessed on his individual shares in the district of his residence except in case the capital of the bank is assessed under said section 64; and, if he permits his individual shares to be assessed in any other district than the one in which he resides, he still must pay taxes there. As in this case he has already paid state, county, and district taxes, including road and poor levies, in the district of his residence, all of which he would have been relieved from, had the assessors discharged their legal duties as aforesaid. It was the law then, and is the law now, that the capital and personal property of a bank should be assessed to it, in its corporate capacity, in the district in which it does business. *Bank of Bramwell v. County Court*, 36 W. Va. 341, 15 S. E. 78. It is also the settled law of this state, both by decision and statute, "that money, credits, securities and investments follow the person." *City of Wheeling v. Hawley*, 18 W. Va. 476. It is self-evident that, if these shares could not be assessed by the county assessor for state and county purposes, they could not be assessed by the town authorities for municipal purposes. That which cannot be regarded in the county cannot be regarded in the town a fractional part of the county. The provisions of the statutory law are plain upon this question. See, also, the case of *Crim v. Town of Philippi*, 18 S. E. 466, (decided this term.) The conclusion, therefore, is that the town authorities illegally assessed and collected the taxes sued for in this case off of the plaintiff in error, and that the circuit court erred in holding otherwise, and reversing the judgment of the justice; and the judgment of the circuit court is therefore reversed, and this court, proceeding to render such judgment as the circuit court ought to have rendered, doth affirm the judgment of the justice, and doth render judgment in favor of the appellant, Thomas F. Watson, for the sum of \$99.37, and the sum of \$—, costs before the justice, aggregating the sum of \$—, with interest thereon at the rate of 10 per cent. per annum until payment, and his costs in this court and in the circuit court expended.

COOK v. DORSEY.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

EQUITABLE PLEADINGS—PARTIES—SUFFICIENCY OF,
HOW QUESTIONED—DEMURRER.

1. A bill in equity may in frame, as to parties, follow the chancery practice used before the enactment of section 37, c. 125, Code, or the form prescribed by that section, but it must do one or the other.

2. If the statutory form be used, persons named in the caption as plaintiff and defendant are such merely from being there named as such; but, if the statutory form be not used, the bill must formally, or in some plain, distinct way make parties plaintiff and defendant; otherwise, it is fatally defective, and a decree upon it would be null.

3. Such a defect in the bill, for want of parties to it, can be taken advantage of, without demurrer, on the hearing, or on appeal unless expressly waived in the lower court.

4. A decree, though null, may be reversed on appeal.

5. A demurrer need not specify causes of demurrer. The general form prescribed by section 28, c. 125, Code, is sufficient.

6. A demurrer may be incorporated in the answer.

7. Special demurrers are abolished by section 28, c. 125, Code.

8. Section 29, c. 125, Code, does not require causes of demurrer to be specified in a written demurrer; but, if none are assigned, it gives court right to ask an assignment of causes *ore tenus* or written, or, on overruling the demurrer, to state that none were assigned. (Syllabus by the Court.)

Appeal from circuit court, Marshall county.

Action by William F. Cook against Thomas J. Dorsey and others to enforce a deed of trust. There was decree for plaintiff, and defendant Dorsey appeals. Reversed.

John J. Jacob, for appellant. J. L. Parkinson and Ewing, Melvin & Riley, for appellee.

BRANNON, J. Suit in equity by Cook against Dorsey and others, decree therein, and appeal by Dorsey. Dorsey filed a written demurrer, and it was overruled. The appellant contends, among other points, that the bill made no parties plaintiff or defendant, and that there was error in overruling his demurrer, and decreeing relief upon such a bill.

A plaintiff in equity may adopt for his bill the frame prescribed by the general chancery practice, or that prescribed by section 37, c. 125, Code, as this statute ought to be construed as cumulative, intended to give an additional, simpler form, and not to destroy a frame of bill good before the statute; but he must conform to one or the other. By equity practice (outside this statute) the bill contained formal parts, one being for the name of the complainant, and it is essential that the complainant be here named. *Bart. Ch. Pr. 258*; *Sand. Eq. 18*; *Daniell, Ch. Pr. 357*; *Story, Eq. Pl. § 28*. It also contained a part for the prayer that process issue against the defendant to answer.

Here, strictly speaking, the defendant must be named, as it was a rule, commonly received as a test, that no one could be considered a defendant against whom, as one here named, process was not prayed. Story, Eq. Pl. § 44. "They only are parties defendant against whom process is prayed, or who are specifically named and described as defendants." 1 Daniell, Ch. Pr. 287, and note 4. But as, under the Virginia practice, process issued, not under the prayer, but before the bill was filed, and as section 5, c. 170, Code 1849, required summons to issue to begin a suit, the presence of this part of a bill, and the naming a person as a defendant in it, was not a test of whether he was a defendant; yet certain it is that somewhere, or in some way, in the bill he must be made a defendant, distinctly and clearly, by language not simply mentioning him in narration of facts, but as a person to be acted upon by decree, so as to make it a finality for and against him as an estoppel. Sand. Eq. 32. A prayer, not that process issue, but that certain persons be treated as defendants, and required to answer the bill, would certainly make them defendants. The bill in Virginia practice contained a part specially designed for naming defendants, and required them to be there named, and the prayer for process was that the defendants above named answer. Bart. Ch. Pr. 263. If the Code frame of bill be adopted, plaintiffs and defendants should be named in the caption, which makes them such without prayer for process, or prayer that they be treated as such. In some clear and sufficient way a bill must have parties plaintiff and defendant. A decree can go only on matters properly stated by allegation in the bill, and for or against parties made parties as to such matters by the bill; otherwise, it is no bill. In *Houston v. McCluney*, 8 W. Va. 135, it was held that when the name of the plaintiff is not stated in the bill, as required by chancery practice before the Code, or as authorized by the Code, it is bad on demurrer. So it must be as to a defendant. The case of *Hank v. Wilson*, 35 W. Va. 36, 13 S. E. 58, is very pointed authority to sustain our holding in this case. No matter that the process names certain parties as defendants. The bill must have parties, for it is the basis on which the structure of the suit rests, and on which the matters of the suit become *res judicata*. A person may be named in and served with process, yet is not a party unless named in the bill; and not only named in it, but there must be allegations relating to him showing why he is a party, what matters touch and concern him, involved and to be decreed upon in the suit. *Chapman v. Railroad Co.*, 18 W. Va. 184; *Moseley v. Cocke*, 7 Leigh, 224; *McCoy v. Allen*, 16 W. Va. 724; *McNutt v. Trogden*, 20 W. Va. 471, 2 S. E. 328; *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278; *Bland v. Stewart*, 35 W.

Va. 518, 14 S. E. 215. And though a man be named in the bill simply in narration of its facts, and it contain matter touching him, and he is made a party in the process, yet, if he be not made a party to the bill, it would be bad, and the decree null. In other words, he must be a party to the process, a party to the bill, and the bill must allege matter touching him so far as it seeks to affect him. The observance of these fundamental rules is all-important in practice, as departure from them renders the decree not only erroneous, but generally void, as inspection of cases above cited will show. Though a decree be void, not simply erroneous, it may be reversed on appeal. *McCoy v. Allen*, 16 W. Va. 734, and cases cited.

This bill has no caption naming parties, and cannot be treated as filed under the Code provision. First, has it a "complainant," or "orator," as he was called in equity practice before the Code provision called him, as in common-law actions, "plaintiff?" By great liberality, perhaps, we may answer that the bill has a plaintiff. It begins, "Humbly complaining, your orator shows," not naming the orator; but the name of William F. Cook, by an attorney, is signed at the foot, and we may say that Cook is the orator. By technical practice he could not be so considered. Has it a defendant? There is no show of any portion of the bill stating names of defendants, nor of a prayer that process issue against any one, nor that any one be treated as a defendant, nor that any one be required to answer or be decreed to do anything. There is not even a hint, I may say, that of the eight persons, besides the plaintiff, named in the bill in the course of its narration, any one or all are to be held as defendants, except that in mentioning Dorsey the language is, in two instances, "the defendant Thomas J. Dorsey." Suppose we were to strain a point to say that made him a defendant; are the others to be? Which ones, —all, or only certain ones? Two deeds of trust were given to secure debts on the land sought to be sold under one of them. The trustees are named in the bill, but only in describing the deeds, not as defendants. The purchaser would get no title unless they be parties. The bill purports to be filed by one unnamed orator, and in its prayer asks relief for an oratrix. If not an inadvertence, who is she? This bill is plainly insufficient and uncertain. To sustain it we must go beyond reasonable liberality, and ignore rules of equity well settled, and which ought to be observed.

It is contended in argument that the demurrer is defective in not assigning causes of demurrer. Under equity practice, outside of statute, a demurrer must assign cause. "A demurrer will not be good if it merely says, generally, that the defendant demurs to the bill. It must express some cause of demurrer, either general or specific." 1 Daniell, Ch. Pr. 586; Story, Eq. Pl. 457;

Bart. Ch. Pr. 1174. But likely, as stated in Story, Eq. Pl. § 455, when the demurrer was general, for want of equity in the bill, it need only say that there is no equity in the bill, and only where it is special, directed to defects of form. Section 28, c. 125, Code, providing the form of a demurrer, has been construed as abolishing special demurrers and the necessity of giving causes of demurrer. Bart. Ch. Pr. 347; Smith v. Lloyd, 16 Grat. 310; Dunn v. Dunn, 26 Grat. 291; Jones v. Clark, 25 Grat. 642, (Syllabus, par. 9); Stewart v. Jackson, 8 W. Va. 29. These cases apply this statute to chancery cases, as I think it ought to be, notwithstanding its language. The case of Stewart v. Jackson, 8 W. Va. 29, justifies the practice of simply noting a demurrer in the order book. The answer may contain a demurrer, in the language of section 28, c. 125, Code, in which case it ought to be headed, "The demurrer and answer of." This is so, as a defendant may plead law and fact at the same time under statute; and the cases of Dunn v. Dunn, supra, and Bassett v. Cunningham, 7 Leigh, 402, are authority here. Bart. Ch. Pr. 385. While it might be thought that the provision in Code, § 29, c. 125, that, "if nothing be alleged by the demurrant in support of his demurrer, the court, if it overrule the same, shall state that fact in the order," and judgment shall not be reversed for that cause, would require a demurrer to specify cause, it does not; for that provision, if, as a remedial provision it be applied to chancery suits, necessarily presupposes that the written demurrer has not specified causes, and, besides, there is section 28, which authorizes such a general demurrer. The provision is probably intended to give the court right to ask a specification of grounds of demurrer ore tenus, or simply state the fact on record that no ground of demurrer was assigned. But, even without a demurrer, the bill is so defective that its infirmity could have been used to prevent a decree on a hearing, or to reverse the decree on appeal. Bart. Ch. Pr. 226, 349; Proctor v. Hill, 10 W. Va. 60; McCoy v. Allen, 16 W. Va. 724.

As the necessary parties are not before the court, we will not consider other questions, but will simply reverse the decree, and remand the cause with leave to file an amended bill. McCoy v. Allen, 16 W. Va. 734.

STATE v. MINES.

(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

LIMITATION OF ACTIONS — RUNNING OF STATUTE AGAINST STATE — AMENDMENT AND REPEAL OF STATUTES — CONSTRUCTION.

1. Section 20, c. 35, Code 1868, abolished the common-law rule that no time runs against the state, and made the state's right subject

to statutes of limitations, the same as individual rights.

2. The clause in section 19, c. 55, Acts 1875, "there shall be no limitation to proceedings on judgments on behalf of the state, or any claim due the state," did not wholly repeal section 20, c. 35, Code 1868, but only limited its operation by taking out of it judgments and money claims of the state; and when said clause was itself repealed by Act March 12, 1881, c. 13, such judgments and claims were again brought under section 20, c. 35, and made subject to statutes of limitations.

3. A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, though it contains no express words to that effect, must, on principles of law as well as in reason and common sense, operate a repeal of the former law. Herron v. Carson, 26 W. Va. 62.

4. When a statute which repealed a common-law rule is itself repealed, the common rule revives. So, by common law, when a statute which repealed a former statute is itself repealed, the former statute revives; but this rule of the common law is changed by section 10, c. 13, of the Code. Under that statute, repeal by implication is the same as express repeal.

5. A cardinal rule in interpreting statutes is to construe them as prospective in operation in every instance, except where the intent that they shall act retrospectively is expressed in clear and unambiguous terms, or such intent is necessarily implied from the language of the statute, which would be inoperative otherwise than retrospectively. In doubt, it should be resolved against, rather than in favor of, retrospective operation. Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736.

6. Statutes of limitations are no exceptions to the rule that statutes are *prima facie* to be given only prospective operation.

7. When a statute is amended and re-enacted with the words, "so as to read as follows," or words of like effect, those parts of the re-enactment embraced in the former law are not considered as repealed and re-enacted, but as law all along continuously from their original enactment; but the new parts are considered as law for the first time from the commencement of the amended act.

8. Section 20, c. 35, Code, amended and re-enacted by chapter 18, Acts 1882, is retroactive upon judgments rendered in favor of the state before its re-enactment.

9. Section 20, c. 35, Code, is not invalid and void because chapter 18, Acts 1882, re-enacting it, is repugnant to the constitution, (article 6, § 30.)

10. When the principal object of an act of the legislature is expressed in the title, and the act embraces, along with such principal object, other incidental or auxiliary objects germane to the principal object, the act is not repugnant to section 30, art. 6, of the constitution, and is valid as to such principal and auxiliary or incidental object.

11. Generally, under said section, the language of the title should be construed in its most comprehensive and liberal sense favorable to the validity of the act, so as to bring the contents of the act within the title; and only where it is very manifest that the contents of the act are not within the title should the act, or any part of it, be deemed invalid.

(Syllabus by the Court.)

Error to circuit court, Ohio county; Joseph R. Paull, Judge.

Action by the state of West Virginia against James M. Mines. Plaintiff had judgment. From a judgment quashing an execution issued plaintiff brings error. Affirmed.

Okey Johnson, for the State. John Bassel, for defendant in error.

BRANNON, J. This is a writ of error taken by the state to a judgment of the circuit court of Ohio county quashing an execution in favor of the state. Was the judgment barred by the statute of limitations when the execution issued? is the question of the case. The judgment was rendered in October, 1877; a second execution was returnable to January rules, 1879; and the next one—the one involved here—issued 19th November, 1891. The state contends that its judgment is protected by the maxim, “*nullum tempus occurrit regi*,”—no time runs against the king. Section 20, c. 35, of the Code of 1868, provided that “every statute of limitations, unless otherwise expressly provided, shall apply to the state, but as to claims heretofore accrued, the time shall be computed as commencing when this chapter takes effect.” This abolished the common-law rule that no time runs against the state. A difficult question here arises,—whether this provision of the Code applies to this judgment. If so, then it is barred by sections 10 and 11, c. 139, of the Code. In chapter 55, § 19, Acts 1875, is found the provision: “There shall be no limitation to proceedings on judgments on behalf of the state, or any claim due the state.” The act containing this clause is not a re-enactment of chapter 35, but an independent act, relating to the collection of taxes. It does not expressly repeal the section of the Code of 1868 above quoted. It is left standing; but, as there is a repugnancy between the two provisions, and the act of 1875 repeals so much of all acts as conflicts with it, we shall say that it is a partial repeal by clear implication of section 20, c. 35, of the Code of 1868,—that is, so far as that section would operate to bar judgments in favor of the state and claims due the state; that is, as I think, claims for money demands. But beyond this it did not repeal the said provision of the Code of 1868, making the state subject to every statute of limitations; but that provision would operate against the state in respect to other rights; for instance, her right to lands, or torts done to her property. It would be more accurate to say that the act of 1875 operated to make exceptions to section 20 of chapter 35 than to call it a repeal. And that the act of 1875 takes out of section 20 only judgments and debt claims is plain from the fact that the clause is found in an act entitled “An act providing for the collection of taxes,” and, as applicable to debt demands, it would be covered by the title, but, if extended to all causes of action in favor of the state, it would be ungermane to the principal object of the title, and void. *Shields v. Bennett*, 8 W. Va. 74. Afterwards, by act of March 12, 1881, (Acts 1881, c. 13,) the legislature amended and re-enacted chapter 30 of the Code, in relation to

the collection of taxes; and, although it related to the same subject as the act of 1875, it left out that clause of the act of 1875 declaring that no statute of limitations should apply to judgments or claims due the state, and thus repealed it. Some question might be raised whether the act of 1881 did so repeal that clause, on the theory that the act of 1875 was not a re-enactment of chapter 30 of the Code, but an original act, so to speak; whereas the act of 1881 is a re-enactment of chapter 30 of the Code; and that, as the act of 1881 is silent as to the subject of limitations, and thus not containing anything in conflict with the limitation clause of the act of 1875, that clause should be held as continuing; and, as repeals by implication can only be allowed where there is plain repugnancy, and where both acts may stand and be executed, we should execute both so far as they do not antagonize. *State v. Enoch*, 26 W. Va. 253.

We ought to consider the said clause of the act of 1875 as not repealed by the act of 1881. But there is another mode of repeal of a statute not based only on repugnancy, and that is, where the later statute makes full and complete provision touching the subject common to both, and it is evident that the legislature intended to review the legislation on that subject, and that the later act should be deemed as full and complete provision upon the subject, the former statute is at an end. *Herron v. Carson*, 26 W. Va. 62. An inspection of the act of 1875 will show that, though not expressly an amendment and re-enactment of Code, c. 30, yet it was intended to be, and substantially and impliedly is such, especially as the act of 1875 expressly repealed chapter 30; and, as the act of 1881 is in terms an amendment and re-enactment of that chapter, so repealed by the act of 1875, viewing them as in pari materia, we are justified in the conclusion that the legislature, by the act of 1881, intended to wholly repeal the act of 1875. Though a later statute be not repugnant to a prior one in all respects, yet if it was clearly intended to take its place it repeals it. *Suth. St. Const.* §§ 154–156. Thus the clause of the act of 1875, providing that no limitation should bind the state as to judgments and claims, is repealed. The repealing act is itself repealed. Does this restore section 20 of chapter 35 of the Code? At common law it would. 1 *Minor*, Inst. 41; 1 *Bl. Comm.* 90; *Suth. St. Const.* § 168; *End. Interp. St.* § 475. But we have a canon or rule of construction in section 10, c. 13, of our Code, that “when a law which has repealed another, is itself repealed, the former law shall not be revived, without express words for the purpose.” Now, if this applies, the Code section is not restored, but the common-law rule that no time runs against the state, which said Code section annulled, would be brought into force again, under that principle of law that when a

statute repealing the common law is itself repealed the common law is restored, as section 10, c. 13, Code, does not apply to statutes repealing common law, but only to statutes repealing statutes. 1 Minor, Inst. 41; Insurance Co. v. Barley, 16 Grat. 383, 384; Booth's Case, Id. 519, 529. But I do not think the statute last quoted applies. There has been question whether that statute applies to cases where the repeal of one statute by another is not express, but only by implication; but as a repeal, though only by construction or implication, is just as much a repeal as when express,—just as much the will of the legislature that the older law shall cease,—I think there is no reason why the statute does not apply to repeals by implication as to express repeals. So it has been held on similar statutes. End. Interp. St. § 476; Milne v. Huber, 3 McLean, 212; Stirman v. State, 21 Tex. 734. See, also, Phillips' Case, 19 Grat. 485.

Now, as I remarked above, section 20 of chapter 35 of the Code was broad and comprehensive, applying every statute of limitation against the state. The act of 1875 only changed or modified it to a certain extent,—that is, prevented its operation as to judgments and claims of the state, leaving it in all other respects operative; simply made an exception to the generality of the operation of the statute; and when that act was itself repealed, and the exception or limitation was no longer in force, said section 20 operates free of that exception. It was only a partial abrogation of section 20. It would have been different had it been a total abrogation. To hold otherwise we should say that the common-law rule that time could not bar the state applied as to judgments and claims for debt, but as to all other grounds of action time would bar. Authority will sustain the position here taken. The old English statute of Gloucester gave costs to plaintiffs recovering damages. Later acts provided they should not recover costs except on a judge's order. The later acts were repealed, and it was held that the statute of Gloucester still operated and gave costs, though Lord Brougham's Act, (13 & 14 Vict.) providing that where an act repealing in whole or part a former act is itself repealed, the last repeal does not revive the former act, without words to that effect, was in force. And a case pointedly apt to this case, supported by good reasoning, is Smith v. Hoyt, 14 Wis. 252, holding, upon a similar statute to ours, that "where an act, or part of an act, is repealed, it is not revived by a subsequent repeal of the repealing act. But where a statute merely excepts a particular class of cases from the provisions of a previously existing general law, which continues to be in force, the repeal of the excepting statute operates to bring such cases again under the general law." The old act gave defendants 20 days in which to answer; later acts gave defend-

ants in foreclosure suits 90 days; and, the later acts being repealed, the court applied the old act, and said: "Where the statute creating the exception is repealed, the general statute, which was in force all the time, would then be applicable to all cases according to its terms. And this would be no violation of the rule of construction before referred to, that the repeal of a repealing act should not revive the act repealed. The act of 1858 was equivalent to a proviso to the general rule that it should not be applicable to foreclosure defendants. But if a proviso creating an exception to the general terms of a statute should be repealed, courts would be bound afterwards to give effect to it according to those general terms, as though the proviso had never existed; and this could not be said to revive a repealed statute. The rule against this relates to absolute repeals, not to cases where a statute is left in force, and all that is done in the way of repeal is to except certain cases from its operation. In such cases the statute does not need to be revived, for it remains in force; and, the exception being taken away, the statute is afterwards to be applied without the exception." And since writing the above I find the case of McConiha v. Guthrie, 21 W. Va. 134, the principle of construction in which supports this view. One act—a general one—declared that no dwelling house should be invaded in condemnation of land for railroads; another later special act declared that a railroad company might, in gorges and other specified places, construct its road by or through dwelling houses. It was held that the later statute was only a qualification or exception to the former, and the prohibition against taking dwelling houses would apply to all places except the particular places specified in the second act and an express repeal of the qualifying act will restore the prohibition in the general statute to its original force, and it will then operate as though the qualifying statute had never existed. So that we may say that section 20, c. 35, was never repealed by the act of 1875, but that the act of 1875 simply qualified or made an exception to it; and thus section 10 of chapter 13 does not hinder the operation of section 20 of chapter 35 on the repeal of the act of 1875. Thus I come to the conclusion that when in 1881 the act of 1875 was repealed, section 20 of chapter 35 of the Code at once applied to this judgment, and the statutory bar of 10 years began to run against it on 12th March, 1881, and had fully run when, on 19th November, 1891, this execution issued. It is very apparent that section 20 of chapter 35 was intended to operate on all judgments, whether prior or subsequent; for it makes special provision as to prior judgments.

There is another reason for holding the judgment barred. An act of February 9, 1882, (chapter 13, Code 1891, p. 261,) amended and re-enacted section 20 of chapter 35 of the

Code, making an unqualified repeal of the common-law rule that no time runs against the state, in the language, "Every statute of limitations, unless otherwise expressly provided shall apply to the state." Is the section as so amended retroactive upon antecedent judgments? A review of the subject confirms my opinion that the point of the syllabus we adopted in *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736, that statutes are *prima facie* to have no retrospective effect, is correct. Authorities in support of that point are vast in volume, and from all quarters. I refer to the discussion of the subject of the in that case, and cite the following additional Virginia and West Virginia cases asserting or conceding it for convenience of reference: *Elliot v. Lyell*, 3 Call, 268; *Warder v. Arell*, 2 Wash. (Va.) 282; *Com. v. Hewitt*, 2 Hen. & M. 181; *Day v. Pickett*, 4 Munf. 109; *Williams v. Lewis*, 5 Leigh, 686; *McCance v. Taylor*, 10 Grat. 580; *Duval v. Malone*, 14 Grat. 24; *Price v. Harrison*, 31 Grat. 114; *Crigler v. Alexander*, 33 Grat. 674; *Ryans' Case*, 80 Va. 385; *Campbell v. Fire-Brick, etc., Co.*, 75 Va. 291; *Robertson v. Gillenwaters*, 85 Va. 116, 7 S. E. 371; *Tennant v. Brookover*, 12 W. Va. 343; *Hoge v. Brookover*, 28 W. Va. 804; *Thornburg v. Thornburg*, 18 W. Va. 526. Nor will it do to say that, on the theory that statutes of limitation concern the remedy, they are construed retrospectively. They are not purely remedial statutes, affording remedy or touching simply remedial process or procedure. In *Duval v. Malone*, 14 Grat. 24, is found a strong case to repel that contention. A statute, by language broad enough to include antecedent indemnifying bonds, enacted a limitation on indemnifying bonds, and it was held to limit suits only on bonds taken after the act. Without defining a remedial statute, I can assert upon authority that statutes of limitation are no exception to the rule that statutes are *prima facie* future in operation. *Day v. Pickett*, 4 Munf. 104; *Duval v. Malone*, 14 Grat. 24; 7 Wait, Act. & Def. 228; *Wade, Retro. Laws*, § 48; *State v. Pinckney*, 22 S. C. 484; *Ward v. Kilts*, 12 Wend. 137; *Garrett v. Beaumont*, 24 Miss. 377; *End. Interp. St.* §§ 279, 284, 287. It is a concession in *Spang v. Robinson*, 24 W. Va., at page 339. As retrospective force given to statutes is contrary to the general principles of construction and of justice, I have been much inclined to the opinion that this section should not be made an exception to the rule; but I am compelled to the conclusion that it must be so treated. When we reflect that section 11, c. 139, of the Code, at the very time of the act of 1882, subjected all judgments, past or future, to its bar by its very terms; and when we reflect that with knowledge that the section applied to prior judgments the legislature applied that section to state judgments by the strong, broad language, "every statute of limitation, un-

less otherwise expressly provided, shall apply to the state," without qualifying or otherwise providing; and when we reflect further that section 11, c. 139, as it had been provided that no execution on judgments should issue after 10 years, expressly excepted state judgments, and the same legislature afterwards amended that section by striking out that exception of the state judgments, without any reservation as to prior judgments, thus harmonizing this section 11 with their amendment of section 20, c. 35,—we are almost inevitably forced to the opinion that it intended to bring state judgments to just the same rule as that governing judgments of individuals. Was the legislature oblivious to the fact that the citizen's judgment, no matter when rendered, fell under the ban of that section? Did it forget so common, so important a statute as that limiting judgments? Add to this the further fact that this section 20, as it was in the first edition of the Code of 1868, had the provision that as to state judgments existing at its adoption past time should not be computed, but only that running after the commencement of the Code, whereas in the re-enactment of the section in 1882 that provision is left out, and that this is the only change, this strengthens us in the conviction that it was intended to bring state judgments within the retroaction of section 11, c. 139. It was, in effect, an amendment of that section, bringing state judgments under it. Why should they not be? If you give peace and repose to a debtor against a private judgment, why not against a public one? Repose is a main principle calling for statutes of limitations. It is to be preferred, if consistent with fair construction, to give the act such application as will grant peace to a debtor against whom a judgment was had in October, 1877, and who had not been called on by execution to pay for almost 13 years,—until November, 1891.

However, the question whether the act of 1882, taken alone, is retroactive, while it may be in some cases important, and calling upon us for decision, is not important in the present case, as the judgment is barred anyhow, regardless of that question. Section 20, c. 35, placing the state under statutes of limitation, operated upon all causes of action from 1st April, 1869, except that judgments and money demands were excepted out of it by the act of 1875; and, this being repealed in 1881, such judgments and claims again fell under section 20. So from April 1, 1869, down to the present the statute of limitations operated upon the state, not merely from its re-enactment in 1882, except for a few years, as to judgments and debt claims taken out of it by the act of 1875, and again put under it by its repeal. The re-enactment of 1882 made no new law. Where a law is amended and re-enacted the portions of the amended sections which are simply repeated from the old law are not

considered as repealed and re-enacted, but as law continuously from their first enactment by the old act, and not born of the re-enactment; while the new or changed portions are law for the first time from the re-enactment. *Price v. Harrison*, 31 Grat. 122; *Ely v. Holton*, 15 N. Y. 595. That it is within the power of the legislature to enact a retroactive statute of limitations, unless it cut off all remedy at once, without leaving a reasonable time for the enforcement of the right, is conceded, and clear on abundant authority. *Cooley, Const. Lim.* 465, 466. In this instance nearly seven years' time was left after the act of 1882 before the judgment would be barred,—surely more than a reasonable time,—and for that matter the state could at once cut off its own remedy. That section 11, c. 139, Code, does act upon prior judgments is clear both from its words and from *Werdenbaugh v. Reid*, 20 W. Va. 588; *Shipley v. Pew*, 23 W. Va. 487; and *Spang v. Robinson*, 24 W. Va. 327. We think this holding is not inconsistent with *Stewart v. Vandervort*, 34 W. Va. 524, 12 S. E. 736. Section 20 of chapter 35, treated as an original act passed in 1882, would thus retroact and count against the judgment time from January, 1879, to November 19, 1891, and bar it.

But it is stoutly claimed that the act of 1882 is unconstitutional. If so, section 20, c. 35, would remain as it was in the Code of 1868, unaffected by the act of 1882; and as it certainly designed to cover all state judgments, it would, for reasons above given, operate against this judgment from 12th March, 1881, and bar it. It is not claimed that its original enactment as part of the Code was unconstitutional, but only its re-enactment in 1882. But we do not think the act of 1882 unconstitutional. It is said to be so on two grounds. One is that it embraces the general object of limitations to all suits of the state,—an object not expressed in the title, contrary to section 30, art. 6, of the constitution, that no act "shall embrace more than one object, and that shall be expressed in the title." The title of the act is, "An act to amend and re-enact chapter thirty-five of the Code of West Virginia, concerning the recovery of claims due the State." If we so held, it would be like an earthquake in the legislation of the state, overthrowing many, very many, provisions found in our Code incorporated into it by acts amending and re-enacting a large number of its chapters through the long period from its original enactment in 1868. We should be more than usually cautious in reaching a conclusion fraught with such disastrous results consequentially flowing from it. We must in every case presume an act constitutional, and in doubt hold it so. *Bridges v. Shallcross*, 6 W. Va. 562. And in *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, touching the same point, the syllabus is: "The conflict between the constitution and a statute must

be palpable to justify the judiciary in disregarding the latter upon the sole ground that it embraces more than one object, or that, if there be but one, it is not sufficiently expressed in the title." *Shields v. Bennett*, 8 W. Va. 74, holds that "the most liberal construction favorable to the validity of legislation which the language of these provisions admits should be adopted." The point of the objection is that the title of the act says that its object is the collection of claims due the state, whereas its body contains another, a second distinct object, and that not expressed in the title, a statute of limitations against the state; and that, too, not merely a limitation against money claims, but also as to suits to recover land of the state or any other action it could bring. This is true, and yet does not render it void. The title of the act says that it is to amend and re-enact chapter 35 of the Code. That chapter contained this section. But the object is further defined to be the recovery of moneys due the state. The act makes detailed provisions for suits, sales under executions, sale of land and debts of the state by the auditor, and other provisions touching the recovery of moneys due the state, and in section 20 provides limitations as to state suits. This is not foreign, but pertinent and germane, to the general object and purpose of the act; an incident fairly connected with the main or general purpose of the act, and not another separate object. *Shields v. Bennett*, 8 W. Va. 74, discusses this subject, and lays down these principles: That "when the principal object of an act is expressed in the title, and the act embraces with such principal object other auxiliary objects, the act, if not otherwise objectionable, is valid, not only as to the principal, but likewise as to the auxiliary objects;" and that generally the language of the title should be construed in its most comprehensive sense. *Cooley, Const. Lim.* 172, properly states the law to be that "the general purpose of this provision is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone would not only be unreasonable, but would actually render legislation impossible. The generality of a title is therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intentment can be considered as having a necessary or proper connection." "None of the provisions of a statute will be held unconstitutional when they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title." *Suth. St. Const.* § 85. The title need not be a detail or index or abstract of the contents of the act. It may include numerous provisions reasonably indicated by the title. *Mont-*

clair v. Ramsdell, 107 U. S. 147, 2 Sup. Ct. 391.

Now, would it not be going very far beyond the purpose, design, and safety contemplated by the clause of the constitution in hand to say that in an act entitled an act "concerning the recovery of claims due the state," and giving remedies by suits and executions, a statute of limitations as to the state may not be incorporated without rendering it open to the objection that it embraces two different objects, or that one of them is not expressed in its title. Giving remedies, may it not limit them? Is it not cognate and kindred to the subject? I shall refer to the opinion and authorities cited in *Slack v. Jacob*, 8 W. Va. 612, for a full discussion of the subject, without further discussion of it here. I will add that in *Bowman v. Cockrill*, 6 Kan. 311, it is held that "a statute of limitations may be inserted in a tax law for the purpose of aiding and assisting in the collection of taxes." "A subject expressed in the title includes all subsidiary details, which are means for carrying into effect the object or purpose of the act disclosed in that subject." *Suth. St. Const. § 9*. This is an amendatory act, and in *Suth. St. Const. § 101*, the law is stated to be that "the constitutional requirement under discussion, as applied to acts of this character, when they contain matter which might appropriately have been incorporated in the original act under its title, is satisfied generally if the amendatory or supplemental act identifies the original act by its title, and declares the purpose to amend or supplement it. Under such a title alterations by excision, addition, or substitution may be made." It cannot be doubted that under the title of the act passed in 1868, establishing a code of laws, it was valid to insert the limitation section 20 in chapter 35. The act of 1882 expresses in its title that it is to amend chapter 35 of the Code, relating to recovery of money due the state; and thus informed every one that it was that particular chapter of the act adopting a Code, which already contained this limitation section 20, that was to be amended and re-enacted. The numerous authorities cited by *Sutherland* seem to support his text, and it is supported by the opinion by Judge Dent in *State v. County Court*, 37 W. Va. 811, 17 S. E. 379. The only question, if question there can be, is as to its application to such an act as our Code act. If I entertained any doubt in this matter it would arise from the fact that section 20 provides limitations for not only suits for moneys due the state, but other suits also. But can any one say that it was not competent and proper to insert this with all this scope in the Code act? And being properly in the Code act, can any one say that it could not, in the re-enactment of the chapter, be again included with

the same scope? If so, then it must be narrowed so as to limit suits for only moneys due the state, and limitation of other suits be made the subject of an original act; for it could not be put in this act, even by specifying the subject of limitations in the title, as it would make the act contain two different objects. This would give a very technical and inconvenient construction to the constitution. Further, I am of opinion that section 20, in all its scope, is constitutional. But let us suppose that, so far as it subjects suits for moneys due the state to limitations, it is sheltered under its title as dealing with a subject germane to the principal subject of the act, but as to actions for other causes it would be invalid. Must we overthrow the entire section? True, the section is in itself a unit and indivisible, but not so in its application to the subjects to which it applies. Our constitution says that when any object embraced in an act is not expressed in the title, the act shall be void only as to the unexpressed object. And the general law is that if the part expressed in the title is not so intimately connected with that part which is unexpressed as to prevent the former from standing and being executed, it shall stand and have operation. *Cooley, Const. Lim. 148*. It would seem to further the purpose of our constitution, and not be going too far, to say that section 20 would be applied in all proceedings for recovery of moneys due the state, and be abortive as to other actions; and this is an execution to recover money on a judgment. Shall we split the section to overthrow it wholly or to support it in part?

The second respect in which the section is said to be unconstitutional is stated thus in the brief: "But, if section 20 of chapter 35 is to be considered as an amendment to the various limitation statutes as such, it is clearly unconstitutional," because of the provision of the constitution that "no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at large in the new act." The proposition of counsel above given is guarded and conditional. The conclusion of unconstitutionality would be correct were the premise or hypothesis sound; but it is not, since the section is not to be considered an amendment to all the numerous statutes of limitations, in a legal point of view, for the purposes of the clause of the constitution quoted. It simply, by general enactment, makes the state's rights subject to them. It does not amend or change them, making them different from what they were, but merely brings new matters within the pale of their operation. The act sets out in full detail chapter 35 as it is re-enacted, including this section, so there can be no objection on that score, and I do not understand that there is. Judgment affirmed.

STATE v. BROOKOVER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

EXECUTION—ISSUANCE TWO YEARS AFTER JUDGMENT.

1. An execution issued upon a judgment after two years from its rendition without an order of court allowing its issuance is properly quashed.

2. Balance of syllabus same as in *State v. Mines*, 18 S. E. 470.

(Syllabus by the Court.)

Error to circuit court, Ohio county; Joseph R. Paull, Judge.

Action by the state of West Virginia against A. P. Brookover and others. There was judgment for plaintiff, and from an order quashing the execution, plaintiff brings error. Affirmed.

Okey Johnson, for the State. Ewing, Melvin & Riley, and Jas. W. Ewing, for defendants in error.

BRANNON, J. The circuit court of Ohio county quashed an execution in favor of the state against Brookover and others, and the state obtained this writ of error. The judgment dates of 22d of January, 1878, and no execution issued until the one quashed, which dates 23d November, 1891, and it was issued without any order of court allowing it, though more than 13 years from the date of judgment had passed without execution. Section 10, c. 139, Code, required notice and order of court to issue the execution, and for this reason it was rightly quashed. In other respects the same legal principles which control the decision this day made in the case of *State v. Mines*, 18 S. E. 470, control this case, and lead us to an affirmance of the judgment.

ARNOLD v. LEWIS COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

CERTIORARI TO JUSTICE'S COURT—PRACTICE—APPEAL—REVIEW.

1. A final decision on a writ of certiorari is reviewable on writ of error from this court, according to the rules of law and practice in other cases.

2. When the plaintiff appeals, the amount claimed in his action generally determines the amount in controversy on the question of jurisdiction in the appellate court, although the judgment may be for less, or for the defendant.

3. Where a record and judgment of a justice is removed and returned to the circuit court on writ of certiorari issued under chapter 110 of the Code, (see Ed. 1891,) it is the duty of the clerk, upon receiving it, to file and docket the case in the same manner that other cases are docketed, and upon the hearing the circuit court should review such judgment of the justice upon the merits, determine all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice may require; and it is error in the court to have the case tried by a jury without having first reviewed such judgment.

4. Where the petition for and the writ of certiorari to the judgment of a justice show that it was not applied for within 10 days after the judgment was entered, it should not be granted, unless good cause be shown why the writ was not applied for within 10 days; and, if so issued after the time without such showing, it should be quashed as improvidently awarded.

(Syllabus by the Court.)

Error to circuit court, Lewis county; Henry Brannon, Judge.

Action by George J. Arnold against the county court of Lewis county. From a judgment for defendant, plaintiff brings error. Reversed.

Linn & Withers, for plaintiff in error.
Louis Bennett, for defendant in error.

HOLT, J. On 9th October, 1888, George J. Arnold brought suit before a justice against the county court of Lewis county for \$300, damages for injury to his property, viz. 12 head of cattle, sustained by him by reason of a certain public highway, viz. a bridge, being out of repair. The case was tried by a jury, who found for plaintiff, and assessed his damages at \$100. Four bills of exception were taken by defendant during the trial, and defendant moved the two justices to set aside the verdict and grant a new trial; but the motion was overruled, and judgment rendered for plaintiff for \$100, with interest from the 8th day of November, 1888, (the date of the judgment,) until paid, and costs. The defendant excepted, and had the evidence certified and made part of the record. On the 31st day of December, 1888, the judge of the circuit court of Lewis county awarded defendant a writ of certiorari to remove into the circuit court for review the record and proceedings in the cause. The writ was issued on the 7th day of February, 1889. On March 7, 1889, the defendant, George J. Arnold, appeared in court, and filed certain exceptions to the transcript and other evidence, and moved the court to dismiss the cause for insufficiency of the record and of the evidence; but the court, without passing directly on the motion, or in any way reviewing the judgment, but overruling it, if at all, by implication, and without setting aside the judgment of the justice, retained the cause as if it had been originally brought therein, called and impaneled a jury of six, who were elected and sworn to try the matter in difference, as prescribed by section 169, c. 50, Code, and, the jury having found for defendant, judgment was rendered thereon, from which plaintiff has obtained this writ of error.

The contention is made, on behalf of defendant in error, that this court has no jurisdiction; that the amount in controversy is but \$100, which must be taken as of the date of the judgment given by the justice. The constitution (article 8, § 3) says: "It [the court of appeals] shall have appellate jurisdiction in civil cases where the matter

in controversy exclusive of costs is of greater value or amount than one hundred dollars;" plainly showing, by excluding costs, that interest is not to be excluded. The statute (chapter 131, § 18) says: "Every judgment except where it is otherwise provided by law shall bear interest from the date thereof, whether it be so stated in the judgment or not;" thus making interest an inseparable incident of the principal sum adjudged. The judgment for \$100 was rendered by the justice on the 8th day of November, 1888, and by its own terms bears interest from date. That the constitution means that in this instance interest on the principal shall be included in determining the jurisdictional amount is further shown by section 12 of the same article, which says that "the circuit court shall have original and general jurisdiction of all matters at law where the amount in controversy exclusive of interest exceeds fifty dollars;"—each clause as a context to the other, thus showing that when interest is to be excluded it says so, and therefore, when silent, the interest is to be included as an inseparable part of the sum in ascertaining the amount in controversy in reference to jurisdiction. See, also, article 3, § 13, Const. So that the value actually in controversy, principal and interest, at the given time, whatever that time may be, determines the question of jurisdiction in this case. This was \$300 as to plaintiff in the trial before the justice, and was the same amount, as this record shows, on the trial de novo in the circuit court. But plaintiff did not complain of the amount found by the jury in the trial before the justice, nor did he put himself in condition to complain in this court of the finding of the jury in the circuit court if he had desired to do so. On the point of including interest, see *Wilson v. Sparkman*, 17 Fla. 871; *Skillman v. Lachman*, 23 Cal. 198. In *Stratton v. Society*, (1827,) 6 Rand. (Va.) 22, Judge Carr says: "We feel no doubt as to the jurisdiction of the court. The interest is unquestionably a part of the matter in controversy." See *Gage v. Crockett*, 27 Grat. 735; *Campbell v. Smith*, 32 Grat. 288; *Harman v. City of Lynchburg*, 33 Grat. 37. When the judgment was rendered before the justice for plaintiff for the sum of \$100, with interest from November 8, 1888, the date of the judgment, the plaintiff had a right to complain, for he had laid his damages for injury to his cattle caused by the breaking down of the county bridge at \$300. and the jury and the justice only gave him one-third of that; but the matter in controversy, in dispute, for which the suit was brought, contested by defendant, about which witnesses were examined, the matter in difference which the jury was sworn to try, was \$300, from the standpoint of the plaintiff, (see *Lee v. Watson*, 1 Wall. 337;) yet plaintiff chose to abide by the verdict, and relinquish the balance of his claim, rather than prolong the controversy. But

the defendant was dissatisfied with the judgment, which he could have paid at once, and he could not increase it beyond \$100 by waiting for the interest to run. When it was tried de novo by a jury in the circuit court on the same pleadings,—plaintiff's claim for \$300, and defendant's plea that there was no damage,—and the jury found for defendant, and judgment was entered on it, \$300 was prima facie, from plaintiff's standpoint, the amount in controversy; but he did not put himself in condition to claim it to that extent, but he did put himself on record as claiming \$100 thereof, with interest from 8th November to that date. That is what he did claim in the circuit court, as matter of fact shown by the record, and that is what he then on the trial de novo lost, if the judgment stands. He in effect moved the court to dismiss the cause, or to hear it on the merits on the writ of review, and give him a judgment for the \$100 and interest. By his motion to dismiss the writ of review for insufficiency of evidence to warrant the setting aside of the judgment below he brought his claim of what he was entitled to distinctly to the attention of the court; and it then became the duty of the court, if not of its own motion, to take up the record of the writ of certiorari, review the judgment of the justice upon the merits, determine all questions arising on the law and the evidence, and render such judgment or make such order upon the whole matter as law and justice might require. If this had been done, it would have appeared that the writ of certiorari ought to have been dismissed as improvidently awarded; for it was not applied for until December 31, 1888, 52 days after the date of the judgment, and no cause of any kind was assigned or shown for the delay. Plaintiff had the right to have the cause heard and determined by the court on the writ of certiorari in review, as the awarding of the writ does not ipso facto set aside the judgment, and leave it to be tried de novo as if it were an appeal proper from the judgment of the justice. This was an error of law apparent on the record, having no relation to the trial by the jury. But it would answer no useful purpose to remand the cause for further proceedings in the circuit court when the record shows that it ought to be dismissed as improvidently awarded. It is well known that, so far as this writ of review applies to this particular class of cases, it is intended to cure and supplement chapter 50, as far as it can be done, in allowing appeals after trial by jury before a justice. In *Poe v. Machine Works*, 24 W. Va. 517, with us a leading case on the remedy by certiorari, it was held that "in cases where the party has permitted the time for appeal to expire, certiorari will not issue for relief unless upon a special showing unmingled with any blame or negligence on the part of such party." See *Long v. Railway Co.*, 25 W. Va. 333, 13 S. E. 1010; *Bee v. Seaman*, 36

W. Va. 381, 15 S. E. 173, both cases arising under the statute as it now is, in which this analogy furnished by the time allowed for appeal was applied. To keep chapter 50, (the Code of the justice,) and matters relating to it alone, as a consistent whole as near as can be, is so important as the dictate of general convenience that it ought not to be disregarded without some good reason. The cases cited above require that the judgment complained of be reversed, and that the writ be quashed as improvidently awarded.

BRANNON, J., not sitting.

JONES v. SINGER MANUF'G CO.

(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

ASSUMPSIT ON CONTRACT—PLEADINGS—HARMLESS
ERROR—REVIEW.

1. Where an action of assumpsit is brought on an entire contract under seal, in which the covenants are dependent, and the pleader sets forth the contract in a special count, it is not sufficient for the plaintiff to aver his readiness and willingness to perform the condition precedent contained in the contract, but he must go further and show a sufficient legal excuse for his nonperformance.

2. The admission of irrelevant testimony, if it be of such a character that it could not possibly prejudice the opposite party, before the jury, is not ground for granting a new trial.

3. A new trial, asked on the ground that the verdict is contrary to the evidence, ought to be granted only in a case of plain deviation from right and justice, not in a doubtful case, merely because the court, if on the jury, would have given a different verdict.

4. Where a motion for a new trial is made on the ground that the verdict was contrary to the evidence, and the motion is denied, the opinion of the court which tried the cause is on such point entitled to great respect in the appellate court, and the appellate court will grant such new trial only in case of a plain deviation from right and justice.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action on a contract by F. P. Jones against the Singer Manufacturing Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

Henry M. Russell, for plaintiff in error.
John J. Jacob, for defendant in error.

ENGLISH, P. This was an action of assumpsit brought by F. P. Jones against the Singer Manufacturing Company, in the circuit court of Ohio county, on the 27th day of February, 1890. The plaintiff was an employe of the defendant, engaged in the business of selling and leasing sewing machines, under several successive contracts, in writing, dated, respectively, the 1st day of March, 1886, the 6th day of December, 1886, the 1st day of October, 1888, the 12th day of November, 1888, and the 15th day of February, 1889. Each of these contracts, except the last-named one, bound the plain-

tiff to devote his entire time and attention exclusively to the business of the defendant in selling and leasing machines and machine supplies, and collecting the proceeds, and in carrying out the instructions of defendant. The contract of February 15, 1889, appears to have been a modification of the former agreements, and provided that the plaintiff should devote a part of his time and attention exclusively to collecting the accounts of the defendant from time to time intrusted to him by the said defendant, and to selling the sewing machines and sewing-machine supplies made and furnished by said defendant, and none other, and in all respects to faithfully carry out the instructions of defendant. The contracts of March and December, 1886, were designated as "F. contracts," and the contracts of October and November, 1888, were designated as "E. contracts." The declaration, which was demurred to by the plaintiff in error, purports to set forth specifically the covenants contained in these several contracts, and the common counts are added. The demurrer was overruled, and the action of the court in overruling said demurrer is assigned as error. In support of the demurrer, the plaintiff in error cites the case of Kern v. Ziegler, 13 W. Va. 707, and contends that, the covenants sued on being dependent, it was not sufficient for the plaintiff to aver that he was ready and willing to perform his part under the contract, but he should have alleged an offer to do so. Now, we must concede at once if the plaintiff, in his declaration, had contented himself with averring that he was ready and willing to perform his part under the contract, after reciting the terms of the contract, the action of the court in overruling the demurrer could not have been sustained; but the pleader went further in this court, and, after averring that 'the plaintiff was at all times ready and willing to perform his part of said contracts, he avers that the defendant, contriving to injure and defraud the plaintiff in the premises, unjustly and wrongfully refused to permit him to collect the money so coming due to it under the written leases aforesaid, and thereby prevented him from collecting and paying over the money which became due and payable to the defendant under said written leases, but that the defendant wrongfully and unjustly collected and received on the written leases aforesaid, given to it for sewing machines made and furnished by it, and sold and leased by the plaintiff in the collecting districts allotted to him, and so sold and leased by him in the period extending from March 1, 1886, to the 1st day of October, 1888, etc. The covenants in this case must be regarded as dependent, and in the case of Roach v. Dickinsons, 9 Grat. 154, in which case the covenants were dependent, it was held that the averment that the plaintiff was ready and willing to execute and deliver a deed was not sufficient;

that being an action of covenant to recover the purchase money for a piece of land. Also, in the case of *Clark v. Franklin*, 7 Leigh, 1, Tucker, P., in delivering the opinion of the court, said: "Nothing is more true than that where a contract is entire, and the covenants are dependent, the plaintiff is in general obliged to aver and prove a complete performance of all that was to be done and performed on his part before he is entitled to demand payment from the other party. But to this well-established rule there is the equally well-established exception that, where the defendant has prevented a performance by the plaintiff on his part, it is not necessary that the plaintiff should aver or prove a complete performance to entitle him to his action. He may recover without doing so, and it is sufficient to show a readiness to perform, and that he was hindered by the defendant." In the case of *Kern v. Zeigler*, 13 W. Va. 708, although it was held, in the fourth point of the syllabus, that "it is not sufficient in such a case to allege that the plaintiff was ready and willing to perform," yet, in the fifth point of the syllabus of the same case, it was held that where it appeared that the plaintiff was ready and willing to perform his part of the contract after setting forth what was required of him, but that he was prevented by the action of the defendant, the count was good. The plaintiff, in the count under consideration, having set forth all that he was required to do under these successive contracts, which were in some respects modifications of the preceding ones, and having averred his readiness and willingness to comply with said requirements, and having further set forth that he was prevented from so doing by the action of the defendant, we think he has thereby shown a sufficient legal excuse for not performing the covenants required of him, and that the pleader, in framing said count, has brought himself within the rule laid down in the case of *Kern v. Zeigler*, supra.

Counsel for the plaintiff in error contends that this count is defective, because it fails to allege that the plaintiff had been continuously in the employment of the defendant under the agreement of March 1, 1886, and that the collections were made by the defendant while the plaintiff was in its employment under that agreement, when it affirmatively appears that after the 15th day of February, 1889, the plaintiff was in the employment under another agreement, inconsistent with that of March 1, 1886, providing that the plaintiff should devote a part of his time to the service of the defendant. Now, the claim asserted by the plaintiff in this case is for commissions on sales made and leases taken by him during the period extending from March 1, 1886, to October 1, 1888, and it is true that the sixth clause of the contract of March 1, 1886, provides that the employe shall not be entitled to any

commission on money received by the employe after the termination of his employment under this agreement, whether from sales or leases made by said employe during such employment or otherwise. The third clause of the contract of December 6, 1886, paragraph b, however, provides for a commission of 25 per cent. (payable weekly and during the employment only) on such moneys collected by said employe, and paid over to the employer, in payment for sewing machines sold or leased by said employe under this agreement and under the agreement of March 1, 1886, within the collection district allotted to him; showing that it was clearly the intention of the contracting parties to place the contract of December 6, 1886, upon the same footing, so far as compensation in the way of commissions was concerned, and to modify said first-named contract so as to continue the plaintiff in the employment of the defendant, and entitle him to commissions, no matter which contract the sales or leases were made under. The parties, by subsequent agreements in writing, had the unquestionable right to make modifications in the original contract; and, although the first contract provided that the compensation was to be paid for certain specified services under that contract, there was nothing to prevent them from doing as they did,—modify said contract so as to allow the plaintiff commissions for services rendered under the subsequent agreement. And when we refer to the eighth clause of the contract of December 6, 1886, we find it provided that the employe should not be entitled to any commission on moneys received by the employer, after the termination of his employment, on sales or leases made under that agreement. This modification would surely entitle the employe to receive commissions for his services, no matter whether he devoted a portion or the whole of his time to the business, so long as he continued in the defendant's employment.

The declaration avers that the plaintiff devoted his entire time and attention exclusively to the collection of all accounts intrusted to him by the defendant, and to selling the sewing machines and sewing-machine supplies made and furnished by the defendant from the 1st day of March, 1886, until the 15th day of February, 1889; and from the 15th day of February, 1889, until and upon the day of the commencement of this suit he had devoted a part of his time and attention to the same purpose, etc.; so that during the period he claims compensation for, to wit, from March 1, 1886, to October 1, 1888, the averment is made that he was in the continuous and exclusive employment of the plaintiff under said first-named contract and its modifications, and we cannot see that the plaintiff's right to recover can be prejudiced or precluded by the fact that, by a subsequent modification of the contract

which relates to a period for which the plaintiff asserts no claim for compensation, he was to devote only a portion of his time to the defendant's service.

It is further contended by counsel for the plaintiff in error that the contract of March 1, 1886, contained a provision that the defendant might, at its option, increase or decrease the number of accounts intrusted to the employe for collection, without otherwise affecting the terms of the agreement, and the employe should forfeit all claims to any commissions on payments on any account after it had been withdrawn from him. This clause, however, was inserted for the benefit of the plaintiff in error; and, if it was entitled to any reduction in commissions by reason of its having withdrawn accounts, etc., from the plaintiff, this is a matter of defense, which might have been set up by the defendant. This court has held in the case of *James v. Adams*, 8 W. Va. 568, that, "in actions founded on special contracts, the declaration should state the entire consideration and the entire act to be done in virtue of such consideration." Also, in the case of *Davisson v. Ford*, 23 W. Va. 618, it was held that, "in framing the declaration on a special contract, it is necessary to set out the whole consideration on which is based the defendant's promise, and it must at the trial be proved as stated, or the plaintiff must fail, because of the variance." In the count under consideration the pleader has, as we think, complied with this requirement.

Counsel for the plaintiff in error also contends that, if the plaintiff was entitled to recover anything, it was not the contract commissions, but the actual pecuniary loss to him arising from the defendant's act. This would have been at best (as he claims) the difference between the commissions contracted for and the expense which the plaintiff would have incurred in collecting the claims. We cannot, however, see what the defendant had to do with the expenses incurred by the plaintiff in making the collections. If the accounts were collected, the plaintiff, under the contract, was entitled to the commissions, no matter what it may have cost him to make such collections. 2 Suth. Dam. p. 440, under the head of "Hiring for Fixed Wages," states the law as follows: "Where the contract is express, and fixes the amount of compensation on performance, that stipulated compensation is the measure of damages, whether the action is brought on the contract or in general assumpsit." And in the case of *Dermott v. Jones*, 2 Wall. 1, (second point of syllabus,) the court holds that, "while a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue either on it or in *indebitatus assumpsit* relying in the last case

upon the common counts, and in either case the contract will determine the rights of the parties." We also find that in *Sedgwick on Measure of Damages* (page 390, note 1) it is said that "where an agent employed for an agreed commission to sell land finds a purchaser at the stipulated price, but the principal declines to sell, and revokes the agent's authority, the law implies a contract on the part of the principal to pay what is reasonable, and it seems the measure of damages would be the whole commission;" citing *Prickett v. Badger*, 1 C. B. (N. S.) 296; *Moses v. Bierling*, 31 N. Y. 462; *Doty v. Miller*, 43 Barb. 529. In view of these authorities, we are of opinion that the plaintiff has committed no error in setting forth his cause of action, and the court committed no error in overruling the defendant's demurrer.

The next error assigned and relied on by the plaintiff in error is claimed to be in the action of the circuit court in admitting certain evidence upon the trial of the case to the jury, against the defendant's objections; and counsel for the plaintiff in error, in his brief, calls attention to the following questions as objectionable, and which he contends should have been excluded, to wit: "During that time, [meaning from March 1, 1886, to February, 1889,] state how far your services had been satisfactory to the company." Again, the question was asked: "In that conversation, [meaning one had with a certain Mr. Gee at the depot,] what was said by you indicating that you had released in any way or canceled your old contract in regard to these collections?" As to the first question objected to, we can but regard it as legitimate. The plea interposed was non assumpsit. An effort was being made to show that the plaintiff had not complied with the terms of his contract, and in response to this the plaintiff, as we think, was properly allowed to show that the manner in which he had performed the services had been satisfactory, or that no complaint had ever been made as to the way in which they were rendered. An averment is contained in the declaration that the plaintiff did devote his entire time from March 1, 1886, to February 15, 1889, to the service of the defendant in collecting accounts and selling machines; and, although it might be regarded that testimony showing a part of his time subsequent to that date was irrelevant to some extent, yet we cannot perceive that the defendant was injured by evidence tending to show that services were performed by the plaintiff subsequent to that date which were acceptable to the defendant, and, if the court committed an error in admitting the same, it must be regarded as a harmless error. And, even if the evidence referred to must be regarded as irrelevant, this court has held, in the case of *Huffman v. Alderson's Admr.*, 9 W. Va. 616, that "the admission by the court of irrelevant testimony, if it be of such

a character that it could not possibly prejudice the opposite party before the jury, is not good ground for granting a new trial." Looking at the entire evidence which was before the jury, our conclusion is that the court committed no error in refusing to exclude the plaintiff's evidence from the jury.

The refusal of the court to give certain instructions is assigned as error by the defendant. Said instructions were three in number, and read as follows: (1) "If the jury believe from the evidence that in February, 1889, the plaintiff notified the defendant that he, the plaintiff, would not thereafter devote his entire time to the service of the defendant, but would devote a part of his time to other business, this, in the absence of other explanatory circumstances, would constitute a termination, at the pleasure of the plaintiff, of the contracts of March and December, 1886, and October and November, 1888, and thereafter the said contracts could only be continued in force by the consent of both parties." (2) "If the jury believe that in February, 1889, the plaintiff terminated at his pleasure the contracts of March and December, 1886, and of October and November, 1888, or any of them, then the plaintiff had no right under said contracts, or any of them, to continue, without the consent of the defendant, to make collections thereafter of amounts remaining unpaid on sales or leases made by the plaintiff under such contract or contracts so terminated, or to recover from the defendant commissions on collections of such amounts thereafter made by it." (3) "If the jury believe from the evidence that prior to the making of the contract of February, 1889, there was a dispute or controversy between the plaintiff and the defendant whether the plaintiff should thereafter be permitted to make collections and receive commissions on sales or leases made under the contracts of 1886 and of October and November, 1888, and if they further believe from the evidence that the contract of February, 1889, was entered into by the parties for the purpose and with the intention of settling that dispute, then the jury should find for the defendant." The first of these instructions was calculated to mislead the jury, and the court committed no error in rejecting it. The contract of February, 1889, was a modification of the former contracts in some respects. It allowed the plaintiff to devote only a portion instead of his entire time to the service of the defendant. It did not provide for a cessation of plaintiff's employment, but, on the contrary, provided for a continuance of it under the modifications therein set forth. Both parties agreed that plaintiff might devote a portion of his time to the service of defendant. The consent of the defendant was given to this modification. Therefore the instruction was well calculated to mislead the jury, by instructing them that if

they believed that in February, 1889, the plaintiff terminated at his pleasure the contracts of March and December, 1886, and of October and November, 1888, or any of them, then the plaintiff had no right under said contracts, or any of them, to continue, without the consent of the defendant, to make collections thereafter of amounts remaining unpaid on sales or leases made by the plaintiff under such contract or contracts so terminated, or to recover from the defendant commissions on collections of such amounts thereafter made by it; and said instructions should have been rejected for the further reason that there is no evidence tending to prove the facts therein recited. Instruction No. 2 was properly rejected, because there was no evidence before the jury tending to prove the facts therein stated. Instruction No. 3 was also properly rejected, for the reason that if the contract of February, 1889, was made to settle a dispute between the plaintiff and defendant, (and there is no proper testimony to show that such was the fact,) yet the contract must speak for itself, and it cannot be added to by parol testimony; and, even if it was made to settle a dispute, we can see no reason why, for that reason, the jury should find for the defendant.

It is also assigned as error that the court refused to exclude the plaintiff's evidence from the consideration of the jury, and also claimed that the court erred in overruling the defendant's motion for a new trial, and rendering a judgment upon the verdict. These assignments may be considered together, as they both depend upon the character and weight of the testimony. In the case of *Miller v. Insurance Co.*, 12 W. Va. 116, this court held that a new trial, asked on the ground that the verdict is contrary to the evidence, ought to be granted only in a case of plain deviation from right and justice, not in a doubtful case, merely because the court, if on the jury, would have given a different verdict. See, also, *State v. Maier*, 36 W. Va. 759, 15 S. E. 991. See, also, *State v. Hunter*, 37 W. Va. 744, 17 S. E. 307, where it was held that where a motion for a new trial is made on the ground that the verdict was contrary to the evidence, and the motion is denied, the opinion of the court which tried the cause is on such point entitled to great respect in the appellate court, and the appellate court in such case will grant such new trial only in the case of a plain deviation from right and justice. There is some conflict in the testimony upon the questions of fact. The jury found the issue for the plaintiff, and the court below refused to disturb the verdict, after having seen the witnesses and heard them testify. Applying the principles of law above quoted to the facts proven, we cannot say that the finding of the jury was a deviation from right and justice, and for these reasons the judgment complained of must be affirmed, with costs.

**BARNES SAFE & LOCK CO. v. BLOCH
BROS. TOBACCO CO.**

(Supreme Court of Appeals of West Virginia.
Nov. 4, 1893.)

**SALE THROUGH AGENT — WHEN TITLE PASSES —
RIGHTS OF SELLER AS AGAINST AGENT'S CRED-
ITORS.**

1. If a contract of agency is entered into, and the principal agrees to furnish to the agent on consignment certain manufactured articles, at a stipulated price, to be paid for when sold, such articles, when so furnished, remain the property of the principal until sold to a bona fide purchaser, and they cannot be executed and sold to pay the debts of the agent, and, if so sold, the purchaser gets no title to any such articles as against such principal.

2. The agent's right to a lien for commission and expenditures is one personal to himself, not transferable, and he alone has the right to take advantage of it.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action in detinue by the Barnes Safe & Lock Company against the Bloch Bros. Tobacco Company. Defendant had judgment, and plaintiff brings error. Reversed.

The other facts fully appear in the following statement by DENT, J.:

On the 21st day of April, 1890, the Barnes Safe & Lock Company entered into a written contract of agency with the Globe Contract Company as follows, to wit: "Articles of agreement between the Barnes Safe & Lock Company, of Pittsburgh, Pa., composed of Thomas Barnes, of the first part, and the Globe Contract Company, of Wheeling, W. Va., a corporation of the state of West Virginia, of the second part, witnesseth, that, for and in consideration of the party of the second part assuming the agency for the manufactures of the party of the first part in the territory hereinafter mentioned, the party of the first part hereby agrees that the party of the second part shall have the privilege of selling their fire and burglar proof safes, vault doors, etc., in the city of Wheeling, W. Va.; also throughout the state of West Virginia; also in Green, Fayette, and Washington counties, in the state of Pennsylvania; and also in Belmont, Jefferson, and Columbiana counties, in the state of Ohio,—the state of West Va. and Belmont, Jefferson, and Columbiana counties, Ohio, to be considered as exclusive territory of the party of the second part, but Green, Fayette, and Washington counties, in the state of Pennsylvania, to be considered as open territory; and the party of the first part shall credit the party of the second part with the regular discounts as hereinafter set forth upon all work shipped into the exclusive territory before mentioned during the continuance of this agreement, whether the orders therefor shall come through the party of the second part or otherwise. The party of the first part further agrees that on all safes or other work sold by the party of the first part from the date hereof to the West-

inghouse interests of Pittsburgh, Pa., the party of the second part is to be credited with one-half the amount received over the discounts hereinafter set forth, less the cost of delivering the safes on upper floors, no charge to be made party of the second part by party of the first on safes delivered to the Westinghouse interests on the ground floors in Pittsburgh only. The party of the first part grants to the party of the second part the following discounts from their regular price list, copy of which is hereto attached and made part hereof, viz.: From the prices mentioned in pages nine, eleven, and thirteen, seventy per cent., and fifteen per cent. off, and the same discounts from any other prices named in said price list, except that the burglar-proof part of any combination, fire, and burglar proof safes shall be calculated at ten cents per pound of actual weight, and except, further, that four tumbler iron-case locks for burglar-proof work shall be charged for extra, at twelve dollars each; four tumbler brass-case locks for burglar-proof work shall be charged for extra, at fourteen dollars each; and end-gear burglar-proof locks shall also be charged for extra. The party of the first part further agrees to furnish the party of the second part with a stock of safes on consignment, said safes to be paid for to the party of the first part when sold by party of the second part, and all safes, etc., sold direct by party of the second part, to be paid for to party of the first part in thirty days, by New York draft. The party of the first part also agrees to paint the name, 'The Globe Contract Co., Genl. Agts., Wheeling, W. Va.,' beneath their own name, 'The Barnes Safe & Lock Co.,' on all safes and other work shipped under this agreement into the territory of the party of the second part. It is understood that all prices given in price list are f. o. b. cars at Pittsburgh, Pa. In consideration of the foregoing, the party of the second part hereby agrees to assume the agency for the manufactures of the party of the first part in the territory herein named, and agrees to work said territory with diligence during the continuance of this agreement. This agreement may be terminated by either party's giving to the other thirty days' written notice of their intention of so doing, and at the end of thirty days this agreement shall be considered as canceled. In witness whereof, the said parties have hereunto attached their hands and seals, this — day of —, 1890; the terms of this agreement, however, to have effect as if agreement were dated April 21st, 1890. Barnes Safe & Lock Co. [Seal.] Thomas Barnes. Witness: John H. Newell. Attest: John M. Sweeney, Secy. Globe Contract Co. W. D. Updegraff, Prest. F. R. Stewart, Genl. Mgr." This agency was continued until the 3d day of November, 1890, when the Barnes Safe & Lock Company sent the Globe Contract Company the following notice of the cancellation of the agency, to wit: "Barnes Safe and Lock Company, (Suc-

cessors to Thomas Barnes & Burke & Barnes,) Manufacturers of Improved Fire and Burglar Proof Safes, Vault Doors, and Bank Locks. 124, 126, 127, 129, and 131 Third Ave., between Wood and Smithfield Streets. (Dictated.) Pittsburgh, Pa., Nov. 3rd, 1890. The Globe Contract Co., Wheeling, W. Va.—Gentlemen: We hereby notify you in writing that the contract that exists between us under date of April 21st, 1890, is canceled, according to the terms of the said contract. Please send us statement by return mail of the safes that you now have on hand; also, at the same time, send us N. Y. draft for the safes you have already sold from those we have sent you from time to time; also please advise us what you intend doing about the safes you have left. We thought, in making this contract with you, that you would be able to do us some good work. We are sorry that this step has to be taken, but under the circumstances, and in justice to our interests in the territory we laid aside for you, we hereby notify you that the said contract is canceled. Yours, truly, Barnes Safe & Lock Co. Jno. H. Newell,"—to which the following reply was sent: "The Globe Contract Company, Wheeling, W. Va. Electrical and Mechanical Engineering and Contracting Plans and Estimates Furnished on Application. Wheeling, W. Va., Nov. 7, 1890. Barnes Safe & Lock Co., Pittsburgh, Pa.—Gentlemen: Yours of 3d inst. to hand, and contents noted. We will prepare statement of sales and safes on hand, and in mean time will expect statement from you of work sold in the territory held by us of which we have had no statement as yet, though we have asked for it repeatedly, and, while we have kept an account of such as came to our knowledge, we naturally reason that we have not all of it on our books. Please attend to this at once, and on receipt of same we will submit our statement. As to safes in stock, you are the party to decide as to them, since you wish to discontinue the agency. They will be at your disposal at any time after we have adjusted matters as outlined above. Very respectfully, etc., Globe Contract Co. F. R. Stewart, Genl. Mgr." Thus matters were allowed to rest between them until the 9th day of July, 1891. The safe in controversy, being one of the safes consigned to the Globe Contract Company under the agreement aforesaid, was levied on and sold by an execution creditor as the property of the Globe Contract Company, and the defendant in error, Bloch Bros. Tobacco Company, became the purchaser thereof. The purchasers then wrote the following letter to the Barnes Safe & Lock Company: "The Bloch Bros. Tobacco Co., Wheeling, W. Va. Wheeling, W. Va., July 17, 1891. Barnes Safe & Lock Co., Pittsburgh, Pa.: We purchased the other day, at constable sale, one of your safes that was owned by the Globe Contract Co., which company failed. The safe was never used.

It is a burglar chest safe, No. 30,255. We purchased the same to put in our vault, and, upon measuring the same, find it is about 3 inches too wide. The object of this letter is to inquire if we could not exchange this safe for another one of such a size that we could get in our vault. An early answer will oblige yours, truly, The Bloch Bros. Tobacco Co." Thereupon the safe company immediately brought an action of detinue for the safe, or the value thereof,—\$200,—before Justice George Arkle, who, on the 12th day of October, 1891, rendered judgment for the plaintiff. From this judgment the defendant company appealed to the circuit court of Ohio county, and on the 13th day of February, 1892, the circuit court, neither party requiring a jury, heard the evidence, and gave judgment for the defendant. The plaintiff then applied for and obtained a writ of error, bringing the controversy before this court.

White & Allen, for plaintiff in error. W. P. Hubbard, for defendant in error.

DENT, J., (after stating the facts.) The counsel for the defendant maintains that the judgment of the circuit court should be affirmed, because: (1) The safe had been sold by the plaintiff to the Globe Contract Company. (2) If that were not so, and the safe was in the hands of the Globe Contract Company as plaintiff's agents, the latter had a lien for the general balance due them, and the plaintiff, not having paid that balance, cannot recover. (3) The plaintiff stood by and saw the safe sold as property of the Globe Contract Company without making any claim. (4) The Globe Contract Company, a trader, not having complied with the provisions of section 13, c. 100, of the Code, this safe, acquired and used in its business, was liable for its debts. (5) If the contract was as claimed by plaintiff, it was an attempt to sell goods, reserving the title, and such reservation is void, under section 3, c. 74, of the Code.

On an examination of many decisions relating to contracts of this kind, we find them apparently contradictory and hard to reconcile; some holding that goods delivered under similar contracts are mere bailments for the purpose of sale; others, that they are sales with reservation of title, and therefore void, under the usual recording acts, as to creditors. But from all the general rule is deducible that the court must determine, from the wording of the contract itself and the circumstances surrounding it, the true intention of the parties in making it; and if the contract was entered into in the form of an agency contract, for the purpose of evading the statute requiring all reservations of title to be recorded, then it should be held void as to creditors. Such was the determination of the court in the case of *Chickering v. Bastress*, 130 Ill. 206, 22 N. E. 542.

But/where there is no attempt at evasion, but the contract is one of pure agency, providing for a consignment of goods to be paid for, at a fixed price, out of the proceeds of the goods when sold, this is a bailment for sale, and not a sale with reservation of title, and the title remains in the consignor until the goods are sold to a bona fide purchaser for value. *Walker v. Butterick*, 103 Mass. 238; *Plow Co. v. Porter*, 82 Mo. 23; *Middleton v. Stone*, 111 Pa. St. 589, 4 Atl. 523; *Dando v. Foulds*, 105 Pa. St. 74. "Ordinarily, if goods are 'consigned' for sale, it is a bailment, and not a sale to the consignee. The goods do not become his property or liable for his debts," "even though consigned on a del credere commission." And the fact that the goods consigned were invoiced at a stated price does not itself constitute the transaction a sale, unless the terms of the consignment be such as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods. *Benj. Sales*, (6th Ed.) p. 7; also, 3 *Amer. & Eng. Enc. Law*, p. 340. Applying these principles to this case, we find that the contract entered into was one of pure agency, without any attempt or thought of evading the statutory law relating to the recordation of instruments when sales are made reserving the title, but a consignment of safes was made to the Globe Contract Company, as such agent, and not in any sense a purchaser, to have on hand to sell for the Barnes Safe & Lock Company, whenever a purchaser could be secured on not exceeding thirty days' time. If no sales were made, then there was no purchaser, and the safes could only be returned to the consignor. If a sale was made, the title passed, not through the consignee, but direct from the consignor to the purchaser; and the price passed through the hands of the consignee to the consignor, after deducting all over a given amount to pay commissions and expenses. It is true that the consignee could have become the purchaser of any of the safes, at any time it might wish to do so, by accounting for or paying the fixed price according to the contract to the consignor; and, when the consignor gave notice of cancellation, it gave the opportunity to the consignee to become the purchaser of any unsold safes, but this the consignee refused to do, but notified the consignor that the safes were at its disposal as soon as the accounts between them were properly adjusted. The consignor may have been guilty of some negligence in not taking steps at once after the cancellation of the contract to recover possession of the safes, but not so as to divest it of its title, as it was waiting for the statement from its agent. And there is no sufficient evidence to show that it stood by and saw the safe sold as the property of the Globe Contract Company without making claim. On the contrary, the proof clearly shows that it had no knowledge of the levy or sale until the

letter written it by the defendant in this case, informing it of the purchase, and wanting to trade it for a different sized safe.

It is hardly worth while to notice the fourth proposition of defendant's counsel,—that the Globe Contract Company was a "trader," within the provisions of section 13, c. 100, of the Code,—because the Globe Contract Company did not do business as a trader with the addition of the words "factor," "agent," and "company," or "& Co.," within the meaning and contemplation of the statute, but it was doing business in its corporate name, and, while transacting other business, it undertook to act as an agent for the Barnes Safe & Lock Company, which fact was plainly painted on every safe handled by it as such agents. This, being a bailment, and not a sale with reservation of title, as heretofore determined, does not come under the provisions of section 3, c. 74, of the Code. To sustain the position taken by the defendant, his counsel quotes the law virtually as set out in syllabus 1, *Chickering v. Bastress*, 130 Ill. 208, 22 N. E. 542: "(1) Contract—Whether a Sale or Mere Bailment. Where the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment; but when there is no obligation to restore the specific article, and the person receiving it is at liberty to return another thing of equal value, he becomes a debtor to make a return, and the title to the property is changed,—it is a sale." The same law is laid down in *Benjamin on Sales*, (6th Ed. p. 5,) in these words: "On the other hand, it is now well settled that if the contract clearly contemplates, either by express provision or by established usage of the business, that the identical thing received will not be returned, but only its equivalent, either in the same form received, or in some manufactured condition, or else paid for in money, at the option of the receiver, the transaction is a sale or exchange. The title passes immediately on delivery, and the risk is on the receiver." This law, while it holds good as to certain kinds of bailments, has no application whatever to that class of bailments known as "consignments for sale," and was therefore improperly applied in the Illinois case above referred to. To so apply it is to do away with all bailments with power to sell, because there is no obligation in such case to restore the specific article, but only the value thereof in money, after a sale is made by the factor or consignee, or, in case no sale is made, then to restore the specific article; and the law quoted above from the fifth page of *Benjamin on Sales* would be directly in conflict with the law quoted from the seventh page of the same work, but to give the construction given in this opinion is to render both pages harmonious.

The only other point urged by the defendant's counsel is the one on which the circuit court, from the briefs, appears to have de-

cided this case, and that is that the appellant was not entitled to recover possession of the safe in controversy, because the Globe Contract Company had a lien on it for unsettled commissions. It nowhere appears that such is the true state of affairs. Accounts appear to be unsettled, but which way the balance will fall is not made evident. Neither is the Globe Contract Company claiming any such lien. If it had one, it was personal to itself, and was waived when it permitted the safe to be taken from its custody, and it cannot be asserted by a third party. "None but the factor himself can set up this privilege against the owner. It is a personal privilege, and cannot be transferred, nor can the question upon it arise between any but the principal and the factor." 3 Amer. & Eng. Enc. Law, p. 339; *Holly v. Huggeford*, 8 Pick. 73. The constable in this case levied on the safe by direction of the general manager, and apparently the only secured creditor of the Globe Contract Company, then wholly insolvent. This is no protection to the officer, nor to the purchaser who bought at the sale, because the doctrine caveat emptor applies in such cases with full force, and the inscription on the safe, "The Barnes Safe & Lock Co.," "The Globe Contract Co., Genl. Agts., Wheeling, W. Va.," was sufficient to put any reasonable man on his guard, especially as it was a new safe that has never been used; and it can hardly be doubted that such shrewd business men as compose the defendant were not fully informed as to the true state of the title to the safe, and purchased it as a matter of pure speculation. If not so informed, it was their own fault, as they knew where to find the owners of the safe. But whether they were or not does not alter the law of this case. "Persons dealing with factors concerning goods intrusted to them are charged with notice of the extent and limitations upon their powers; and if they deal with them as if they were acting for themselves, or as if they were dealing with their own property, such persons do so at their peril that such is the fact, or that the factor has special authority from the owner, or that, by the well-established and recognized usage and customs of trade in that line, the factor is authorized to deal with and dispose of the goods in the manner proposed. If the transaction is brought in question by the owner of the goods, the burden of proving the factor's authority is upon the party dealing with him." *Kauffman v. Beasley*, 54 Tex. 563; *Story*, Ag. § 225. There is no pretense or claim in this case that the Globe Contract Company, through its general manager, was authorized by the Barnes Safe & Lock Company to turn this safe over to the constable, to be sold and applied on the debts of the Globe Contract Company, and he, in so doing, acted wrongfully towards the true owners of the safe and the purchaser at the sale, but could not thereby deprive the true owners of their title, nor confer any

title on the purchaser, because he was exceeding the authority conferred by the agency. For the foregoing reasons, the judgment of the circuit court is reversed, and judgment is rendered for the appellant, the Barnes Safe & Lock Company, for the safe in question, or, in lieu thereof, the sum of \$125, the agreed value, with interest thereon until paid, and his costs in this and the circuit court and before the justice of the peace expended.

HOLSBERRY et al. v. POLING et al.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

CONTRIBUTION BETWEEN SURETIES — PARTIES — FRAUDULENT CONVEYANCES — PLEADINGS — DESCRIPTION OF PREMISES.

1. Where a suit in equity is brought by one or more sureties against their cosureties to compel contribution, and a tract of land is sought to be sold as the property of one of said cosureties, which is claimed by the wife of said cosurety as having been purchased and paid for by her, although the title remains in her vendor, it is error to decree a sale of said tract of land so claimed by said wife without making said vendor a party to the suit.

2. In a suit of this character, when the bill alleges the insolvency of a cosurety, who is dead, and such allegation is not denied, but admitted, the heirs at law of such dead cosurety are not necessary parties to the suit.

3. Where mention of the land sought to be subjected as the property of said cosurety as fraudulently conveyed to his wife gives no description or clue of identity, except the naming of the county in which it lies, and there is nothing in the proceedings that renders it more certain, it is too indefinite to authorize any legal proceeding to subject the same.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county.

Action by William Holsberry and others against Perry F. Poling and others. From the decree rendered, defendant Poling and others appeal. Reversed.

J. Hop. Woods, for appellants. W. T. Ice and M. Peck, for appellees.

ENGLISH, P. One Jacob Hudkins, in the month of October, 1876, was elected sheriff of Barbour county, W. Va., for the term of four years, commencing on the 1st day of January, 1877, and on the 8th of December, 1876, he executed two bonds as such sheriff, one in the penalty of \$20,000, and the other in the penalty of \$40,000, with William Holsberry, Daniel Felton, J. W. Robinson, A. T. Crim, P. F. Poling, W. K. S. Stalnaker, Elam T. Poling, Andrew Valentine, and others, as his sureties. Some time during the year 1877, some of said sureties became dissatisfied, and declined to act further as such, and the county court of said county required said Hudkins to execute new bonds, which he did on the 3d day of December, 1877, in like penalties with said first-named bonds, with William Holsberry, J. W. Robinson, Daniel Felton, A. T. Crim, P. F. Poling, W. K. S. Stalnaker, Elam T.

Poling, Elliott Stalnaker, and Andrew Valentine as his sureties. The said sheriff defaulted and became insolvent, and left the state, owing large sums of money to the state of West Virginia, the county of Barbour, and to various persons, for which his said sureties were made liable. In January, 1882, the state of West Virginia brought suit upon the official bond of said Jacob Hudkins against him and his sureties, and process was issued therein, and executed on the said Hudkins and his said sureties in January, 1882, and on the 28th day of April, 1883, a judgment was rendered against A. Valentine, A. T. Crim, P. F. Poling, W. Holsberry, W. K. S. Stalnaker, D. Felton, and J. W. Robinson for the sum of \$2,450.50, with interest thereon at the rate of 12 per cent., and costs, which judgment was docketed in the judgment lien docket in the clerk's office of the county court of Barbour county. On the 13th day of March, 1882, a judgment was recovered in the name of the state of West Virginia, for the use of L. C. Elliott, against said Hudkins and his sureties upon his said bonds, for the sum of \$377.30 and costs. On the 14th day of July, 1888, the state of West Virginia, for the use of Barbour county, recovered a judgment against said sureties upon said bonds for the sum of \$618.21 and costs; and on the 22d day of October, 1888, James E. Heatherly, sheriff of Barbour county, recovered judgment upon said official bonds against said sureties for the sum of \$608.75 and costs. Andrew Valentine died, leaving his widow, Rachel Valentine, and the following named infant children, surviving him, to wit, Sarah Valentine, Carry Belle Valentine, and E. Valentine. Said William Holsberry, Daniel Felton, A. T. Crim, and Jacob Robinson, having paid off the greater part of said judgments, filed their bill at June rules, 1889, in the circuit court of Barbour county, against Perry F. Poling and Elizabeth Poling, his wife, Leonard C. Bowman, William K. S. Stalnaker, and Martha Stalnaker, his wife, Elam T. Poling, Elliott Stalnaker, Jacob Hudkins, William H. H. Shaffer, William B. Poling, Shelton L. Reger, special commissioner, Warwick Hutton, administrator of Andrew Valentine, deceased, A. J. Valentine, Sarah E. Valentine, Carry Belle Valentine, and Rachel Valentine, claiming and alleging that they were entitled to be substituted to the benefit of the liens and judgment so paid by them, and to have contribution from their said cosecurities on the official bonds aforesaid, to the extent of their pro rata share of said liabilities as such cosecurities. Said bill, among other things, alleged that the said Andrew Valentine, then deceased, was the owner of valuable lands in Barbour county at the time he became surety upon said bonds, and even up to the time of said Hudkins' default; that he sold said lands, and with the proceeds purchased two valuable tracts of land in Ran-

dolph county, W. Va., which he procured to be deeded to his wife, the defendant Rachel Valentine, who was then the owner thereof; that said shuffling of property from the name of the said Andrew Valentine into the hands and name of his wife, the said Rachel Valentine, was done to hinder, delay, and defraud the plaintiffs from obtaining contribution from him, and that the said lands were liable, in the hands of Rachel Valentine, for his, the said Andrew's, proportion of the debts aforesaid. The plaintiffs were thus seeking to follow the proceeds of the lands alleged to have been sold in the county of Barbour by the said Andrew Valentine, and subject said lands in the county of Randolph, which they alleged had been purchased with said proceeds, to sale, to obtain contribution for the amounts they had paid as his cosecurities. In order that this might be done, the infant children of said Andrew Valentine were regarded as necessary parties, and made parties by the bill. The plaintiffs, by their bill, were demanding the sale of real estate, which they alleged was purchased with the money of their deceased father. It is true the defendant Rachel Valentine files her answer to this portion of the bill, denying in positive terms the allegations of the bill; and while she admits that her deceased husband owned real estate in Barbour county after he became one of the sureties of said Hudkins, which was sold, and the proceeds invested in land in Randolph county, yet she alleges that said land was sold under a deed of trust to pay debts of her husband, and that none of it was ever deeded to her or owned by her at any time, but claims that she owned some land in Randolph county, which was purchased with her own money, and she further alleges that her husband died intestate and insolvent. This answer was replied to generally. There is no proof of the insolvency of said Andrew Valentine, and there is no proof that the lands in the county of Randolph held by said Rachel Valentine were purchased with her own money, as alleged in her answer. In this case the administrator of the estate of Andrew Valentine was before the court, and the infant heirs at law were also made parties defendant, but the administrator failed to answer the bill, and the infant defendants were not represented by a guardian ad litem. Said bill further alleged that the defendant Perry F. Poling, after the execution of summons upon him in the action upon said bonds, to wit, on the 2d day of March, 1882, sold his farm of 200 acres of valuable land to the defendant Leonard C. Bowman for the sum of \$2,000, and that said land was sold with intent to hinder, delay, and defraud the creditors of said Perry F. Poling, and especially to hinder, delay, and defraud the state of West Virginia, and all who might ever have the right to sue upon said official bonds of the said Hudkins, sheriff as afore-

said, and that he did so for the purpose of hindering, delaying, and defrauding plaintiffs from recovering from said Perry F. Poling his just and equitable part of said indebtedness aforesaid. Answers were filed by L. C. Bowman, Perry F. Poling, and Elizabeth Poling, putting in issue the allegations of the bill with reference to the fraudulent conveyance of the lands of said Poling to said Bowman.

Numerous depositions were taken in the case, and on the 20th day of February, 1891, a decree was rendered in the cause directing a commissioner therein named to ascertain and report the aggregate amounts to which the plaintiffs were entitled by way of contribution from the defendant Perry F. Poling, as one of the sureties of Jacob Hudkins, on his official bond as such sheriff, what payments had been made by plaintiffs, or what liabilities had been incurred by them, or either of them, as sureties on said bonds, for which they were entitled to contribution from said Perry F. Poling, etc., but required no report from said commissioner as to the alleged fraudulent conveyance made by Andrew Valentine, nor as to the amount he or his estate was liable to contribute towards the payment of said judgments, or to reimburse the plaintiffs for the amounts paid thereon by them. In compliance with the requirements of this decree, a report was made by a commissioner, ascertaining the amount said Perry F. Poling was liable for, leaving out of consideration any liability on the part of said Andrew Valentine, and finding that the tract of 153 acres described as containing 200 acres, which was conveyed by said Poling and wife to L. C. Bowman, was liable to the satisfaction of one-fifth of said judgment debts. This report was excepted to by the defendant Poling and wife and L. C. Bowman because no examination or finding was made touching the real estate of Andrew Valentine, deceased, or of the defendant William K. S. Stalnaker, as charged in the plaintiffs' bill, as to its liability and contribution to the debts found by the commissioner to be due to the plaintiffs from the defendant Poling, and because the allegations of plaintiffs' bill were taken for confessed as to the liability of said Valentine and Stalnaker for contribution, yet the report found and fixed the whole liability upon the defendant Perry F. Poling, without settling the rights and equities of the plaintiffs against said real estate of said Valentine and Stalnaker. These exceptions were overruled, said commissioner's report was confirmed, and a sale of the land conveyed by Poling and wife to L. C. Bowman was directed to be made, by commissioners therein appointed, to satisfy the liability of said P. F. Poling, thus ascertained; and from this decree the defendants P. F. Poling and wife and L. C. Bowman obtained this appeal.

It is assigned as error by the appellants that the court entered a decree of sale of the

land sold by said Poling to Bowman before an inquiry had been made into the alleged liability of said Andrew Valentine and W. K. S. Stalnaker, and the alleged fraudulent transactions on their part. It is, however, distinctly alleged in the bill that said Andrew Valentine and W. K. S. Stalnaker were insolvent, and the allegations of the bill with reference to the fraudulent sales and purchases made by said Valentine in the name of his wife neither designate the kind of land sold by him, its amount or locality, except that it was situated in Barbour county. Neither does it describe in any manner the land purchased by him in the name of his wife in Randolph county, and the same is true with reference to the allegations of the bill in reference to the sales alleged to have been made by said Stalnaker, only, in making said allegations, it does not state in what county the lands sold by him were located. It simply alleges that he was the owner of valuable real estate at the time he became surety upon said bonds, and at the default of said Hudkins he suffered a chancery suit to be brought against him for certain pretended debts, in which suit his lands were sold, and his wife became the purchaser, and divided the same into small farms, and sold them out at a large profit, and that he and his wife have left the state, and are insolvent. These allegations are not regarded as sufficient, either as to said Valentine or Stalnaker, to authorize the court to take any definite action. It is impossible to tell what lands were sold by Valentine, or what lands he purchased with the proceeds; and, as to said Stalnaker, looking to the allegations of the bill, we cannot know what lands he owned, by whom they were subjected, or where they were located, and the court could take no definite action under said allegation. It was, however, alleged, and not denied, that both of these parties were insolvent, and in the case of *Bruce v. Bickerton*, 18 W. Va. 343, (third point of syllabus,) it has been held that, "in a suit in equity for contribution, it is not necessary to make parties to the suit the personal representatives of insolvent deceased cosureties, for whom the plaintiff has been compelled to pay money as cosurety." See, also, *Montague's Ex'r v. Turpin's Adm'r*, 8 Grat. 453, where it was held that "where two or three obligors in a bond are dead, or insolvent, and there is no personal representative of either of them, the obligee, coming into equity to enforce the payment of the debt against the personal representative of the other obligor, is not bound to have personal representatives of the deceased insolvent obligors appointed, and make them parties." Barton, in his *Chancery Practice*, (vol. 1, p. 217,) lays down the rule thus: "Where one surety sued another for contribution, it was held that the executor of a third surety, who was dead, ought to be a party, although he died insolvent; but the general rule is that if, in such cases, the

principal is clearly insolvent, and the fact of insolvency is proved, he need not be a party," citing 1 Daniel, Ch. Pr. pp. 270, 271, where the author says: "And it seems from this circumstance, and also from the case of *Lawson v. Wright*, 1 Cox, 275, that if the principal is clearly insolvent, and can be proved to be so, (as by his taking advantage of an act for the relief of insolvent debtors,) he need not be a party to the suit." See, also, Story, Eq. Pl. § 169, and authorities there cited. And, as we have seen, in a suit for contribution by one or more of the sureties of a joint and several bond against his cosureties, the representative of a deceased insolvent cosurety is not a necessary party.

The sale of said 14-acre tract mentioned and described in the bill as having been purchased from Adam Harsh, the title of which yet remains in said Adam Harsh, from whom it was purchased without first bringing said Adam Harsh before the court as a party to the suit, is also assigned as error; and although counsel for appellees, in their brief, seem disposed to pass it over as a harmless error, we must regard it differently. The general principle is that the party holding the legal title must be brought before the court before a sale can be made under its decree, and the title passed to a purchaser. It has so been held where the legal title is outstanding in a trustee. See the cases *Bilmyer v. Sherman*, 23 W. Va. 657, (fifth point syllabus.) In the case of *Renick v. Ludington*, 20 W. Va. 562, Judge Green, in delivering the opinion of the court, quotes from Story's Equity Pleading, (section 72,) as follows, (in speaking of necessary parties:) "One of these is a principle admitted in all courts upon questions affecting the suitor's person and liberty, as well as property, namely, that the rights of no man shall be finally decided in a court of justice unless he himself was present, or at least unless he has had a full opportunity to appear and vindicate his rights. Another is that, when a decision is made upon any particular subject, the rights of all persons whose interests are immediately connected with that decision, and affected by it, shall be provided for, as far as they reasonably may." Adam Harsh, for some reason, has seen proper to retain the title to said 14-acre tract of land; and he has not been afforded an opportunity, in this suit, of saying why he does so. When parties purchase and pay for land, it is not usual for the purchaser to allow the legal title to remain in the vendor, and, if we are left to conjecture, we must say he has some good reason for so doing; but, be that as it may, he holds the legal title to the tract of land. It was error to decree the sale of it, without bringing him before the court. See, also, *Smith v. Parsons*, 33 W. Va. 653, 11 S. E. 68.

The appellant Bowman alleges that it was error to sell his land, and at the same

time sell for the same debt the 14 acres claimed by plaintiffs to have been bought with money paid by him to Perry F. Poling in the purchase of the 200 acres and the 8½ acres. As to this assignment of error, there is no allegation in the bill that said 14 acres of land were purchased by Elizabeth Poling with money derived from her husband or from said Bowman as part of the purchase money for said 200 and 8½ acre tracts of land. The deposition of Elizabeth Poling shows that she paid the purchase money for said 14 acres in stock; that she raised grain on her brother-in-law's land, and traded it for stock, which she paid on the land; so that, so far as the allegations and proofs go, there is no foundation for said exception. As we are of opinion that there was error in decreeing the sale of said 14 acres of land in the absence of Adam Harsh, we deem it unnecessary, at present, to discuss the testimony as to the manner in which said 14 acres of land were paid for, and by whom, as there will, no doubt, be additional testimony, when the cause is remanded, and the proper parties are brought before the court. I will, however, say that if it is then made to appear that said 14-acre tract and 44-acre tract were purchased by said Elizabeth Poling with money obtained from her husband, derived either from the sale of said 208¼ acres or otherwise, said 14-acre tract and 44-acre tract should be sold, as the property of Perry F. Poling, before said 208¼-acre tract is subjected to sale.

As to the error assigned in finding the sum of \$630, with interest, since March 2, 1882, the commissioner's report was made for the purpose of assisting the court in ascertaining the liabilities of the defendants, and the court had the right to take the information thus derived, and modify the report so as to reach the result sought to be ascertained; but, as the report will have to be recommitteed, it will be of no benefit to discuss it, as it now stands.

As to the error based upon the fact that no guardian ad litem was appointed for the infant children of Andrew Valentine, deceased, our conclusion is that, said Andrew Valentine being confessedly insolvent, his heirs were not necessary parties. Neither was it necessary that they should appear by guardian ad litem. And as to the sixth error assigned, to the action of the court in entering a decree of sale until the liability of said Andrew Valentine and W. K. S. Stalnaker, and the fraudulent conveyance made by them, had been inquired into, we conclude that such inquiry was unnecessary, on account of the insolvency of the said parties.

As to the seventh error assigned, to wit, in the court's reserving the consideration of the sale of said 44 acres because of the pendency of said suit of *Heatherly v. Poling*, we cannot see that the appellants are prejudiced by said action. The decree complained of is reversed, and the cause remanded.

TYGART'S VAL. BANK v. TOWN OF
PHILIPPI et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1893.)

ILLEGAL TAXATION — RESTRAINING COLLECTION —
REMOVING CLOUD ON TITLE — EQUITY JURISDIC-
TION.

1. If a municipal corporation, in taxing property, acts *ultra vires* by taxing property which it has the right to tax, beyond the limit fixed by the organic law conferring the power to tax, a court of equity will, on a bill filed by the owner of the property so illegally or excessively taxed, enjoin the collection of the taxes illegally assessed.

2. A court of equity has jurisdiction in such a case to remove a cloud from the title of real estate where the property assessed is partly of that character. It also has jurisdiction to restrain the collection of such taxes so illegitimately assessed because the action of the municipal corporation was *ultra vires*.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county.

Action by the Tygart's Valley Bank against the town of Philippi and others to restrain the collection of certain taxes. There was decree for defendants, and plaintiff appeals. Reversed.

Dayton & Dayton and William T. Lee, for appellant. J. Hop. Woods, for appellees.

ENGLISH, P. This was a suit in equity, brought by the Tygart's Valley Bank, a corporation formed under the laws of the state of West Virginia, against the town of Philippi, a municipal corporation under the laws of this state, in the circuit court of Barbour county, seeking to restrain and enjoin the defendant from the collection of \$145, which is the residue of a tax ticket of \$605.75, which the plaintiff claims the defendant exceeded its legal powers in assessing against its real and personal estate, which was assessed the same year for state, county, and district purposes at \$46,075. The bill alleges, in substance, that the plaintiff is a duly-chartered corporation under the laws of the state of West Virginia, and engaged in a general banking business in said town of Philippi; that said town is a municipal corporation under the laws of the state of less than 10,000 inhabitants; that the plaintiff is the owner in fee of a lot within the limits of said municipal corporation, upon which stands a two-story brick building, in which its general banking business is conducted; that said banking building and lot upon which the same is situated is assessed for the year 1892 for state, county, and district taxation purposes at the value of \$1,075, and the said plaintiff is further assessed for state, county, and district purposes as and for its personal property and value of its stocks, bonds, etc., for the same year upon a valuation of \$45,000, making a total valuation of \$46,075 taxable property within the limits of said municipal corporation assessable and subject to taxation as shown by

the assessor's books of said county, and as regularly assessed for state, county, and district purposes as aforesaid; that both by the general law of this state governing cities, towns, and villages of less than 10,000 inhabitants, as also by a distinct ordinance of said municipal corporation, the town of Philippi, it is expressly provided that all tax levies for the purposes of said municipal corporation should be made upon values assessed for state and county purposes, and not otherwise; that, notwithstanding these plain provisions of the law of the state and the ordinances of the said town, the said defendant corporation, acting by and through its town council, on the — day of —, 1892, appointed the defendant John H. Daniels assessor for said town, and the said Daniels, utterly disregarding said law and his duty in the premises, and wholly ignoring the assessment for state and county purposes, assessed the real property of the plaintiff at \$1,075 and the personal property, stocks, bonds, etc., of plaintiff at \$59,500, or a total assessment of \$60,575 upon the real and personal property of plaintiff, being an excess of \$14,500 over the assessment made for county and state purposes; and the said municipal corporation subsequently, upon said illegal assessment made by said Daniels, levied a tax against the said plaintiff for municipal purposes of \$1 upon the \$100 of said value and assessment ascertained by said town assessor Daniels, and caused a tax bill for the sum of \$605.75 to be made out and placed in the hands of the said John H. Daniels, whom they had also appointed tax collector, for collection; and that the said Daniels had not only demanded payment thereof, but had been actively engaged in seeking to enforce collection. Plaintiff also alleged that under the organic law of the state said municipal corporation was prevented from levying a higher rate than \$1 on the \$100 of values ascertained for state and county purposes, and by the same laws of the state all assessments, fines, and penalties imposed by the authorities of such municipal corporations were expressly made liens upon the real estate, and as such liens have priority over all other liens except the liens for taxes due the state, county, and district; and plaintiff charged that the illegal levy so made and based upon the illegal assessment aforesaid constituted a lien upon the real estate of the plaintiff situated within the limits of said municipal corporation. Plaintiff further alleged that, recognizing the right of said defendant corporation to levy a rate of one dollar upon the hundred upon the values ascertained for state and county purposes, the plaintiff, on the 17th day of December, 1892, before the institution of this suit, tendered to the said John H. Daniels, through its agent and cashier, the sum of \$460.75, the amount of \$1 on \$46,075, the value of the real and personal estate as as-

essed against it for state and county purposes, which tender was made by said plaintiff to be in full of the assessment for the said year 1892, due from it to the said corporation; that the said John H. Daniels, when said tender was made, refused to accept the same as being in full of said assessment and levy, but unlawfully seized upon the same, stated it should be credited upon said tax bill, and was seeking to collect the remainder of said bill, to wit, the sum of \$145, from the plaintiff. The plaintiff also charged that the remaining portion of said tax bill was wholly illegal, null, and void, but that the same constituted a cloud upon the title of the said plaintiff's real estate, and the plaintiff prayed that the defendants might be enjoined from collecting the remaining \$145 of said tax bill until the matters therein set forth might be inquired of, and that they might be perpetually enjoined and restrained from its collection, and the cloud thereof on the title to plaintiff's said real estate be wholly removed, etc. The defendants filed a demurrer to the plaintiff's bill, and also filed their answers, putting in issue the material allegations of said bill, and gave notice of a motion to dissolve said injunction in vacation, which motion having been heard on the 28th day of January, 1893, the demurrer to said bill was sustained, the injunction was dissolved, and from this decree the plaintiff applied for and obtained this appeal.

The first error assigned and relied on by the appellant is the action of the court in sustaining said demurrer to the plaintiff's bill. Looking merely to the form of the bill, we find it in all respects conforms to the statute as prescribed in section 37 of chapter 125 of the Code. It is however, contended by counsel for the appellees that the demurrer should have been sustained for want of equitable jurisdiction. Now, it is charged in the bill that both by the general law of this state governing cities, towns, and villages of less than 10,000 inhabitants, as also by ordinance of said municipal corporation, (the town of Philippi,) it is expressly provided that all tax levies for the purposes of said municipal corporation shall be made upon values assessed for state and county purposes; and if this allegation was not for the purpose of considering the demurrer to be regarded as true, when we turn to the statute (section 100 of chapter 29 of the Code) we find it expressly provided that "taxes for county, district, city, town and village purposes shall be levied only upon the values of property ascertained for state purposes, provided this section shall not apply to taxes for city purposes in cities of more than ten thousand inhabitants;" and it is distinctly alleged in the bill that said town of Philippi is a municipal corporation under the laws of the state of West Virginia, of less than 10,000 inhabitants. It is also alleged that the real estate of the appellant for the year 1892

was assessed for state, county, and district purposes at the value of \$1,075, and its personal property and value of its stocks, bonds, etc., for the same year upon a valuation of \$45,000, making a total valuation of \$46,075 taxable property within the limits of said municipal corporation assessable and subject to taxation as shown by the assessor's books of said county, and as regularly assessed for state, county, and district purposes, as aforesaid; and notwithstanding these facts the assessor of said municipal corporation assessed the real property of the appellant at \$1,075, and the personal property, stocks, bonds, etc., at \$59,500, making a total assessment upon the real and personal property of appellant of \$60,575 being an excess of \$14,500 over the assessment made for state and county purposes; and said municipal corporation levied a tax of \$1 upon the \$100 valuation thus assessed and placed in the hands of its collector, who was seeking to enforce its collection. By section 36 of chapter 47 of the Code, "there shall be a lien on real estate within such city, town or village for the city, town or village taxes assessed thereon and for all other assessments, fines and penalties assessed or imposed upon the owners thereof by the authorities of such city, town or village from the time the same are so assessed or imposed which shall have priority over all other liens, except the lien for taxes due the state, county and district and may be enforced by the council in the same manner now provided by law for the enforcement of the lien for county taxes or in such other manner as the council may by ordinance prescribe." The plaintiff, in his bill, alleges that the amount of said tax bill in excess of \$460.75, to wit, the sum of \$145, is wholly illegal, null, and void, but that the same constitutes a cloud upon the title of the said plaintiff's real estate. The question, then, for our consideration is whether equity has jurisdiction by way of injunction under this state of facts to restrain the collection of said sum of \$145, which is in excess of the amount with which said property was legally chargeable. In the case of *City of Richmond v. Crenshaw*, 76 Va. 936, it was held (second point of syllabus) that "by a long course of decisions it has been settled that the remedy against the attempt to coerce the payment of an illegal tax is by injunction." Can there be any question as to the fact that the tax is illegal which said municipal corporation sought to enforce the payment of, as set forth in the pleadings in this case? There can be but one answer to this question. It was a tax levied in contravention of the plain provisions of the statute. Said town transcended its powers by levying its rate beyond the limit prescribed by law. Dillon (2 Mun. Corp. § 922) says: "Upon a survey of decisions in Great Britain and the United States, while they exhibit some diversity of opinion, it seems to us, in view of the nature of municipal powers, the

danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs, to wit, the taxable inhabitants, that the following conclusions rest upon sound reason, and have also the support of the decided preponderance of judicial authority:

(1) The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers, when these are acting *ultra vires*, or assuming or exercising a power over the property of the citizen, or over corporate property or funds which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant." Pomeroy, in his valuable work on Equity Jurisprudence, (volume 1, [2d Ed.] § 260,) in treating of this question, says: "In a large number of the states the rule has been settled in well-considered and often-repeated adjudications by courts of the highest character for ability and learning that a suit in equity will be sustained when brought by any number of taxpayers joined as coplaintiffs, or by one taxpayer suing for himself and all others similarly situated, or sometimes even by a single taxpayer suing on his own account, to enjoin the enforcement and collection, and to set aside and annul any and every kind of tax or assessment laid by county, town, or city authorities, either for general or special purposes, whether it be entirely personal in its nature and liability or whether it be made a lien on the property of each taxpayer, whenever such tax is illegal. * * * In the face of every sort of objection urged against a judicial interference with the governmental and executive function of taxation, these courts have uniformly held that the legal remedy of the individual taxpayer against an illegal tax either by action for damages, or perhaps by certiorari, was wholly inadequate; and that to restrict him to such imperfect remedy would in most instances be a substantial denial of justice which conclusion is, in my opinion, unquestionably true."

It is claimed by the appellant in its bill that the taxes illegally assessed upon its land created a cloud thereon, and that this fact would confer jurisdiction upon a court of equity. This position, however, is earnestly controverted by counsel for the appellee. This, however, is no longer an open question in this state, as we find that this court held in the case of *Powell v. City of Parkersburg*, 28 W. Va. 698, "that, as taxes assessed on real estate without any lawful authority create a cloud upon the title thereof, a court of equity will for that cause alone entertain a bill to remove the cloud by perpetually enjoining the collection of such illegal taxes." The only question, then, is whether said sum of \$145 was illegally assessed against the appellant's property. If so, it creates a lien upon the real estate, and is expressly so de-

clared to be by statute whether it was assessed upon the value of the realty or personality, and, as we have seen, constitutes a cloud upon the title, which alone would confer jurisdiction upon a court of equity. So, also, in the case of *Christie v. Malden*, 23 W. Va. 667, this court held in the third point of the syllabus, that "if a municipal corporation erroneously or illegally taxes property which it has the power to tax in a proper manner, the remedy for such error must be sought generally in a court of law; but if it acts *ultra vires*, by taxing property not subject to taxation, or taxes property which it may tax beyond the limit fixed by the organic law conferring the power to tax, a court of equity will, on a bill filed by the owner of the property so illegally or excessively taxed, enjoin the collection of such taxes." In the case we are considering said municipal corporation taxed property which it might tax beyond the limit fixed by law conferring upon it the power to tax, and under the authority just cited a court of equity would enjoin the collection of such taxes. Snyder, J., in delivering the opinion of the court in *Christie v. Malden*, supra, says: "The distinction established and recognized by the decisions between the cases, in which equity will and in which it will not take jurisdiction, is well defined by Lord Cottenham in *Frewin v. Lewis*, 4 Mylne & C. 249, 255. He says: 'So long as the public functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, this [chancery] court will not interfere * * * to see whether any regulation they make is good or bad, but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction.'" See 2 High, Inj. § 1241; *Carter v. City of Chicago*, 57 Ill. 288. In the case before us the allegations made in the bill in the light of the authorities I have cited in my opinion clearly confer jurisdiction upon a court of equity to restrain the collection of the taxes improperly assessed, for the reason that the act of making such assessment was *ultra vires*, and for the further reason that such assessment cast a cloud upon the appellant's title to said real estate which it had a right to come into a court of equity to have removed. We are therefore of opinion that the court erred in sustaining the demurrer to

plaintiff's bill, and in dissolving said injunction. The decree complained of must therefore be reversed, and the case remanded, with costs to the appellant.

YORK v. FREE.

(Supreme Court of Appeals of West Virginia.
Nov. 25, 1893.)

APPEAL FROM JUSTICE COURT—DOCKET ENTRY.

Action before a justice by York against Bert Free. An entry on the docket reads: "1891, April 4th, H. H. Free appeared and filed bond with Frank Burt as security, and asks that an appeal be granted to the circuit court of Marion county. Bond approved, and appeal granted. J. F. Christy, Justice." The appeal bond recites the appeal as asked by Bert Free. The appeal is to be regarded as taken by Bert Free, not H. H. Free.

(Syllabus by the Court.)

Error to circuit court, Marion county.

Action by James York against Bert Free. From a judgment dismissing an appeal from a justice's court, defendant brings error. Reversed.

A. B. Fleming, for plaintiff in error. C. Powell, for defendant in error.

BRANNON, J. In an action before a justice by York against Bert Free judgment was rendered, and an appeal taken. In the circuit court Free moved the court to allow an amendment of the transcript from the justice's docket to cure a mistake in it, and the appellee objected to the amendment, and moved the court to dismiss the appeal as improvidently awarded, and the court refused to allow the amendment, and dismissed the appeal as improvidently awarded, and Free obtained this writ of error. The alleged defect in the justice's record made the ground for dismissal of the appeal is that the appeal was not taken by Bert Free but by H. H. Free. Of course, no one but a party can take an appeal; but is this appeal to be regarded as one taken by H. H. Free? That depends partly on this entry in the justice's docket, found in regular order of entries in the case under the proper title of the action: "1891, April 4th, H. H. Free appeared and filed bond with Frank Burt as security, and asks that an appeal be granted to the circuit court of Marion county. Bond approved, and appeal granted. J. F. Christy, Justice." Take this entry alone. Properly construed, it shows an appeal by Bert Free. A suitor in a justice's court may appear by agent. The motion was not to dismiss the appeal because of want of authority of H. H. Free to act for Bert Free. We must presume such authority after an appeal has been perfected. We construe the entry as showing an appearance by H. H. Free for Bert Free as his agent, and asking an appeal, not for himself, a stranger to the

cause, but for Bert Free, a party; not for York, as he had no occasion to appeal, having obtained judgment for the full amount of his demand, but for Bert Free, the one—the only one—against whom that judgment was rendered. The courts say that proceedings before justices must be dealt with with liberality in order to support and make them reach the ends of justice. Section 180, c. 50, Code, specially provides as to the docket that, "so far as the entries in the docket are concerned the form shall be regarded as immaterial, if the truth be stated so as to be intelligible." Now, why construe this entry so as to make it do the absurd thing of granting an appeal to an utter stranger, when it does not say so, and it is consistent with its language to construe it as intended to grant an appeal to the only party to whom it could be properly granted? If the entry says a party appears and asks an appeal, we take it that he asks it for himself, he being a party; but when he is not a party, that inference is unreasonable; and if we make inference we adopt the reasonable one,—that he is seeking an appeal as agent for one who is a party. When this entry says "appeal granted," and does not say expressly to whom, shall we not say it is granted to a party to the record, rather than a stranger, who could not, under any circumstances, appeal, especially as there are but two parties only one of whom could appeal? The entry says, "Bond approved, and appeal granted." When once an appeal bond is accepted and approved, an appeal is in being, and the justice's further action in sending up a transcript from his docket and the papers is only ministerial; and, as there was only one party who could appeal, the approval of the bond gave only him an appeal. Go a step further. Bert Free, in the circuit court, appeared in this appeal as appellant, and moved to correct the supposed mistake. His affidavit in support of the motion, and H. H. Free's also, show that he was made agent to ask the appeal. He thus ratified the act of H. H. Free as his agent, and adopted the appeal as his, and he would be estopped and bound by judgment on the appeal, and the circuit court should have further entertained the appeal as his. Go still a step further. The appeal bond recites the action and judgment before the justice, and that Bert Free desired an appeal. This bond is part of the record. It ought to be looked to as well as the docket. Read with it, if the docket could be regarded uncertain, the bond makes certain who is appellant. The bond's not being signed by Bert Free makes no difference, as a stranger may give it. I do not think it was at all necessary to amend the transcript from the justice's docket. We must therefore reverse the order of dismissal, overrule the motion to dismiss, and remand, with direction to the circuit court to proceed with the appeal according to law.

BLUESTONE COAL CO. v. BELL et al.
(Supreme Court of Appeals of West Virginia.
Nov. 22, 1893.)

MINING LEASE—ABANDONMENT—COLLATERAL CONTRACT—SPECIFIC PERFORMANCE—LACHES.

1. Where a lease is executed to a party, of all coal, timber, and mineral privileges on a certain tract of land, for the term of 99 years thence ensuing, the lessee agreeing to pay 10 cents per ton for the coal mined and shipped therefrom, and for all such timber as said lessee may think merchantable, which may be cut, shipped, sawed, or moved from said leased premises, 50 cents per 1,000 square feet of lumber of inch thickness, and a proportionate sum for other thicknesses, or 25 cents per tree, at the discretion of said lessees or their assigns, no time being fixed for the commencement of operations, the lessor has a right to presume that said operations will be commenced in a reasonable time.

2. If nothing has been done under said contract for the period of 17 years from the date of the contract, the lessor has a right to presume the contract has been abandoned, and said lessee or his assigns cannot, after having been guilty of such laches, restrain said lessor from cutting and using the timber on said land by enjoining him from cutting and removing the same.

3. Where it is made apparent that said lease was entered into under a mutual mistake as to the existence of a workable vein of coal in said land, and that said timber contract was induced by the belief that such coal did so exist, and to aid the lessee in his mining operations, said contract should be rescinded, not only as to the coal, but as to the timber.

4. In order that a party may have specific performance of a contract, he must not be in default, but must show himself to have been ready, eager, prompt, and desirous of maintaining his rights. The rule of laches is more strictly applied in cases of this character than in ordinary suits for accounts, etc.

(Syllabus by the Court.)

Appeal from circuit court, Mercer county; R. C. McLaugherty, Judge.

Action by the Bluestone Coal Company against David Bell and Ralph Shrader to restrain defendants from cutting and removing timber from certain land. There was a decree for plaintiff, and defendant Bell appeals. Reversed.

A. C. Davidson and Okey Johnson, for appellant. J. S. Clark and A. W. Reynolds, for appellee.

ENGLISH, P. On the 28th day of March, 1872, David Bell, of Mercer county, entered into a written agreement with Eli Bailey, Harrison W. Straley, David E. Johnston, and Isalah Bee, whereby he demised and leased unto them, their personal representatives and assigns, all coal, timber, and mineral rights and privileges whatsoever contained on, in, and beneath the surface of all and every part, portion, and acre of his, the said David Bell's, farm lands, ground, property, and possessions, lying and being in the county of Mercer, W. Va., on the waters of the Bluestone, adjoining James Bell, Green Belcher, and Calties, and others, and containing 150 acres, be the same more or less, to have and to hold the same from the date of said agree-

ment, for the period of 99 years thence ensuing; and the said Bailey, Straley, Johnston, and Bee, their personal representatives and assigns, agreed to well and truly pay or cause to be paid to the said David Bell, the lessor thereof, during the said term, period, and space mentioned, for and in consideration of said demise, a rent of 10 cents per ton of 2,240 pounds for each and every ton of coal and minerals mined and shipped therefrom; and, for all such timber as the lessees might think merchantable, they agreed to pay or cause to be paid to the said David Bell, his personal representatives or assigns, when the same was shipped, cut, sawed, or moved from said leased premises, at the rate of 50 cents per 1,000 square feet of lumber of inch thickness, or a proportionate sum for other thicknesses, or 25 cents per tree, at the discretion of the lessees, their personal representatives, etc.; and the said Bailey, Straley, Johnston, and Bee, their personal representatives, successors, and assigns, might and should have and enjoy full and free access, ingress, and egress into, or beneath, and over said lands, for the purpose of opening, mining, and shipping the coal and other minerals thereon and therein, and for the cutting, sawing, and removing lumber, and to build and erect the necessary buildings and machinery to operate and work the same, with undisturbed right of way for all necessary roadways to and from their or his said mines, timbers, and works; and the further consideration of one dollar to him in hand paid by the said Bailey, Straley, Johnston, and Bee, the receipt whereof was thereby acknowledged by the said David Bell, the same to be binding upon his heirs, administrators, successors, and assigns, which agreement was acknowledged by the parties thereto, and was admitted to record in the recorder's office of Mercer county on the 23d day of September, 1872. By successive transfers at different dates, the said lease came into the hands of the Bluestone Coal Company, the appellee, on the 30th day of June, 1884, and some time in the year 1890 said Bluestone Coal Company filed its bill in the circuit court of Mercer county against said David Bell and Ralph Strader, setting forth therein the terms of said agreement, and the various transfers thereof, and alleging that under said lease it had the exclusive privilege of cutting, manufacturing, and using the timber on the said land during the said term of 99 years, and that said David Bell, and those claiming under him, had nothing whatever to do with the timber growing upon said leased premises, and had no more right to interfere with the same, in any manner whatever, than they would have if the plaintiff was the absolute owner of the said leased premises in fee simple, until after the said period of 99 years. Said plaintiff further alleged that the said David Bell had entered into some sort of an arrangement with the defendant Shrader, under which

they were cutting, manufacturing, and destroying the timber upon the said leased premises, and that the said timber was not being cut, manufactured, and destroyed as aforesaid for farming and building purposes on the said leased premises; that it was the owner of a large area of coal lands in the immediate vicinity of the said leased tract of land and premises, and was then extensively engaged in mining coal from the said lands; that, in order to enable it to carry on its said mining operations, it was necessary to use in the said mines a large amount of timber; that the timber in the vicinity of its said mines was rapidly being used up, and that, in order to be able to continue its business of mining, it will be obliged to continue the use of large quantities of timber, and that, in order to meet the said necessity for timber, it was of great importance to it that the timber on said leased premises should be preserved to meet the future demands aforesaid for timber; that if the said Bell was permitted to cut, manufacture, and destroy the timber from said leased premises, and plaintiff was forced to resort to its action for damages against said Bell, the present market value of the timber would be nothing to compare with the special value of the said timber to the plaintiff for the purposes aforesaid; that the value of said timber to the plaintiff was many times its present market value; and that if the defendants were permitted to cut, manufacture, and destroy the said timber, it would be compelled in the future to supply the place of the said timber by buying and shipping timber from a great distance, at ruinous freight rates, and that it would be irreparably damaged thereby. And plaintiff charged, upon information and belief, that, unless the defendants were restrained by a court of equity from so doing, they would cut, manufacture, and destroy all of the timber upon the said leased premises, and it would suffer irreparable damage thereby; and plaintiff prayed that said David Bell and Ralph Shrader, and all other persons, their employes, servants, agents, etc., be restrained by injunction from cutting, manufacturing, or in any manner interfering with or destroying, the timber on the said leased premises, during the said term of 99 years, and for general relief. This bill was sworn to on the 27th day of June, 1889, and an injunction was awarded on the 1st day of July, 1889, by the judge of said circuit court in vacation, restraining said Ralph Shrader and David Bell, their agents and servants, from cutting, sawing, or removing from the 150 acres of land in the bill and Exhibit A described the timber growing thereon, except for farming and building purposes needed by said David Bell personally on said land, until the further order of said circuit court, or a judge in vacation.

On the 18th day of November, 1889, the defendant David Bell demurred to the plaintiff's bill, and also filed his answer, which

answer was replied to generally. In his answer the said David Bell admitted the execution of the paper exhibited with plaintiff's bill, which he avers was miscalled a lease, and alleges that in fact said paper, though such in form, was not in legal effect a lease, but that it was a mere optional contract, speculative in its character, entered into on the part of said Bailey and others for purely speculative purposes, and for a long number of years it had been abandoned, and was only sought to be revived by David E. Johnston and H. W. Straley and their associates after new events and developments, not contemplated when the paper was executed, made it desirable on their part to do so. That said paper was executed in 1872, when it was expected to secure the construction of a railroad from Hinton, up New river, to Bluestone; thence up Bluestone; the parties, at the time said paper was executed, asserting, and the defendant believing, that he had coal on his land, and that said railroad would be built within the then short period of five years from the date of said paper. That the scheme of constructing said railroad never materialized, and the whole matter, and all so-called contracts of every kind entered into on these facts, were completely abandoned. That some years afterwards the Norfolk & Western Railroad Company went to work in good faith to build a railroad to Bluestone, to develop its immense coal fields lying north of the Bluestone river, and gave evidence of business and wonderful development by building a mining town and opening mines at what is now Pocahontas. That defendant's land happened to lie south of Bluestone river, where it is considered by all parties there is no coal; and said Straley and Johnston did not buy the defendant's coal land, as they did that of others lying north of Bluestone river, but went to work deliberately to speculate on said old paper, by assigning it to the Bluestone Coal Company, in violation of right and justice. That the real consideration which induced the defendant to execute said paper was the representations relied on and believed: (1) That said railroad up Bluestone would be built in five years; (2) that defendant's land contained valuable and extensive coal veins, which said Bailey and others would proceed promptly to work, and pay defendant large sums for his royalty of 10 cents per ton, as per stipulations in the paper; (3) in view of the above benefits, defendant agreed also to part with his timber at the nominal price named; (4) there was no other consideration whatever, either actual or nominal, which induced the execution of said paper. The one dollar named was in fact not paid. That nothing had ever been done by any of the parties toward carrying out the real contract. In fact, its performance was impossible at the very time

of its execution; the real subject-matter and substantial inducement to the contract being the supposed existence of valuable coal veins on said lands, when none such in fact existed; so that, by the mutual mistake of all parties concerned, they went through the form of contracting about a supposed subject-matter that had no existence, and the supposed existence of which was the real and only inducement to the so-called contract. That, as to the timber, defendant never would have entered into any such agreement to sell his timber at the nominal prices named, had he for a moment thought that he was dealing about the timber alone, and that in view of these facts, the said Bailey, Johnston, and others having done absolutely nothing towards carrying out said contract on their part, the real inducement to the contract, namely, the existence thereon of coal, having failed, and the timber of defendant having become valuable from other causes, for which the said Bailey, Johnston, and others are in no wise responsible, to now allow the pretensions of the bill would be most unjust, inequitable, and unreasonable,—in fact, in violation of common justice and equity. The defendant also claimed that the plaintiff could not occupy the favored position of purchaser for value without notice, for the obvious reason that all purchasers are held to have notice of all facts, where the information they have would lead to inquiry; that the plaintiff knew or ought to have known that nothing had been done under said paper to vest any rights whatever; that the plaintiff well knew that there was no coal on said land before it became the purchaser thereof, if a purchaser at all for value; that it well knew from the face of the paper the character of the agreement, and could have ascertained the real facts by applying to the defendant, and that David E. Johnston and H. W. Straley acted as the agents of the plaintiff in making said contract, and thus had actual knowledge of all the real facts; that said paper of March, 1872, is, in legal effect, virtually nothing but a contract at will, which, of course, must be at the will of both parties, and the failure of said Bailey and others to do anything under the contract for the long time named above, and the actual abandonment thereof, as above set forth, was equivalent to—in fact, was—an exercise of their will, which terminated and put an end to the so-called contract; that the plaintiffs had notice, in contemplation of law, of all this, and were bound by it; that the plaintiff avers in its bill that it is operating extensive coal operations on its lands north of Bluestone river, which is true, but the bill is discreetly silent as to any intention on the part of plaintiff to ever do any mining on defendant's land; that this is no oversight, for they or it well knew that there was no coal on defendant's land, but wants defendant's timber for its min-

ing purposes; and he denies plaintiff's right to it. Defendant further alleges that, in the usual course of husbandry, he has had a portion of his land cleared, and the timber thereon deadened, and, in order to save it, he sold the timber, as he had a right to do, to his codefendant, Shrader; that the land upon which he sold his timber to Shrader is the best land on his farm, which he was clearing for agricultural purposes, and, if he cannot be permitted to clear up and cultivate his farm for agricultural purposes, he will be forced to move off, and abandon his home, and turn it over to plaintiff; that before the execution of said so-called "contract" the said Bailey and others represented to him that, in the event the railroad up Bluestone river was not built in the period of five years from the execution of said lease, the said paper or lease was to be void, and not binding on any one, and defendant charged that said representations were the only inducements that led to the execution of said paper on the 28th of March, 1872, especially on the part of defendant; that said paper constitutes a cloud on his title, which a court of equity would remove, and that it would be just and right for a court of equity to declare said paper or so-called "contract" null and void, and that the same be canceled and delivered to him, and he prays that it may be so declared, and for general relief. The plaintiff filed a special replication to said answer, denying all of the matters therein alleged, constituting a claim for affirmative relief. Some depositions were taken in the cause, and on the 26th day of December, 1890, a decree was rendered in the cause, failing to pass on the demurrer, perpetuating the injunction as to the defendants, Ralph Shrader and David Bell, perpetually enjoining them from cutting, sawing, and removing from the 150 acres of land in the bill described the timber growing thereon, except for farming and building purposes needed by said David Bell, and refusing to grant the affirmative relief prayed for by said David Bell in his answer; and from this decree this appeal was obtained.

As nothing is said about the demurrer in the decree complained of, it must be presumed that counsel for the defendant did not insist upon it in the court below; and, whether it was or not, if the plaintiff, or those under whom it claims, have not, by some laches or neglect on their part, failed to comply with the terms of the agreement set forth in the bill, in a reasonable time, the allegations therein contained must be regarded as sufficient to entitle the plaintiff to be heard in a court of equity. Now, then, if we turn our attention to the attitude of the parties at the time said agreement was made, and say that, at the time they were treating in regard to this 150 acres of land, both parties were ignorant of the fact that the land contained no vein of coal, yet a casual glance

over the agreement discloses the fact that the coal underlying the land was to be mined and removed, and the timber was to be cut, sawed, or moved from said leased premises at the rate of 50 cents per 1,000 square feet of lumber of inch thickness, or a proportionate sum for other thicknesses, or 25 cents per tree, at the discretion of the lessees, their personal representatives and assigns, etc., to be paid for when the same was shipped, cut, sawed, or moved from said leased premises, —an exceedingly low price for timber, and a price which it is difficult to believe a man would receive for his timber, unless he was to be compensated in some other manner for parting with it at this low price; and what man, in his sober senses, would agree that his timber should be cut and shipped at this low price, and at any time the lessee might think proper, so it was within the period of 99 years, unless such agreement was coupled with another contract, as this one was, from which he could reasonably expect to derive some profit? The defendant Bell, in his answer, says the real subject-matter and substantial inducement to the contract was the supposed existence of valuable coal veins on said lands, when none such in fact existed; so that, by the mutual mistake of all parties concerned, they went through the foolish form of contracting about a subject-matter that had no existence, and the supposed existence of which (*viz.* the coal) was the real and only inducement to the so-called contract, and that he never would have entered into any such agreement to sell his timber at the nominal prices named, had he for a moment thought that he was dealing about the timber alone. And the fact that the agreement, on its face, shows that it contemplated the mining and removal of coal from the land at 10 cents per ton shows that the agreement was made under a mutual mistake, as the defendant Bell was selling something he did not own, and the lessee was thereby purchasing something he could not get. David Bell, whose testimony is taken in the cause, states that, at the time said contract was entered into, he was of opinion that there were valuable coal deposits on said tract, and that he would not have contracted to sell his timber at the prices he did, if he had known there was no coal in said land, and that he agreed to these prices in order that they should have the timber for mining purposes; and I. A. Welch, another witness, who is an expert in reference to coal formations, and has had experience in the Flat Top region, in the vicinity of this land, states that there is no vein of coal, of any value, in this land. This evidence shows clearly that there was a mutual mistake as to the coal, which was the most important inducement to the contract, and but for which said Bell says he would never have executed it. The further fact is disclosed by the testimony, that, in order to transport the timber from this land to the lands of the plaintiff, the

Bluestone river would have to be crossed; and it would have to be carried several miles by rail; and the witness Welch further states, when asked whether the timber on the land referred to in the plaintiff's bill will have a special value to the plaintiff or its successors or assigns, says that, "at the present time, he cannot think the timber on the tract in question can be turned to any valuable account; that, after the timber is exhausted from the land in coal, it may then be valuable for mine ties and props." In view of this testimony, which is uncontradicted, it is difficult to perceive how the plaintiff could suffer irreparable damage by failing to get it. Even if there was no mistake in the parties, in entering into the contract, would it be in accordance with the rules of equity, under the circumstances surrounding this case, where a mutual mistake has led the parties to contract in regard to a subject which has no existence, to specifically enforce the contract as to another subject, which never would have found any place in such contract, had it not been regarded as an ancillary concomitant to the remaining portion of the agreement with reference to mining and removing the coal? We can conceive of nothing more inequitable than the enforcement, specifically, of a contract for timber, originating as this one did, and so closely allied with a contract for the coal which was supposed to lie beneath it that it might well be regarded as forming an entire contract, which should not be enforced by piecemeal in a court of equity.

The general principles governing cases of this character are laid down in 15 *Amer. & Eng. Enc. Law*, p. 628, as follows: "In order that a mistake may come within the cognizance of a court of equity, it must be shown to be —First, material, or the moving cause of the complaining party's action; second, mutual, or shared in by both parties to the transaction; third, unintentional; and, fourth, free from negligence." It would be difficult to use language which would more accurately describe the mutual mistake which was made by the contracting parties with reference to the coal supposed to underlie this land, which acted as the moving cause and inducement to the contract for the timber. In the absence of the coal, the evidence shows there would have been no contract for the timber. This was the foundation on which the timber contract rested, and, the foundation having no real existence, the superstructure must fall. *Kerr on Fraud & Mistake*, at page 405, says: "The jurisdiction of equity over mistake is exercised much more liberally where the mistake is in matter of fact than where it is in matter of law. The admission of ignorance of fact as a ground of relief is not attended with those inconveniences which seem to be the reason for rejecting ignorance of law as a valid excuse," etc. And again, in a note on page 410, we find it is said that "nothing is more clear than the doctrine that

a contract founded in a mutual mistake of the facts constituting the very basis or essence of it will avoid it." See *Irick v. Fultons' Ex'r*, 3 Gratt. 193. But if this agreement was not entered into by reason of mutual mistake, but was induced by representations made by the parties with whom he contracted in regard to the construction of a railroad up the Bluestone within a short period and as to the veins of coal underlying said Bell's land, if these representations had no foundation in fact, and induced the contract in reference to the timber and coal, if these representations are to be considered as material, and it is shown that they were relied on by said Bell, it is ground for a rescission of the contract, in equity. This doctrine is found in the case of *Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, (first point of syllabus,) where "false representations of material facts constituting inducement to contract, and on which a party has a right to rely, is ground for rescission in a court of equity. Matter of opinion may amount to affirmation, and be inducement to contract, and will be ground for rescission, especially where parties deal not on equal terms. An affirmant has, or is presumed to have, means of information not equally open to the other party." See, also, *Linhart v. Foreman's Adm'r*, 77 Va. 540, (first point of syllabus,) where it is held that "a false representation of a material fact constituting an inducement to the contract, on which the purchaser had a right to rely, is ground for the rescission of the contract by a court of equity, although the party making the misrepresentation was ignorant as to whether it was true or false; and the real inquiry is not whether the vendor knew the representation to be false, but whether the purchaser believed it to be true, and was misled by it into the contract. In such case, whether the false representation was innocently or willfully made, the effect is the same on the purchaser." See, also, *Lowe v. Trundle*, 78 Va. 63; 2 Pom. Eq. Jur. §868.

The next question I shall consider is whether the party seeking relief from the court, and those under whom it claims by assignment, have shown that diligence which would entitle them to relief in a court of equity, even if the contract was not the result of mutual mistake, or of misrepresentation either willfully or innocently made, upon which the defendant acted. In making this agreement to lease the coal mentioned therein, and to let the lessor have the timber to aid in its safe and economic mining, it is presumed that said David Bell expected to receive some returns in the shape of royalty during his natural lifetime; and, although the agreement provides that the lease is to continue for 99 years, the law contemplates that operations shall be commenced in a reasonable time, in order that the lessor may enjoy his royalty, and the lessee the coal; otherwise, the presumption arises that the

lessee has abandoned his rights thereunder. In this case, it was evidently contemplated that the timber should be used about the mining operations. It was not, however, intended that the mining operations could be postponed for 70, 80, or 90 years, until prices and circumstances changed,—until it was ascertained that no coal existed under the land,—and still allow the lessor to claim the timber at a nominal price. But, if operations were not commenced in a reasonable time, the defendant Bell had the right to treat the whole contract as abandoned. In the case of *Iron Co. v. Trout*, 83 Va. 409, 2 S. E. 713, the court, in speaking of this subject, says: "The lease was for a term of twenty years. Yet, looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren incumbrance on his land,—a cloud on his title,—an incubus and a manacle, which would oppress him, and destroy the marketable value of his land. No lease of land for a rent for a return to the landlord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for the purposes of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landlord." "A man buying and paying for land may do with it as he likes, but a tenant to whom land passes for a specific purpose has no discretion. He must perform what he has stipulated to do, and if he has obtained the lease by misrepresentation and fraud the lessor may have it rescinded in equity." And in the case of *Cowan v. Iron Co.*, 83 Va. 547, 3 S. E. 120, it appears that an agreement was made in June, 1880, between said Cowan and said Radford Iron Company for the sale of all the ores, minerals, etc., underlying a certain tract of land owned by said Cowan. Said company had the right to enter at any time from and after the date of the contract, with workmen, etc., to mine and remove the ore. In the summer and fall of 1880, the said company, in pursuance of its provisions, entered upon the said land, and removed a small quantity of ore,—some 200 tons,—and paid to said Cowan 15 cents per ton therefor, and after that did nothing further; and in January, 1884, a bill was filed by Cowan to have a rescission of said contract. The circuit court dismissed the plaintiff's bill. An appeal was taken, and the court of appeals of Virginia held that, "if one party may terminate an estate at his will, so may the other. Right to terminate is mutual;" also, that "where the minerals in certain lands are sold, with the usual mining rights to begin at any time after date of the agreement, with no time fixed for their ending,

while the compensation is to be paid quarterly, as the iron ore is mined, but lessee to have the privilege of removing from the land at any time any machinery, etc., erected by him, and lessee has abandoned, and failed to mine and pay anything quarterly, he must be held to have terminated the estate, as he had the right to do, and lessor is no more and no further bound thereby." Barton, in his *Chancery Practice*, (volume 1, p. 121,) states the doctrine thus: "Owing to the general rule that the specific performance of a contract will not be enforced, in a court of equity, unless the party seeking it has not been in default, but, on the other hand, has shown himself to have been ready, eager, prompt, and desirous of maintaining his rights, the rule of laches is more strictly applied in cases of this character than in ordinary suits for accounts, etc., and hence, though in some instances a long delay has been held insufficient to bar the complainant's rights, yet in others a very short time has been sufficient for that purpose." In this case, the party who was to mine and remove the ore had only failed to do so for about four years, while in the case under consideration the lessees had waited for 17 years without mining a lump of coal. The Bluestone Coal Company, some 13 years after the contract was made, authorized the railroad company to take some timber off of the defendant Bell's land for cribbing for trestles, and Mr. Welch was directed by the president of the Bluestone Coal Company to pay said David Bell for said timber, but he refused to accept it in payment for timber used by the railway company, so that no timber was ever taken from the said land; and the testimony shows there is very little merchantable timber on said land. But, be that as it may, under the decisions above quoted, and under the circumstances shown by the testimony, the defendant Bell had a right to regard said contract as abandoned; and it being manifest that there was a mutual mistake in the contracting parties as to the character of the coal in said lands, the court erred in perpetuating said injunction, and refusing to dismiss the plaintiff's bill, and in refusing to rescind said contract and dissolve said injunction. The decree complained of is therefore reversed and annulled, and such decree entered here as the circuit court should have rendered, with costs.

STATE v. WARREN.

(Supreme Court of North Carolina. Dec. 19, 1893.)

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—LOCAL POLICE LAWS.

1. Acts 1891, c. 42, making it unlawful, among other things, to use profane language to the disturbance of the peace on the lands of the Henrietta Cotton Mills, in Rutherford county, is not an undue interference with free speech, as applied to language which fails of being a nuisance under the state law, because not used in

the presence or hearing of persons, to their annoyance.

2. Acts 1891, c. 42, to protect the operatives of the Henrietta Cotton Mills, in Rutherford county, making certain industries and behavior unlawful on lands of said mills, is a police law, and not invalid as a local criminal law.

Appeal from superior court, Rutherford county; Armfield, Judge.

J. T. Warren, convicted under Laws 1891, c. 42, of using profane language on land of the Henrietta Cotton Mills, appeals. Affirmed.

Said act makes it unlawful to manufacture or sell liquor, use profane language, fire off firearms, congregate on the bridge, etc., on lands of the Henrietta Cotton Mills, in Rutherford county.

The Attorney General and John Devereux, for the State.

CLARK, J. The defendant was arrested upon a warrant issued under chapter 42, Acts 1891, for "unlawful and willful use of profane and indecent language, that did disturb the peace, on the lands of the Henrietta Mills." On the trial before the justice of the peace the defendant pleaded guilty. He was fined \$50, and appealed. The sworn complaint was made on October 31, 1892, and the warrant issued on the same day. The trial was had, and a plea of guilty entered, on November 3, 1892. We only note that the officer returned the warrant, "Served on October 12, 1892," to say that this was a palpable inadvertence, of no purport, since the defendant appeared in the action. If pleaded at the trial, the justice should have granted the officer leave to amend the return. Code, § 908. Not being pleaded, the plea upon the merits cured the error as to the defendant. The defendant having pleaded guilty, his appeal could not call in question the facts charged, nor the regularity and correctness in form of the warrant. Code, § 1183. He is concluded as to these, though in fact the proceedings are regular in form. The words used by the defendant need not have been set out. *State v. Cainan*, 94 N. C. 880. The appeal could only bring up for review the question whether the facts charged, and of which the defendant admitted himself to have been guilty, constituted an offense punishable under our laws and constitution. *Whart. Crim. Pl. & Pr.* (9th Ed.) § 413. Though the record proper states that in the superior court the defendant was tried by jury and found guilty, it seems that in fact the object of the appeal was merely to test the validity of the statute, since the judgment was arrested by the court upon the ground that the act of the legislature was unconstitutional. There are two grounds upon which the unconstitutionality of the statute may be urged.

First, that it is an interference with the freedom of speech. The legislature could have empowered a municipality to make the

use of such language punishable by its ordinances, when it falls short of being a nuisance punishable by state law, from not having been "committed in the presence and hearing of divers persons, to their annoyance," etc. *State v. Calnan*, 94 N. C. 880; *State v. Debnam*, 98 N. C. 712, 3 S. E. 742. Of course, the legislature could do this directly, if it could do it indirectly, as by authorizing a municipality to make an ordinance to that effect.

Secondly, it may be urged that this is criminal law, and hence must be uniform, and take effect over the whole state. But, on the contrary, it is a police regulation, and hence may be limited in its operation to such localities as the legislature may prescribe. The distinction between the two has been too often pointed out to require reiteration. Such public local acts have been often sustained by this court in cases of prohibition of sale of seed cotton in certain counties, of intoxicating liquors in prescribed localities, or the sale of certain commodities in places named, without being weighed, and the like. These precedents, and the reasons for the distinction drawn, are given by Avery, J., in *State v. Moore*, 104 N. C. 714, 10 S. E. 143, which is cited and approved in *State v. Moore*, 18 S. E. 342, (at this term.)

The court should have overruled the motion in arrest, and affirmed the judgment, the defendant having pleaded guilty before the justice. This case differs from *State v. Koonce*, 108 N. C. 752, 12 S. E. 1032. There, the defendant pleaded not guilty. Having been convicted, he moved in arrest of judgment. This being denied, he appealed. The court properly held that on such appeal the whole case was opened, and the trial was *de novo*, (Code, § 900), and not restricted to the motion in arrest of judgment. But here the defendant has restricted himself by his plea of guilty. There can be no facts left open for consideration by a jury after such plea, and the sole question for review is the legal one, which we have discussed. The judgment of the superior court is set aside, and the case is remanded, that judgment may be entered below affirming the sentence of the justice of the peace. Reversed.

LONG v. CREWS et al.

(Supreme Court of North Carolina. Nov. 28, 1893.)

DEEDS—ACKNOWLEDGMENT—SUFFICIENCY.

The attempted acknowledgment of a trust deed before a notary public who was a preferred creditor is a nullity, because taken before an officer disqualified to act, and is not cured by probate upon such acknowledgment before the clerk and by registration.

Appeal from superior court, Granville county; Brown, Judge.

Action by J. H. Long against J. A. Crews and others. There was judgment for defendants, and plaintiff appeals. Affirmed.

Batchelor & Devereux, Graham & Graham, B. S. Royster, and L. C. Edwards, for appellant. Strong & Strong, for appellees.

OLARK, J. In this state it is settled law that an acknowledgment of a deed by the husband, and privy examination of the wife, taken before a justice of the peace, commissioner, or notary, is a judicial, or at least a quasi judicial, act, and, if such officer is not authorized to take it, the probate upon it by the clerk, and registration, are invalid against creditors and purchasers. This was laid down by Pearson, J., in the leading case of *De Courcy v. Barr*, 45 N. C. 181, in which a commissioner of deeds for this state, in another state, took the examination of a resident of this state, temporarily absent from it. The probate and registration based upon said defective acknowledgment were held invalid. Though the statute in this special particular was changed by Code, § 632. (*Buggy Co. v. Pegram*, 102 N. C. 540, 9 S. E. 412,) the principle has been since followed in *Toussaint v. Outlaw*, 79 N. C. 235; *Duke v. Markham*, 105 N. C. 137, 10 S. E. 1017, and many other cases. In *Ferebee v. Hinton*, 102 N. C. 99, 8 S. E. 922, it was held by Shepherd, J., that an acknowledgment before a clerk of the county where the land lay, taken outside of the state, rendered the registration invalid. The registration upon an acknowledgment before an officer not authorized to take it is not even notice to creditors and subsequent purchasers. *Robinson v. Willoughby*, 70 N. C. 358; *Smith v. Castrix*, 27 N. C. 518; and there are other cases. The plaintiff relied on *Darden v. Steamboat Co.*, 107 N. C. 437, 12 S. E. 46, and *Perry v. Bragg*, 111 N. C. 159, 16 S. E. 10. In the first, the headnote is misleading, unless carefully read, for the case shows that the deeds were in fact acknowledged in the county where the grantors resided. In the latter, the point was taken that the deed was improperly acknowledged before the clerk of Franklin, when the grantor resided in Granville; but it did not appear in the facts agreed that the land might not be situated in Franklin, and the case went off on other points. It is true these were all cases where the registration and probate were insufficient because the acknowledgment was made before an officer by reason of his locality not authorized, or acting outside of his local jurisdiction, and the ruling is sustained by ample authority elsewhere. 1 Amer. & Eng. Enc. Law, 146, note 2, and 1 Devl. Deeds, §§ 487, 488, with cases cited. The curative acts (1891, c. 12; 1893, c. 293) are legislative recognition of the prior defect in jurisdiction in taking acknowledgment. But exactly the same principle still applies where the officer taking the acknowledgment is disqualified, not (as above) by not acting within the authorized locality, but by reason of his interest in the deed, either as party, trustee, or cestui que trust.

1 Devl. Deeds, § 476, and cases there cited. In both cases alike, the acknowledgment is taken, so to speak, coram non iudice, and cannot authorize probate by the clerk and registration. *Beaman v. Whitney*, 20 Me. 413; *Groesbeck v. Seeley*, 13 Mich. 329; *Davis v. Beazley*, 75 Va. 491; *Bowden v. Parrish*, 86 Va. 67, 9 S. E. 616; *Brown v. Moore*, 38 Tex. 645; *Wasson v. Connor*, 54 Miss. 351; *Withers v. Baird*, 32 Amer. Dec. 754, and notes; 1 Amer. & Eng. Enc. Law, 145, note 6; 16 Amer. & Eng. Enc. Law, 775. The act of 1885 (chapter 147) places deeds on the same footing as to registration as mortgages and deeds of trusts were on under Code, § 1234. The attempted acknowledgment of the deed in trust before a notary public who was a preferred creditor therein was before an officer disqualified to act, and hence a nullity. It could not be cured by probate upon such acknowledgment before the clerk and registration. *White v. Connelly*, 105 N. C. 65, 11 S. E. 177; *Freeman v. Person*, 106 N. C. 251, 10 S. E. 1037. The deed was properly excluded. No error.

EDWARDS v. JONES.

(Supreme Court of North Carolina. Nov. 28, 1893.)

FOREIGN JUDGMENTS—COPY AS EVIDENCE—RES JUDICATA.

1. The certificate of the judge of the court in which a foreign judgment was rendered, that the clerk's attestation of the copy of the record of the judgment is in due form, is conclusive.

2. Where the copy of the record of a foreign judgment on which an action is brought shows that the court had jurisdiction, defendant cannot show that he and his attorney made mistakes, and that the judgment was for more than was due.

Appeal from superior court. Alleghany county; Winston, Judge.

Action by Morgan Edwards, administrator of the estate of T. M. Dobyns, deceased, against H. F. Jones. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff alleged that he was the administrator of the estate of T. M. Dobyns, late a citizen of the state of Virginia, who died in 1872, having made and published his last will and testament, which has been duly admitted to probate in that state, and also in this; that one D. W. Dobyns was appointed executor of that will, and qualified as such executor in the state of Virginia, but was thereafter removed from said executorship by the proper court of that state, and one Marshall was duly appointed administrator de bonis non, cum testamento annexo, of the estate of T. M. Dobyns; that said administrator became plaintiff in the place of the removed executor in a suit then pending in the circuit court of Carroll county, in the state of Virginia, in which the appellant was defendant. In that cause, process had been duly served on the defendant, and

he had appeared by counsel, and filed an answer. At October term, 1884, of said circuit court, a judgment was rendered in that suit against the defendant, and to enforce the payment of that judgment this suit was brought by the plaintiff here, who has been duly appointed administrator of that estate in this state, it being admitted that the defendant has no property in the state of Virginia, and is a citizen here. Upon the trial the plaintiff offered in evidence a certified copy of the record of the aforesaid judgment, to which the defendant objected "on the ground that judge's certificate is defective." The objection was overruled, and the defendant excepted. The defendant offered evidence that tended to show that mistakes were made in taking the account in the Virginia suit of the dealings between him and T. M. Dobyns, who had been his partner, the object of the said suit being to effect a settlement of the partnership accounts. He said that he employed counsel who represented him in that litigation, and that he went over the accounts with his lawyer, but did not discover then any mistakes, and did not appeal from the judgment rendered against him in that cause. He also testified that he had great confidence in the executor, and turned over to him his vouchers, but lost confidence in him before the suit was brought. On the whole evidence being in, the court charged the jury that the Virginia judgment was an estoppel, and that plaintiff was entitled to recover upon said judgment the amount of the claim, and gave judgment accordingly. The defendant excepted, and assigned as error: (1) For the admission of the certified copy of the record of the Virginia court; and (2) for that, upon the whole evidence, the jury ought to have been permitted to say whether the Virginia judgment was procured through the fraud of the administrator Marshall or of D. W. Dobyns, and whether the defendant, Jones, was bound by the same.

R. A. Doughton, for appellant. Strong & Strong and A. E. Holton, for appellee.

BURWELL, J. The exception of the defendant to the introduction of the copy of the record of the judgment of the circuit court of Carroll county, Va., upon the ground that the certificate of the judge thereon was "defective, in that it states that the record is in due form of law, instead of in due form according to the law of this state," cannot be sustained. The attestation of the clerk should be, as here, in the form prescribed for the court in which the judgment was rendered, and the certificate of the judge that the clerk's attestation is in due form is conclusive. Black, Judgm. § 878. This record of the judgment of a court of the state of Virginia being thus in evidence, and it appearing therefrom that the court that rendered that judgment against the defend-

ant had properly acquired jurisdiction over the parties and the subject-matter, it followed that, as full faith and credit must be given to that judgment thus established, no defense against it was open to the defendant, except such as would have availed him in the court in which it was rendered, except, perhaps, fraud. Id. § 881. And of fraud vitiating this judgment there is no evidence whatever. It is final and conclusive on the merits. Nothing can be set up against it that, with proper diligence, might have been interposed in the action in which it was rendered. Hence, it was not allowable for the defendant to attempt to show in this action that he or his attorney in that cause had made mistakes or omissions that enhanced the amount of the recovery against him there. He was represented there by counsel. The court, as we have said, had jurisdiction of him and his cause. What was there determined by the judgment then rendered is finally settled. The amount there ascertained to be due from him to the estate of T. M. Dobyns should be paid by him to the ancillary administrator in this state, that he may dispose of it according to law. Affirmed.

WILLIAMS v. KERR.

(Supreme Court of North Carolina. Nov. 28, 1893.)

ACKNOWLEDGMENT—LOST RECORDS—SECONDARY EVIDENCE—FORECLOSURE OF MORTGAGE—PARTIES—LIS PENDENS—STATUTE OF LIMITATIONS—ADVERSE POSSESSION.

1. Where the probate of a mortgage recites that the justice of the peace taking the acknowledgment was a justice of the county where the land lay, the presumption is that he was a justice of such county, in the absence of proof to the contrary.

2. It is not necessary that lost records of mortgage foreclosure proceedings shall be supplied by supplemental proceedings, but they may be proved by secondary evidence, where satisfactory proof of the loss has been made.

3. Loss of the records of a foreclosure suit is sufficiently proved to render secondary evidence thereof admissible, where the clerk of the court, the commissioner who sold the land, and the attorneys in the foreclosure suit, testify that they have made diligent search for them, and have been unable to find them.

4. Where a purchaser of mortgaged premises from the mortgagor did not record his deed until after a suit for foreclosure was brought, he is considered a purchaser pendente lite, and is as effectually bound by the judgment as if he had been made a party.

5. Subsequent incumbrancers, though proper parties to a foreclosure suit, are not necessary parties.

6. If there has been a payment on a mortgage bond within ten years before suit brought to foreclose the mortgage, the debt is not barred, and the purchaser at the foreclosure sale acquires title.

7. In an action by the purchaser of land at a foreclosure sale to recover the same from the grantee of a purchaser from the mortgagor, it was not error to charge that a mortgagor in possession of land held under the mortgage, as did also a purchaser from him, if he had notice of the mortgage, and that he had such notice

if the mortgage was registered at the time of the conveyance, and that a seven-years holding by such mortgagor or purchaser would not give title.

8. Nor was it error to charge that if the purchaser bought the land from the mortgagor, with actual knowledge of the mortgage, agreeing to assume the mortgage debt, he was in possession under the mortgage, and defendant, having bought the land from such purchaser within less than a year before suit to foreclose, did not have possession long enough to make his title good against the mortgagee, even if his possession was adverse and without notice.

Appeal from superior court, Sampson county; Winston, Judge.

Action by C. H. Williams against John D. Kerr to recover land. From a judgment for plaintiff, defendant appeals. Affirmed.

Both plaintiff and defendant claim title to the land in suit from one James S. Boone. The plaintiff offered a deed of mortgage dated September 20, 1876, duly registered, from said Boone and wife to M. E. Parker, wife of J. P. Parker. Defendant objected to introduction of said deed because it did not appear from the clerk's commission that the person authorized to take the same was a justice of the peace or a resident of the county, or that he took the acknowledgment in said county. The objection was overruled, and an exception taken. The plaintiff next offered a deed dated July 21, 1879, from J. P. Parker and wife, aforesaid, to Edward Williams. The plaintiff next proposed to show by the clerk and other witnesses that the foreclosure papers in the case of Edward Williams against J. S. Boone and wife had been lost, and could not be found. Defendant objected, because said lost records could not be supplied in this way, and could only be supplied by an independent action to restore the same. The objection was overruled, and exception taken. Plaintiff next offered Bizzell, the clerk, and M. C. Richardson, the commissioner who sold the land and executed the deed to plaintiff, and also the attorney in said case, and the defendant, Kerr, as witnesses, each of whom swore that they had made diligent search for the lost papers in their respective law offices, and also in the clerk's office, and had been unable to find them, and that they were lost; that they had searched repeatedly. The court held that secondary evidence was now admissible, after objection and exception. Plaintiff next offered the records in the foreclosure case. Defendant objected to these records, because it appeared that suit was brought September 19, 1889, and prior to that date the defendant had taken a deed from the mortgagor, and was in possession of the land, and also because he was not a party to the said suit. This objection was overruled, and exception taken. A deed from M. C. Richardson, commissioner, to plaintiff, dated January 4, 1890, and duly registered, was next read and put in evidence, over objection and exception. It was proven that the defendant was in possession

of the land in dispute. J. S. Boone, being put on the stand as a witness for plaintiff, stated that he made the last payment on the land and mortgage to M. E. Parker in December, 1879, the payment being \$75 or \$80. The bond was \$400 at first. Credit was entered on the back of note. That he was in possession of the land until he sold it to Newkirk, in 1883. Sold land to Newkirk, with the understanding that he was to assume the Parker debt. J. D. Kerr is now in possession, and has claimed it ever since C. H. Williams bought it. M. O. Richardson sold the land. Kerr was present at the sale, and forbade the sale in presence of the plaintiff, who bought it. Defendant offered a deed from Boone to Newkirk, dated August 14, 1883, registered January 2, 1890; also a deed from said Newkirk to defendant, dated April 2, 1890, covering the land in dispute. Plaintiff offered the answer to estop the defendant, and read the same as evidence. It appeared in evidence that on April 12, 1890, a suit was brought by plaintiff against defendant to recover the same land, but at October term, 1891, a nonsuit was taken, and this action was begun within a year. Upon the issue of the statute of limitations, the court charged the jury that if they believed that in December, 1879, Boone, the mortgagor, paid \$75 on the bond, and that in September, 1889, within 10 years, an action was begun to foreclose said mortgage, the cause of action was not at said time barred by the 10-year statute of limitation; that the purchaser at such foreclosure sale was not at that time barred, if the debt was not out of date. Defendant excepted. The court also charged the jury that a mortgagor in possession of land held under his mortgage, as did also a purchaser from such mortgagor, provided he had notice of the mortgage, and that, if the mortgage was registered at the time of the purchase, that was notice to the purchaser. That a seven years' holding by such mortgagor or purchaser would not give title. Defendant excepted. That if Newkirk had actual knowledge of the mortgage when he bought the land of Boone, and agreed to assume the Parker debt, and purchased with this understanding, he would be in possession under the mortgage. That the defendant, having bought of Newkirk in 1890, had not had possession of the land a sufficient length of time to make his title good against the mortgagee, even if it were adverse and without notice. Defendant excepts to this portion of the charge.

J. D. Kerr, for appellant. Allen & Dortch, for appellee.

CLARK, J. It is true that, if the mortgage was acknowledged before a justice of the peace not of the proper county, (Code, § 1246, subd. 1.) the registration would be invalid, (*De Courcy v. Barr*, 45 N. C. 181;

Todd v. Outlaw, 79 N. C. 235; *Duke v. Markham*, 105 N. C. 137, 10 S. E. 1017, and cases cited; *Devl. Deeds*, §§ 487, 488.) It is also true, as contended, that the acts validating such irregular acknowledgments and probates, (Acts 1889, c. 252; Acts 1891, c. 12; Acts 1893, c. 293,) while good, probably, as between the parties, and as to third parties, from the passage of the acts, would not validate such acknowledgments and probates as to third parties, whose rights had already been acquired prior to the validating statutes, (*Gordon v. Collett*, 107 N. C. 362, 12 S. E. 332.) But here the probate recites that the justice of the peace taking the same was a justice of the peace of Sampson county, where the land lay; and the presumption is that he was a justice of the peace of said county, and that he took the acknowledgment within the same, subject to proof of the contrary. *Kidd v. Venable*, 111 N. C. 535, 16 S. E. 317; *Darden v. Steamboat Co.*, 107 N. C. 437, 12 S. E. 46; *Devereux v. McMahon*, 102 N. C. 284, 9 S. E. 635.

Exc. 2. It was not necessary that the lost record should be supplied by an independent action. Upon satisfactory proof of loss, secondary evidence is admissible. *Mobley v. Watts*, 98 N. C. 284, 3 S. C. 677; *Hopper v. Justice*, 111 N. C. 418, 16 S. E. 626.

Exc. 3. The proof of loss was sufficient to justify the admission of secondary evidence of the lost records.

Exc. 4. This goes upon the ground that the defendant was not a party to the proceedings in foreclosure. The defendant's title was derived by conveyance from Newkirk, the assignee of the mortgagor, and the plaintiff had purchased at the foreclosure sale made under proceedings in which the mortgagee and the mortgagor were the parties. The foreclosure action was commenced on the 19th day of September, 1889, and the sale by the commissioner under the decree rendered therein was on the 4th day of January, 1890. The records are lost, and it will be presumed that the decree was rendered upon a complaint regularly filed, setting out the facts. The deed from the mortgagor, Boone, to Newkirk, though dated August, 1883, was not registered until the 2d day of January, 1890; and the deed from Newkirk to the defendant Kerr, though dated 15th October, 1889, was not registered before April 2, 1890. In *Collingwood v. Brown*, 106 N. C. 366, 10 S. E. 868, the court say: "If, at the time it [the deed] is so filed for record, there is a pending suit, the holder of such a deed, previously withheld from the record, is a pendente lite purchaser." And in that case it is held that such a purchaser is as effectually bound as if a party to the action. It would be strange, indeed, if a party could take a deed pending litigation, and could hold the deed in his pocket, setting up no claim, and after the litigation closes could say he ought to have been made a party. The defendants Kerr and Newkirk were not

made parties because the records did not show that either had title, or claim of title. Besides, subsequent incumbrancers are proper parties in a foreclosure proceeding, but not necessary parties. *Kornegay v. Steamboat Co.*, 107 N. C. 118, 12 S. E. 123.

Excs. 5 and 6 are, it seems to us, simply exceptions out of "abundance of caution," and are without merit.

Exc. 7. If there was a payment on the mortgage bond within 10 years before suit brought, the debt not being out of date, the purchaser at the foreclosure sale was not barred. Code, § 152, subd. 3; *Ely v. Bush*, 89 N. C. 358.

Exc. 8. The court correctly charged the jury that "a mortgagor in possession of land held under his mortgage, as did also a purchaser from such mortgagor, provided he had notice of the mortgage, and, if the mortgage was registered at the time of the purchase, that was a notice to the purchaser, and a seven-years holding by such mortgagor or purchaser would not give title." *Parker v. Banks*, 79 N. C. 480.

Exc. 9. The court correctly stated the law in charging that "if the purchaser bought the land with actual knowledge of the mortgage, agreeing to assume the mortgage debt, he would be in possession under the mortgage; and, the defendant having bought the land from the aforesaid purchaser within less than a year before the suit was originally brought, (this suit having begun within one year after a nonsuit taken in such original suit,) the defendant would not have had possession of the land long enough to make his title good against the mortgagee, even if his possession were adverse and without notice." *Parker v. Banks*, *supra*. No error.

STEALMAN v. GREENWOOD.

(Supreme Court of North Carolina. Nov. 28, 1893.)

FALSE RETURN — ACTION FOR PENALTY — AMENDMENT OF RETURN.

After a person has brought an action against a sheriff to recover the penalty for a false return on an execution, such officer, by leave of court, may amend the return so it will speak the truth, and thus defeat the action.

Appeal from superior court, Wilkes county; E. T. Boykin, Judge.

Action by Bennett Stealman against S. J. Greenwood to recover a penalty for a false return on an execution made by defendant as sheriff. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff's action was for an alleged false return made by defendant sheriff, for the penalty of \$500 prescribed by statute. Plaintiff introduced in evidence a judgment of a justice of the peace, duly docketed in the superior court, in a cause entitled *Burnett Stealman v. Joel Church*, in which it was adjudged that the plaintiff recover of the de-

fendant the sum of \$7.50 and interest and costs, etc. Plaintiff also introduced an execution issued upon the aforesaid judgment, commanding the sheriff to satisfy said judgment out of the personal property of the defendant, and, if sufficient personal property cannot be found, then out of the real property belonging to the defendant on the day when the said judgment was docketed, etc. The sheriff returned this execution as follows: "This execution not satisfied. Collected from sale of land,—see return of sale in this execution,—\$9.50. My fees and commissions retained, \$2.56. Paid into office, \$6.94. After due advertisement according to law, I sold the land described in the levy in this execution on the 13th of October, 1890, at the courthouse door, when James W. McNeill became the bidder, in the sum of \$9.50." By leave of the court the following amended return is made on the execution: "That I received the execution on the 7th of April, 1890. The plaintiff furnished me \$5 to defray expenses of laying off homestead and personal property exemption. I proceeded to summon appraisers, [naming them,] who proceeded on the 7th of August, 1890, to view the defendant's land, and lay off and assign to him his homestead therein, and his personal property exemption. There was no excess of personal property out of which any part of the execution could be satisfied, and I levied the execution on the excess of the defendant's land, as found by the appraisers; and after due advertisement and notice to defendant, I sold the same publicly, to the last and highest bidder, at the courthouse, on September 13, 1890, when James W. McNeill became the bidder and purchaser thereof at the price of \$9.50. That of the \$5 furnished me by plaintiff to lay off the homestead, etc., I paid \$1 to each of the three appraisers above-named, and retained \$2 as my fee for laying off the homestead, etc., and out of the money arising from the sale I retained my commissions on this execution, in which is included 62½ cents due me on a former execution issued in the same case, returnable to March term, 1890, as will appear by the return on said execution, and paid the balance (\$6.94) into office. This 14th day of September, 1891." Signed by the sheriff, by J. H. Andrews, D. S. After this action commenced, on a notice issued to the plaintiff at fall term, 1891, the defendant was allowed to amend his said return on the execution as above, which said amendment was made and attached to the aforesaid execution, and the plaintiff excepted. Issue submitted by the court: "Is the plaintiff entitled to recover the statutory penalty demanded in the complaint?" Answer: "No." The court instructed the jury that if they believed the evidence the plaintiff could not recover. Judgment for defendant. Appeal by plaintiff.

L. S. Benbow, for appellant. D. M. Furches, for appellee.

MacRAE, J. Plaintiff's counsel readily concede the power of the court to allow the amendment, but they deny that its effect is to discharge any part of the penalty, especially the part thereof which is said to belong to the plaintiff. They contend most strenuously that the court has no right to "purge the vice" of the false return, and discharge the penalty, after the popular action becomes a private one of plaintiff, by reason of his bringing suit. The authorities cited by the learned counsel for the plaintiff seem to establish the position that popular actions can only be barred, after suit brought, by a pardon, and possibly by a repeal of the penal statute. But the power of amendment in the courts to make the return speak the truth (the amendment, when made, relating back to the time of the return) is entirely distinct from the power to remit or to pardon, and has been too long established, and is too well settled, to be now disturbed. The statute, as interpreted in this state, imposing the penalty, even in cases of mere mistake, is so severe, and apparently harsh, but for the extreme importance, both to public and private interest, that these returns should in all cases speak the truth, that the discretionary power of allowing amendments in meritorious cases has always been liberally exercised. *Albright v. Tapscott*, 8 Jones, (N. C.) 473. In *Hassell v. Latham*, 52 N. C. 465, which was an action like the present, brought in the superior court for a false return in the county court, where the sheriff was allowed to amend in the latter court, it was held that the plaintiff was not entitled to recover. While it does not appear, in so many words, that the amendment was made after suit brought, there is much to indicate that such was the fact. In *Patton v. Marr*, 44 N. C. 377, which was a motion to amerce for an insufficient return, and it was held that the return was sufficient, the court said: "Nor can there be any doubt that the court would have allowed the sheriff, the defendant, if he had been here, to amend his return." In *Finley v. Hayes*, 81 N. C. 308, the court said: "It is inconceivable how it was that the defendant did not obtain leave to amend his returns so as to acquit himself of all penalty." In *Peebles v. Newsom*, 74 N. C. 473, it is said that "any hardship resulting from this rule may be relieved, and will be relieved by our law of amendment." The plaintiff, by bringing this action, acquired no such vested right to the penalty that it might not be defeated by an amendment of the return. *Murfree, Sher.* § 879. This power of allowing amendment is so deeply fixed into our judicial system that all persons bringing such actions as the present do so with notice that the return may be amended, and the penalty never recovered. There are many instances of amendment of process, by which rights are acquired and lost. Defects in judgments may be amended, even after a writ of error; and execu-

tions may also be amended after they have been acted upon, so as to render them a justification to the officer, where otherwise they would not be, although it, thereby, may bar an action of him who has been imprisoned on it, or had his property sold under it, while in an imperfect state. *Bender v. Askew*, 14 N. C. 149. There is no error.

TAYLOR v. MILLER.

(Supreme Court of North Carolina. Nov. 28, 1893.)

LIMITATIONS OF ACTIONS—NEW PROMISE—WHAT CONSTITUTES.

The agent of the payee of a note which was almost barred by the statute of limitations wrote to the maker, demanding payment of such note, and of another note held for collection by such agent. The maker wrote in reply that "I propose to settle both of your claims the first of next month, which I hope will be agreeable." He never owed such payee any debt except such note. Held, that the maker's letter was such a promise as prevented the bar of the statute as to the former note, under Code, § 172, requiring such promise to be contained in some writing signed by the party to be charged thereby.

Appeal from superior court, Davie county; Boykin, Judge.

Action by John C. Taylor against P. A. Miller on a promissory note. Plaintiff submitted to a judgment of nonsuit on the suggestion of the judge that there was not sufficient evidence to bar the statute of limitations, and appeals. Reversed.

T. B. Bailey, for appellant. Watson & Buxton and Jacob Stewart, for appellee.

MacRAE, J. The action was upon a note for \$400 and interest, dated March 29, 1886, payable one day after date, and made by defendant to plaintiff. The only plea was that of the statute of limitations, and the same was good, unless there had been a new acknowledgment or promise in writing, under section 172 of the Code. The case turns upon the testimony of E. L. Gaither and a letter referred to therein, which witness testified that he had received from the defendant. That portion of his testimony which is material is as follows: "That on or about the first of November, 1891, the plaintiff put this note into witness' hands for collection. That witness had this note and one other note against the defendant. That on the fourth of November, 1891, witness wrote to defendant a note, a copy of which is: 'Dear Sir: Mr. John C. Taylor had your note for \$400 principal. He says you have promised to pay it off, and he needs the money, and has left it with me so you can take it up. Please settle the matter at your earliest convenience, and, if you can't pay it all at once, send me what you can. Respectfully, [Signed] E. L. Gaither.' That between the 4th of November and the 21st of December, 1891, the witness received a letter from the defendant,

postmarked 'Mocksville, N. C., December 21, 1891,' and is as follows: 'Mr. E. L. Gaither, Mocksville, N. C.—Dear Sir: Your letter received, and I have been to town twice to see you, but you were not in. I propose to settle both of your claims the first of next month, which I hope will be agreeable. Will see you in person soon. Yours, respectfully, [Signed] P. A. Miller.'" It was also in evidence that the defendant has never owed the plaintiff anything but this one note sued on. The question is whether this letter was such a promise or acknowledgment as continued the obligation of the promise contained in the note, and prevented the bar of the statute,—whether the words "propose to settle," taken in connection with the testimony of Gaither and the rest of the letter, can be reasonably construed to mean "promise to pay." If they will bear the latter construction, the bar of the statute has been repelled; if not, the plaintiff can have no relief. The word "propose," like nearly every other word in the English language, has many meanings. A proposal may mean an offer, as of marriage; an introduction, as of a measure in a legislative assembly. It may also mean an expression of intention or design. I "propose to settle" is the same as I "intend or mean to settle." Webster defines it: "To form or declare a purpose or intention." A "promise" is defined to be a declaration which gives to the person to whom it is made a right to expect or claim the performance or nonperformance of some particular thing. There are many other meanings of these words, as there are also of the word "settle." Indeed, there are two distinct words "settle," the meanings of which have become confused. But we have no difficulty in selecting the definition in the Century Dictionary of this word in its colloquial sense, "To liquidate, balance, pay," as appropriate to the present use of it. We must construe language in its ordinary significance, unless it is manifestly used in some special or technical sense. Mr. Gaither writes to the defendant demanding payment of this specific note and another. The defendant answers: "I propose to settle both of your claims the first of next month, which I hope will be agreeable." How would this answer strike a man in an ordinary business transaction? It is evident that its effect would be to raise the expectation of payment at the time specified. The accumulation of adjectives used in their application to the words "acknowledgment and promise" in the statute has produced the impression that it requires more than an ordinary promise in writing to repel the bar of the statute. The old law, before the promise need be in writing, was: "The new promise must be definite, and show the nature and amount of the debt; or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally

definite and certain, from which a promise to pay such debt may be implied." *McBride v. Gray*, Busb. 420; *Faison v. Bowden*, 72 N. C. 405; *Riggs v. Roberts*, 85 N. C. 153. Since the statute, the words used are as applicable to this case: "The promise must be unconditional." *Greenleaf v. Railroad Co.*, 91 N. C. 33. It must be "certain in its terms." *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525. In *Riggs v. Roberts*, supra, the words "distinct and specific," and "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. While either one of these qualifying words, alone, would be applicable to the promise or acknowledgment to take the case out of the statute of limitations, there is no special weight superadded by the use of them all at once. The law speaks for itself: "No acknowledgment or promise shall be received as evidence of a new or continuing contract whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby." Here is the original contract, liable to be defeated by the plea of the statute, but still continuing. Here is the correspondence between the agent of the payee and the maker himself; it is perfectly definite and certain as to what note is meant. And here is the letter of the defendant, in which he refers to the letter which describes it and demands payment; he proposes to settle both claims the first of next month. The defendant was probably no philologist. He used words in their ordinary acceptation, and which could not be misunderstood. We think they fill the letter and spirit of the statute. There is error, and a new trial must be awarded.

BARFIELD v. BARFIELD et al.

(Supreme Court of North Carolina. Nov. 28, 1893.)

EXECUTION—AGAINST LAND OF DECEDENT—WILLS—CONSTRUCTION.

1. A sale of a decedent's land under a writ of venditioni exponas issued after his death, without the issue and service of a scire facias against his heirs, is null and void.

2. A will gave land to testator's wife for life, and after her death to his son, providing that the son, before taking possession, should give or secure to his sisters a certain sum of money, and that, in case he should fail to do so, the land should be sold, and such sums be paid them, the balance of the proceeds to be paid the son. *Held*, that after the widow's death the daughters had neither title nor right to possession of the land, but only the right to prevent the son's occupying it and appropriating the rents until the sums due them should be paid, or else to have the land sold; and where, instead of taking this course, they rented out the land and appropriated the income, they are liable to account to the son therefor.

Appeal from superior court, Wayne county; Brown, Judge.

¹ Code, § 172.

Action by Solomon J. Barfield against Ally A. Barfield and others to recover land. From a judgment for plaintiff, defendants appeal. Affirmed.

The plaintiff introduced in evidence the will of John Barfield, probated in 1849, under the fourth and fifth items of which he claimed the land in controversy. The fourth item of said will is as follows: "I leave to my wife, during her natural life, the home plantation, and I hereby request her to relinquish her life estate in forty acres of land which she has, as will appear by reference to a deed made by me to my son, Solomon Barfield, in lieu of that to have her life estate in my home place;" and the fifth item of said will is as follows: "After the death of my wife I give, devise, and bequeath to my son, Solomon Barfield, to him and his heirs forever, all my lands lying on Buck swamp, in the county of Wayne. My son, Solomon, however, is, before he takes possession of the home plantation, (where his mother will reside during her lifetime,) required to give or to secure to my two youngest daughters, Ally A. and Mary, three hundred and fifty dollars apiece; and in case he fails to pay or secure the payment to them of the above-mentioned sums, three hundred and fifty dollars to each of them, then, and in that case, the home plantation to be sold, they each to receive the share due to them, and the balance of the money to go to Solomon and his heirs." It was admitted that the land in controversy, and described in the complaint, is the same as the home plantation spoken of in said will; that John Barfield died on the 20th day of October, 1848, and that Nancy Barfield, his widow, qualified as his executrix, May, 1849; that Nancy Barfield, his widow, died on the 16th day of August, 1889; that the defendants Ally A. Barfield and Mary R. Barfield (now wife of the defendant D. A. Cogdell) are children of John and Nancy Barfield, and are the persons named as devisees in said will; that defendants are in possession of said land, and were in possession when this action was begun, and refuse to surrender the same; that said defendants have been in possession of said land since the death of Nancy Barfield, and were in possession at and before her death; that on the 27th day of February, 1892, a notice was delivered to the defendants, of which the following is a copy: "To Ally A. Barfield and Mary R. Cogdell: The will of our father, John Barfield, leaves the home plantation, on which he lived, on Buck and Thunder swamps, in Wayne county, to me after the death of our mother, Nancy Barfield, now dead, and I now demand possession of the same; and I will now pay you each the sum of \$350, as provided in said will, if you elect to surrender the possession of said land to me without litigation. Let me know if you will do so by the 15th of March, 1892; otherwise, I shall assume that you refuse to deliver possession on the condition above stat-

ed. This 27th of February, 1892. Sol. J. Barfield. Witness: Daniel Kornegay,"—and that no other offer to pay or secure said sums of \$350 each has been made, and no money has been tendered, except as shown in said notice, or paid into court by the plaintiff.

Evidence was introduced by plaintiff to show the rental value of the land since 1889. The defendants put in evidence the following receipt: "Received of Mrs. Nancy Barfield \$75.00, being the amount bid by her for the tract of land on which John Barfield lived, on the north side of Thunder swamp and on the south side of Falling creek, joining the lands of George L. Kornegay, James Manly, and others, sold by me by virtue of a writ of venditioni exponas issued from the superior court of Johnston county to satisfy a judgment recovered by the state of North Carolina, and returnable to the fall term, 1853, of said court, said land being sold by me at public auction this 15th day of August, 1853," (signed by the sheriff,) and also a writing signed by said sheriff, (O. Coor,) dated in 1869, and purporting to be a deed made by him to Nancy Barfield, and corresponding to this receipt. This writing was not under seal. They also put in evidence a deed from Nancy Barfield to them, dated in 1881, and introduced evidence to show that they had rented out the land since her death, and had received the income therefrom. There was evidence tending to show that the femes defendant had removed two houses from the land, and their value. One of the plaintiff's witnesses testified that he paid to Nancy Barfield, executrix of the will of John Barfield, \$6000, between 1850 and 1855. This was objected to. The objection was overruled, and the defendants excepted. The following issues were submitted to the jury: "(1) Is the plaintiff the owner, and entitled to the possession, of the land described in the complaint, subject to the defendants' lien under the will of John Barfield, as alleged in the complaint? (2) Are defendants in possession thereof? (3) What is the annual value for rents and profits? (4) What damages other than rents is plaintiff entitled to recover, if any?" His honor instructed the jury that, if they believed the evidence, the plaintiff was the owner and entitled to the possession of the land, and they should answer the first issue, "Yes." The defendants excepted, as follows: "(1) For that the plaintiff deduced his title from the fifth item of the will of John Barfield, and by said item a condition precedent was attached before the plaintiff could take possession of the land, to wit, the payment or security of \$350 each to Ally and Mary Barfield, and it did not appear that the condition had been performed; that the offer of February 27, 1892, did not fulfill the condition for the reasons—First, that the plaintiff did not make an actual tender of money; second, that he did not tender interest from the death of

the life tenant; and, third, that he did not pay into court the amount admitted to be due the defendants. (2) For that the defendants had shown title to the land in controversy." There was a verdict for the plaintiff. His honor stated the account between the parties, charging the plaintiff with interest on the sums due to the femes defendant (\$350 each) from the day of the death of Nancy Barfield, the tenant for life, and charging the defendants with the rents from January 1, 1890, and also with the damages assessed by the jury on account of the removal of the houses; and, having then determined what was due to each of the femes defendant, (\$141.44,) he then made the following order: "It is ordered and adjudged that plaintiff is the owner, and entitled to recover possession, of the property described in the complaint; that upon the payment to the clerk by the plaintiff, for the use of Ally A. Barfield and Mary R. Cogdell, of the above-mentioned sums of money, then he shall issue a writ of possession. In case said money is not paid, with interest, within ninety days after April 17, 1893, it is adjudged that the land be sold for cash, after advertisement, by the clerk, to the highest bidder at the courthouse in Wayne county, and, in case of sale, that he report his proceedings to the next term of court, and that the proceeds be applied in payment of said liens in favor of defendants, hereinbefore adjudged, and remainder, if any, to plaintiff. Let costs be taxed against defendants, and execution issue after the expiration of said ninety days." The defendants excepted to the judgment rendered. "(1) For that the plaintiff is allowed rents prior to February 27, 1892, when he claims to have tendered payment to the defendants. (2) For that it was adjudged that plaintiff was the owner, and entitled to the possession, of the land in controversy."

Allen & Dortch, for appellants. W. T. Faircloth, for appellee.

BURWELL, J. The contention of the defendants, that Nancy Barfield acquired a title in fee to the land in dispute by virtue of a purchase of it by her at a sale made in 1853 by the sheriff of Wayne county, has nothing to support it. They themselves showed that, if it was sold at all, (of which there was in fact no legal evidence,) the sale was made under a writ of venditioni exponas issued several years after the death of John Barfield, and they made no proof whatever of the issuing or serving of any scire facias against his heirs. The writ was null and void, (Samuel v. Zachery, 28 N. C. 377,) and every act done under it goes for nothing. This disposes of the defendants' alleged title, and brings us to the consideration of the rights of the parties under the will of John Barfield.

By that will, the title to the land, upon the death of the widow, was vested plainly

in the plaintiff and his heirs. The title did not in any event descend to all the heirs of John Barfield, nor did it in any contingency vest in the femes defendant, his daughters. The latter had, under that instrument, neither title nor right of possession. The land was simply charged with the payment of the sum of \$350 to each of them. It was their privilege, according to the provision of the will, to prevent their brother from occupying the land, and appropriating the rents to his own use, till these sums were paid to them, and to that end they might have invoked the aid and protection of a court by proper proceedings to have the rent collected and reserved, and the land sold, so that, out of the fund so arising, they might certainly have what the testator said they should have. Instead of pursuing this course, they chose to assert a title adverse to the plaintiff devisee, to rent out the land, and appropriate the income to their own use, and, when their pretended title fails, they insist that the rents accruing from the death of the life tenant to the date of plaintiff's offer to pay the sums charged on the land for them belonged to them, and that they are not accountable therefor to the plaintiff. His honor properly decided that they should account for all the rents received by them. As we have said, they had no right to the possession, either as heirs at law or devisees. Had the testator put the title in them, with a provision that it should vest in the plaintiff when he paid to each of them the sums named, the rents might have been theirs till the payment was made, or there was a proper tender of payment. But this provision the testator did not see fit to make. He willed that they should have a certain sum of money. This they will have received when the judgment is fully executed, with interest thereon from the day it was first incumbent on the plaintiff to pay it. It is difficult to see how they can, with any show of reason, claim more than this under their father's will. The judgment, we think, in a very proper manner provides for an adjustment and settlement of the conflicting claims of the parties. The evidence in relation to the payment of money to the executrix of John Barfield's will was immaterial. Its admission, if erroneous, was harmless. Affirmed.

STATE v. DE GRAFF.

(Supreme Court of North Carolina. Nov. 28, 1893.)

CRIMINAL LAW—ADMISSIONS—PROOF OF HANDWRITING—NEW TRIAL.

1. When a motion to quash the indictment, on the ground of the relationship of a grand juror to the person injured, is made after arraignment and plea, and refused, without reasons assigned, the exercise of the court's discretion is presumed, and its order is not reviewable.

2. When a juror was challenged, and it appears that his opinion, adverse to the accused, was based on rumors only, and he testified that, after hearing the evidence, he could render a fair and impartial verdict, the court's finding that he was impartial will not be disturbed.

3. The mere fact that an officer, in making the arrest, pointed a pistol at the accused, and advised him to give up, does not vitiate the latter's subsequent admissions, under circumstances showing that he had no fear of violence.

4. Code, § 1146, provides that, at the commencement of his examination, the prisoner shall be informed by the magistrate that he may refuse to answer any question put to him, and that such refusal shall not be used to his prejudice. Accused was duly warned that he need not say anything unless he wanted to, and it would not be used against him, if he did not testify, that it was dangerous to go on the stand, etc. *Held*, a substantial compliance with the statute, so as to admit the accused's statements made before the magistrate.

5. A witness testified that he had been many years a bookkeeper; was secretary and treasurer of the city; it was his duty, as such, to compare writings to see which were genuine; to examine checks and drafts; had been in the business 15 years; had such experience in inspecting handwritings that he could compare a paper with one known to be genuine, and tell if the former was genuine. *Held*, that he was competent as an expert to make such comparison.

6. A witness testified that he had been four or five years register of deeds; had occasion to examine signatures; was frequently called on to prove signatures of deceased persons in the clerk's office; used a magnifying glass to detect erasures; had such experience that he could compare a writing with one admitted to be genuine, and tell if the former were genuine. *Held*, that he was competent as an expert to make such comparison.

7. An affidavit made by the accused in the same case, the signature being admittedly genuine, is a proper exemplar for comparing handwriting.

8. It is within the court's discretion to refuse a new trial for newly-discovered evidence that a witness for the state had, before trial, spoken in hostile terms of the prisoner, and stated that he desired his conviction.

9. Affidavits of grounds for new trial cannot be considered by the supreme court, in reviewing the order refusing a new trial, unless the facts have been found by the trial court, and spread upon the record.

Appeal from superior court, Forsyth county; Winston, Judge.

Peter De Graff, convicted of murder, appeals. Affirmed.

The Attorney General, for the State.

SHEPHERD, C. J. The prisoner was indicted for the murder of one Ellen Smith, and, after his arraignment, moved to quash the indictment, on the ground that one of the grand jurors was a cousin of the deceased, and therefore disqualified to participate in the finding of the bill. In *State v. Gardner*, 104 N. C. 739, 10 S. E. 146, it is held that, if a motion to quash for the disqualification of a grand juror is made before plea, the prisoner has a right to have the motion granted; but if the motion be made after plea, but before the jury is impaneled, it may be granted or not, in the sound discretion of the judge; and in such latter case, if the motion is simply declined, with-

out the assignment of any reason, it will be assumed that such discretion was exercised, and no appeal will lie from the ruling. The exception, therefore, to the refusal of the motion, is without merit.

Two of the petit jurors were challenged, and, after examination, the court found that they were impartial, and they were sworn. It appears that their opinions, adverse to the prisoner, were based upon rumors only, and they both stated that, after hearing the testimony, they could render a fair and impartial verdict. The exceptions to the rulings of the court upon the question of indifference, based upon such examination, cannot be sustained. *State v. Ellington*, 7 Ired. 61; *State v. Collins*, 70 N. C. 243; Busb. Dig. 336, 337.

In the course of the trial, certain confessions were offered by the state, and their admission was excepted to, because of alleged threats made by the witness on the occasion of the arrest of the prisoner. The witness Adams, a policeman, testified as follows: "I went to help arrest the prisoner. The sheriff and two others went along. Saw prisoner at the window of Russell's house at about 12 o'clock at night. He pulled the curtain back. I said to the prisoner: 'Peter, you had just as well give up. You may get one of us, but we will get you.' We went in, and I pointed my pistol at the prisoner. Prisoner had three heavy pistols and 52 rounds of cartridges in a trunk by the bed. After the prisoner put on his clothes, he began to make fun of us for coming after him with little popguns. We had Smith & Wesson's pistols. He said, 'Let me show you some pistols,' and he showed us these three large pistols. He rode behind me on a horse to Winston. He was not frightened, nor was he tied. No threats were made to him and no promises, and his statements were voluntary." The witness, at another stage of the trial, was examined again upon this subject, but his testimony was substantially the same. The witness then testified to declarations made by the prisoner concerning his flight to Roanoke and New Mexico, and his subsequent return to this state. It is hardly necessary to cite authority in support of the ruling of the court. The single circumstance of pointing the pistol at the prisoner, in connection with the language of the witness, indicating that it was done only for the purpose of effecting the arrest, very clearly would not have authorized the exclusion of the declarations subsequently made; and especially is this so in view of the conduct of the prisoner, showing that he had no actual fear of violence, and also because of the entire absence of any circumstances whatever that were likely to produce such an apprehension.

It appears that, when the officer was on the porch of the house where the prisoner was staying, the owner inquired, "Who was it?" It also appears that the prisoner was

in the room, and heard the remark. The remark was harmless, but had it been otherwise, having been made in the presence of the prisoner, it was plainly admissible. *State v. Ludwick*, Phil. (N. C.) 401. This exception, like several others, is so trivial that, but for the gravity of the charge, it would be overruled without comment.

Neither is there any force in the objection to the admission of the statements of the prisoner before the committing magistrate. The testimony upon this point is that "he was duly warned; told that he need not say anything unless he wanted to, and it would not be used against him if he did not testify, and it was dangerous to go on the stand," etc. It is well settled that, in cautioning the prisoner under such circumstances, it is not necessary that the exact language of the statute (Code, § 1146) should be used. A substantial compliance is sufficient, and such was the case in the present instance. *State v. Rogers*, 112 N. C. 874, 17 S. E. 297.

Equally untenable is the objection to the testimony touching the general character of the witness Davis, and the same is true as to the question asked the said witness whether the prisoner told him where the deceased was at a certain time. The witness gave a negative answer, and, even if the question were objectionable, (and we do not see that it is,) the prisoner could not have been prejudiced thereby.

The state introduced a letter found in the bosom of the dead woman, and introduced Wilson, as an expert, to prove that the said letter was in the handwriting of the prisoner. Wilson, being examined by the court as to his qualifications as an expert, testified as follows: "Was bookkeeper many years. Am secretary and treasurer of the city. It is my duty as such to compare handwritings, to see which are genuine and which are not; to examine checks and drafts. Have been in the business 15 years. I have had such experience in the business of inspecting handwritings that I can compare a paper with one whose genuineness is known, and tell if the former paper is genuine." His honor held that the witness had been properly qualified as an expert, and the prisoner excepted. The witness was then handed an affidavit made by the prisoner in this case, the signature to which was admitted to be genuine, and the witness was permitted to compare the same with the letter, and to give his opinion as to whether the letter was in the handwriting of the prisoner, and the prisoner excepted. Another witness, J. P. Stanton, was also examined, and gave similar testimony. He testified in reference to his competency as an expert as follows: "Have been four or five years register of deeds of the county. Had occasion to examine signatures. Frequently called on to prove signatures in clerk's office of dead men's names. Used magnifying glass to detect erasures. Have had such experience

that I can compare a writing with one admitted to be genuine, and tell if the former is genuine." All of the exceptions addressed to the admission of this testimony are so fully discussed in the elaborate opinion of this court in *Tunstall v. Cobb*, 109 N. C. 816, 14 S. E. 28, that it is only necessary to refer to it as decisive authority as to the qualification of these witnesses as experts, and in support of the ruling under which they were permitted to state their opinions, based upon the comparison of the writings in evidence. See, also, *Yates v. Yates*, 76 N. C. 142, and *Fuller v. Fox*, 101 N. C. 119, 7 S. E. 589.

The testimony as to Ray's leaving after the homicide was evoked by the prisoner upon cross-examination, and cannot form a ground of exception. It seems, however, to have been immaterial, and in no view could it have prejudiced the prisoner.

After the verdict, the prisoner moved for a new trial, on the ground of newly-discovered evidence, which was to the effect that one Brewer, a witness for the state, had, before the trial, expressed himself in very bitter terms against the prisoner, stating, in effect, that he desired his conviction, etc. The affidavit also states that the prisoner did not know of the hostility of said witness until after the counsel had argued the case. It is well settled that the granting of a new trial upon newly-discovered evidence is, in the absence of gross abuse, a matter within the discretion of the court, and that its refusal to do so is not reviewable upon appeal. It is also well established that the court will not exercise such a discretion where the new testimony is merely cumulative, or, as in this case, only tends to contradict or discredit the opposing witness. Therefore, even if the ruling of his honor were the subject of review, we would have but little hesitation in sustaining it. *State v. Starnes*, 97 N. C. 423, 2 S. E. 447; *Carson v. Dellinger*, 90 N. C. 226; *State v. Mitchell*, 102 N. C. 347, 9 S. E. 702. It may be observed, in passing from this exception, that there was abundant evidence, besides the testimony of Brewer, to support the conviction of the prisoner, and that the hostility of this witness, if known to the jury, would very probably have had no influence upon the verdict.

The remaining question to be considered grows out of the affidavit of one Hudson to the effect that two of the jurors who tried the case had, on several occasions before the trial, expressed the opinion that the prisoner was guilty, and that the affiant did not inform either the prisoner or his counsel of the fact. It is stated in the motion, but not in the affidavit, that these jurors made a contrary statement on the voir dire. His honor overruled the motion, but found no facts, and it is settled by repeated decisions that, where the facts are not found, the affidavits cannot be considered in this court. In *State v. Godwin*, 5 Ired. 401, Chief Justice Ruffin discussed the question very elab-

orately, and adopted the above conclusion as "unavoidable." In that case the prisoner was convicted of murder, and moved for a new trial, on affidavits tending to show improper conduct on the part of the jury. The chief justice said: "It is not in the power of this court to look into the affidavits, or, at least, to act on them. One would think this must be understood, upon a moment's reflection on the nature of the jurisdiction of the court. In matters of common law, it is strictly a court of errors, and can only review the matters of law. We cannot, therefore, go out of the record, or pay any regard to affidavits, for the evidence forms no part of the record. A record is constituted of the pleadings, the acts of the parties in court, and the acts and doings of the jury and court thereon. If advantage is sought by any extrinsic matter which occurs at the trial or in the course of proceeding, it must be put into the record as a fact, or be stated in an exception, and not left to be collected by this court upon evidence. This evidence is directed exclusively to the judge who tried the cause, and his determination on it is conclusive. He ought not to state, therefore, the evidence submitted to him, but his judgment as to the fact itself, which the evidence was offered to establish. * * * When, therefore, a motion is made to vacate a verdict for certain alleged causes, the first thing is to ascertain whether the alleged causes really exist, for, until the facts be found, no question of law can arise, and this court is confined to the consideration of the matter of law only. We can in such case do nothing, * * * and therefore, acting judicially, we must assume that the application was unsupported in point of fact, though we might in our private judgment think there was evidence before the judge on which he might or ought to have found the fact" in favor of the prisoner's contention. In *Rinehardt v. Potts*, 7 Ired. 403, the motion for a new trial for gross misconduct of the jurors was based upon an uncontradicted affidavit, and Daniel, J., in delivering the opinion of the court, said: "The case sent up here only states [as in the present case] 'that the court refused the motion.' We do not know upon what grounds the judge refused the said motion. It may have been because he did not believe the affidavit of Dowdle. The defendant did not pray the court to give the reason for rejecting the motion, and we cannot see that it was in fact overruled against law. We cannot say there was any error in the judgment of the judge on this part of the case. We have often stated that this court cannot act upon affidavits offered in the court below." In *State v. Smallwood*, 78 N. C. 560, after a conviction for murder, the prisoner made a similar motion, based upon uncontradicted affidavits, and the court, on the authority of the above decisions, held that it would not look into the affidavits. Bynum, J., in

delivering the opinion, said: "They [the court] only decide upon the record presented to them, and therefore, if such motion is designed to be submitted to their revision, the facts must be ascertained by the court below, and spread upon the record. That has not been done in this case." This point was recently before the court in *State v. Best*, 111 N. C. 638, 15 S. E. 930, in which the authority of the foregoing cases was again recognized and approved, and we think that no rule of practice is better established in this state. The prisoner is required, under this rule, to request a finding of facts; and if this is refused, and there is any phase of the testimony which presents a legal, and not merely a discretionary, ground for a new trial, it seems that it will be awarded by this court. While this requirement of the prisoner may be attended in some instances with injustice, by reason of his neglect, yet it would seem to be no more than the application of the general principle that all motions and exceptions must, even at the peril of life, be taken in apt time. We cannot, however, forbear repeating the earnest injunction of Chief Justice Ruffin that the facts be found in motions of this nature, whether requested by the prisoner or not. In the present case the judge, in view of all the circumstances, may have acted wisely, supposing he was vested with discretionary power, under the ruling in *Spicer v. Fulghum*, 67 N. C. 18, (a point which it is unnecessary to decide,) or he may have concluded that the affidavit was unworthy of belief, or that no challenge was in fact made to the jurors. *State v. Perkins*, 66 N. C. 126; *Baxter v. Wilson*, 95 N. C. 137. However this may be, we are not, under the rule to which we have referred, and which has ever been so rigidly followed, permitted to act upon the affidavit offered by the prisoner. Until the rule is relaxed, the only remedy to be found in a meritorious case is in the executive department of the government. After a patient and careful investigation of the record, we have been unable to discover any error in the rulings of the court, and, in view of the whole testimony, we see no reason for disturbing the verdict. Affirmed.

FULTON v. ROBERTS et al.
(Supreme Court of North Carolina. Nov. 28, 1893.)

HOMESTEAD—WHO MAY CLAIM—"RESIDENT OF THIS STATE."

1. The court charged: "The words, 'a resident of this state,' in Const. art. 10, § 2, regarding homesteads, have a more restricted meaning than 'domicile.' To entitle a person to the constitutional exemption, he must be an actual, not constructive, resident. Where the facts show an actual removal from the state, even for a definite period, the person so removing ceases, while absent, to be a resident, though he intend to return and resume his residence." *Held* correct, and corrective of a

previous instruction that a resident is one who has a permanent dwelling, to which, when absent, he intends to return; that a residence continues until he acquires another by actual removal, with intention to remain altogether for a definite or indefinite period; that residence is established by occupancy and intention to make a home; that, these concurring, the time of residence is immaterial,—this instruction being appropriate to "domicile," but too broad as applied to "residence" entitling to homestead.

2. An instruction that if defendant actually removed to another state for a definite or indefinite period, and had his home there, then that would be his residence; but if he only went to trade in the winter, and return in the spring to his home in the state, and did not actually move to the other state, and settle there, as his home, then he had his homestead rights in the state,—correctly defines the rights of one claiming homestead as "a resident of the state," under Const. art. 10, § 2.

3. In an action for possession of land, by the holder of the sheriff's deed against the judgment debtor, the burden is on defendant, claiming the land as homestead, to show that a homestead had not before been allotted him, but if he make such showing the burden is on plaintiff to prove that defendant was not entitled to the land in question as homestead; and, defendant's former residence in the county being admitted, it is for plaintiff to show that defendant had later become a resident of another state.

Appeal from superior court, Surry county; McCorkle, Judge.

Action for possession of land by Winston Fulton against Rufus Roberts and another. Judgment for defendants. Plaintiff appeals. Affirmed.

The plaintiff claimed under a sheriff's deed made in pursuance of a sale of the locus in quo made by S. H. Taylor, sheriff of Surry county, to satisfy an execution in his hands against the property of defendant Rufus Roberts. The defendants resisted plaintiff's recovery, and claimed that the sheriff sold the property without first having allotted homestead to the defendant Rufus Roberts, and that the sale was, therefore, void. The plaintiff contended (1) that, under the admissions filed of record, there was no necessity for laying off homestead before the sale; (2) that defendant Rufus Roberts was not entitled to have homestead allotted him, because, at the time of said sale by the sheriff, he was not a resident of this state. The admitted facts filed of record are as follows: "It is admitted that, at the time of sale by sheriff of the lot in controversy, the lot was a lot on which there was a cabinet shop one hundred feet by two hundred feet, in Mt. Airy, and unoccupied, and that the defendant owned and occupied as a residence, if not a residence of Georgia, the Sulphur Springs tract, of seventy-five acres of land, four miles from Mt. Airy, and that this tract was worth five thousand dollars or more." Holton, Haymore, Graves, Watson & Buxton, Attorneys for Plaintiff. Carter, Joyse, Sparger, Glenn, Attorneys for Defendants.

The following issue was submitted: "At the time of the sale of the locus in quo, on the 27th day of April, 1881, was the defendant Roberts a resident of North Carolina?"

Upon this issue alone, there was a large amount of testimony offered by the plaintiff, tending to show that prior to said sale the defendant Rufus Roberts had sold off at auction, and privately, all of his real estate, consisting of plantations and town lots in Mt. Airy, except the lot in controversy, and two or three other lots sold on same day by the sheriff, and except the Sulphur Springs tract, which tract he was offering for sale; also, tending to show that he had bought real estate in Milledgeville, Ga., and erected buildings thereon and farm near by; also, evidence of declarations made by Roberts to various persons, both before and after the sale, claiming Georgia as his home, and disclaiming North Carolina, declaring he could not be induced to live here again. The defendant testified in his own behalf that, while he went into the mercantile and farming business in Georgia, he had never abandoned North Carolina as his home, and offered much evidence to corroborate him, and to sustain the affirmative of the issue. There being no exception taken by plaintiff to evidence, it is deemed unnecessary to set it out in full.

After the close of the evidence and the argument of counsel, the judge charged the jury, in writing, as follows: "The time has arrived when you are called upon to act. This is an important case. You have given it a patient hearing. A large amount of testimony has been introduced. You will scarcely see as many intelligent witnesses, and more ably argued on both sides by counsel, than in this case. You will consider all that has been said by all the witnesses. If you find any discrepancy in their testimony, you will reconcile it, if you can; and, if you cannot do that, then you may believe one, and reject another,—believe a part or the whole, as you may judge to be right. You will consider the intelligence and opportunity of the witnesses of knowing the facts to which they testify. You may consider their demeanor, and their interest in the matter in controversy, and the relation they stand in to the parties. And after you have considered all the facts, as deposed to by the witnesses, then you will determine the issue submitted to you. *"The burden of satisfying you, by a preponderance of testimony, that the defendant Roberts was a nonresident at the time of the sale is thrown upon the plaintiff."* The only issue you have to try is whether, at the time of the sale of the locus in quo, was the defendant Roberts a resident of the state of North Carolina on the 27th day of April, 1881? A 'resident' denotes one who has a permanent dwelling, to which the party, when absent, intends to return. The residence of a person continues until he acquires another by actually removing to another country with the intention of remaining in the latter altogether for an indefinite period or a definite period. Two things must concur to constitute residence;

First, occupancy; secondly, the intention to make it a home. If these two concur, it makes no difference how short his residence may be in the new residence. The words, 'a resident of this state,' employed in Const. art. 10, § 2, in respect to homestead, have a more restricted meaning than that usually given to 'domicile.' To entitle a person to the constitutional exemption, he must be an actual, and not a constructive, resident. Where the facts show an actual removal from the state, even for a definite period, the person so removing ceases, so long as he remains absent, to be a resident of the state, in respect to his right to a homestead, although he may have the intent to return and resume his residence. So, if you find that defendant Roberts actually removed to the state of Georgia for a definite period or an indefinite period, and had his home there, then that would be his residence, and he would not be entitled to the homestead in this state, and you will answer, 'No.' But if he only went to Georgia for the purpose of trading in the winter, and returning in the spring to his home in North Carolina, and did not actually move to Georgia, and settle there, as his home, then he would be entitled to a homestead in this state, and you will answer the issue, 'Yes.'

The jury found the issue, "Yes," and the plaintiff's counsel moved the court for a judgment for the possession of the land upon his sheriff's title, and the admissions filed of record, insisting that there was no necessity, under the law, for the allotment of homestead before the sale. Motion refused by the court, and plaintiff excepted. The plaintiff then moved for a new trial because of error in the instructions to the jury given by the court, and assigns as erroneous that part of the instructions appearing in italics. Motion overruled, and plaintiff appealed.

Watson & Buxton and A. E. Holton, for appellant. Glenn & Manly, for appellees.

AVERY, J. Two questions are raised by this appeal: (1) If it be admitted that the defendant Rufus Roberts was a citizen of North Carolina, could the sheriff lawfully sell, under execution issued against him upon a judgment recovered on a debt created since 1868, a tract of land belonging to him, other than that upon which he lived, and distant four miles from it, when no homestead had been allotted to him? (2) Was the definition of "a resident," given in the instruction of the court to the jury, because of its inaccuracy or inconsistency, calculated to mislead them in passing upon the issue submitted?

While it may have been supposed by the framers of the organic law that a debtor would usually elect to have his homestead allotted in his dwelling place and the surrounding land, "his choice is not positively restricted to that nor to contiguous land." *Mayho v. Cotton*, 69 N. C. 292; *Hughes v.*

Hodges, 102 N. C. 246, 9 S. E. 437; *Flora v. Robbins*, 93 N. C. 40. The constitution guarantees the right of selection between different tracts, in express terms, if, as suggested in *Mayo v. Cotton*, supra, the power would not have been implied necessarily in the grant of exemption in a home worth \$1,000. Const. art. 10, § 2.

The sale, having been made to satisfy a debt created since the homestead exemption became a part of the constitution, was void, therefore, if the defendant was, as a resident of this state at that time, entitled to the benefit of that privilege. *Long v. Walker*, 105 N. C. 90, 10 S. E. 858. It is true that the general definition of a "resident" given by the court was incorrect, and embodied the very terms in which this court has defined "domiciled," which is a much more comprehensive term. *Horne v. Horne*, 9 Ired. 99; *Plummer v. Brandon*, 5 Ired. Eq. 190. Generally, one who has acquired a domicile at a given place must have resided there with the intention of making it a home, and the fact that he temporarily resided elsewhere, with the purpose of returning to such home, would not impair any right growing out of having become domiciled there. *Fleming v. Straley*, 1 Ired. 305; *Burke County Com'rs v. Buncombe County Com'rs*, 101 N. C. 520, 8 S. E. 176. But, however erroneous the general proposition may have been, the more specific instruction as to the "restricted meaning of the words, 'a resident,'" in article 10, § 2, of the constitution, must, of necessity, have been understood by the jury, and followed in answering the issue submitted to them. If the jury were made to comprehend what was meant by the words, as used in the constitution in reference to the right of exemption, and that their inquiry was limited to ascertaining whether the facts brought the defendant within the definition of a "resident," as the words are there used, the confounding of "domicile" with "residence" in the abstract proposition was a harmless error. The instruction which bore directly upon the issue was as follows: "The words, 'a resident of this state,' employed in the constitution, (section 2,) in respect to homesteads, have a more restricted meaning than is usually given to 'domicile.' To entitle a person to a constitutional exemption, he must be an actual, and not a constructive, resident. Where the facts show an actual removal from the state, even for a definite period, the person so removing ceases, so long as he remains absent, to be a resident of the state, in respect to his rights to a homestead, although he may have the intent to return and resume his residence." Although a juror might have thought that for some purposes a resident might mean one who is domiciled, he could not fail to understand from the foregoing instruction that one who actually removed from the state for a limited period, even *animo revertendi*, would

forfeit his right of exemption by failure to occupy the place protected by the constitution for the purpose of furnishing him a home. Indeed, the explanatory proposition embodies substantially the language used by the court in *Lee v. Moseley*, 101 N. C. 814, 7 S. E. 874, and in *Munds v. Cassidey*, 98 N. C. 563, 4 S. E. 353, 355, to draw the distinction between a domicile, as understood in reference to the right of suffrage or of administration, and a residence, such as was essential to the retention of the right of exemption under the constitution.

We see no error in the last paragraph of the charge. If the defendant did not actually remove to Georgia, and make it even a temporary home, but visited that state for the purpose of trading in the winter, and returned to his home in North Carolina in the spring, he acquired none of the advantages, and must be subject to none of the disadvantages, there incident, in contemplation of law, either to being a resident or domiciled during such a sojourn. Though he may have been accompanied by his family, he would not have been entitled to the benefit of similar exemption laws as a resident of Georgia; and, adopting the test suggested by this court, we must conclude that the right of exemption ceases here when, by reason of a change of residence, it begins in another state, or when a similar occupancy of a place of residence by one coming from a sister state to this state would entitle such person to the benefit of section 2, art. 10, of our constitution. *Lee v. Moseley*, and *Munds v. Cassidey*, *supra*; *Baker v. Legget*, 98 N. C. 304, 4 S. E. 37. It is not necessary to a decision of the questions involved in this case to advert to the difference in the character of the residence or domicile which would entitle one to the right of suffrage, protect him against attachment, or qualify him to administer on an estate. *Boyer v. Teague*, 106 N. C. 602, 11 S. E. 665; *Wheeler v. Cobb*, 75 N. C. 21; *Hannon v. Grizzard*, 89 N. C. 115; *Roberts v. Cannon*, 4 Dev. & B. 256; *Carden v. Carden*, 107 N. C. 214, 12 S. E. 197; *Abrams v. Pender*, Busb. 260.

The onus was upon the defendant to show that a homestead had not been allotted to him, as, in the absence of any evidence beyond the proof of judgment, execution, levy, and sale,—all apparently regular,—the presumption would have been in favor of the validity of plaintiff's title. *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142; *Bule v. Scott*, 107 N. C. 181, 12 S. E. 198; 2 Whart. Ev. §§ 1318, 1319. But, as soon as it appeared in evidence that a homestead had not in fact been allotted, the presumption in favor of the regularity of judicial proceedings was rebutted, as it would have been if the same fact had appeared upon the face of the record. *Mobley v. Griffin* and *Bule v. Scott*, *supra*. It would not have been incumbent on the plaintiff, in a case where the record

showed that no exemption had been allowed, to negative the possibility of nonresidence. But if it had not been decided, in both of the cases cited, that proof that no homestead was allotted upon what appeared, either from the date of the judgment or of the contract, to be a new debt, rebutted the presumption of regularity in the sale, another principle may be invoked, which is clearly decisive of the question as to the correctness of the charge. It was shown, and admitted by both parties, that the defendant had been a resident of Surry county, in the state of North Carolina, prior to his purchase of the property and engaging in mercantile business in Milledgeville, Ga. That fact being settled, it was incumbent on the plaintiff to show that his place of residence was not still the same, because the law presumed the status once shown to continue, (2 Whart. Ev. §§ 1285, 1286,) generally, and especially as to place of residence; and the duty resting upon a plaintiff to show his right to recover shifted, therefore, to Fulton, upon the rebuttal of the presumption in favor of the regularity in the sale, on which his *prima facie* case was dependent. The burden of showing a change of domicile, when it becomes material to do so, "unquestionably lies on the party who asserts the change," (5 Amer. & Eng. Enc. Law, 865,) and "it is presumed that the residence of a person continues to be in the place where it is proved to have been until the contrary is shown." 17 Amer. & Eng. Enc. Law, 76. We conclude, therefore, that, in view of the admitted fact that the defendant had resided in Surry county, the burden of showing that he had subsequently become a resident of another state, when his land was sold, rested upon the plaintiff, and there was no error in so instructing the jury. Affirmed.

ADAMS v. FIRST NAT. BANK OF WINSTON.

(Supreme Court of North Carolina. Nov. 28, 1893.)

BANKS—OVERDRAFT OF FIRM—CHARGES ON INDIVIDUAL ACCOUNT.

A bank cannot charge an overdraft of a firm against the individual account of a member of the firm, though the member, as such, may be liable for the overdraft.

Appeal from superior court, Forsyth county; E. T. Boykin, Judge.

Action by J. J. Adams against the First National Bank of Winston to recover the sum of \$40, alleged to be due on account. There was judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff, introduced as witness in his own behalf, testified that on the 21st day of March, 1892, the firm of J. J. Adams & Co., composed of himself and one J. A. Reid, dissolved copartnership; that theretofore they had an account with the defendant bank,

and plaintiff went to defendant bank before noon of the said day, and asked for the account in bank of J. J. Adams & Co., wishing to know the balance; that he was told by the bookkeeper of the bank that the balance due J. J. Adams & Co. was \$201.08, which amount was there and then paid to him; that this sum was coming to witness as due him of the assets of J. J. Adams & Co.; that several days thereafter, about the 23d of March, the plaintiff deposited with the defendant bank the sum of \$615 of his own money from the sale of his own individual property, and opened the account in his own name; that he checked on this sum various times in various amounts, and that on the 5th day of April, 1892, he made a check for balance due him, when he was told by the officer of the bank that his check was not good by \$40; that this sum had been taken from his account, by order of the president of the bank, and paid on a draft drawn by J. J. Adams & Co.; that his balance, less the \$40, was paid to plaintiff, plaintiff demanding the total amount, including the \$40, which was refused. Plaintiff further testified that he did not know whether the check for \$40 drawn in the name of J. J. Adams & Co. was in the bank at the time he asked for the balance due J. J. Adams & Co., on March 21st, or not; that no notice of the dissolution of the copartnership of J. J. Adams & Co. has been given by publication. Col. James Martin, in behalf of the defendant, testified that he was a bookkeeper in the defendant bank, and on the 21st March, 1892, the plaintiff asked him for balance of J. J. Adams & Co., which he told him was \$201.08, and which plaintiff made check for, and drew the amount out of bank. That a check of J. J. Adams & Co. for \$40, made by J. A. Reid, came into bank, I think, on that day. It might have been in the bank at the time I gave the balance of \$201.08 to Mr. Adams. It was not entered on the books, but might have been on the file. I cannot say whether it was in bank at the time or not. I did not know it had been paid by the teller. If I had known so, I would have charged it in the account of J. J. Adams & Co. before giving the plaintiff the balance. J. A. Reid, a witness for defendant, testified that he was a member of the firm of J. J. Adams & Co.; that he drew the check for \$40 on the firm account in bank to pay an individual debt due by him for rent; that the check was given several days before the 21st of March; that the firm agreed to dissolve on the 21st of March, but no final settlement of the copartnership had ever been made; that on the 21st of March they quit business, and Adams drew out all they had in bank. The court instructed the jury, among other things, as follows: "That if the check given by J. A. Reid was paid by the defendant after the payment to plaintiff of the balance of \$201.08, then the plaintiff would be entitled to recover; that if, as the defendant

contended, the check for \$40 was paid by the bank before the check for \$201.08 was paid plaintiff, and the defendant gave the balance by mistake, the plaintiff would not be entitled to recover,"—to which charge, given as above stated, defendant excepted, and assigned as error the charge as above given; and, further, that he did not tell the jury that the defendant had a right to offset the \$40 check as an overdraft of the firm against the individual account of J. J. Adams.

Watson & Buxton, for appellant. Glenn & Manly, for appellee.

CLARK, J. If the overdraft of the firm of which plaintiff was a member was paid by the bank after the balance was drawn out, it not appearing that the bank had any notice of the dissolution, such overdraft could be recovered by the bank out of the plaintiff as a member of the firm. If, at the time the plaintiff drew a check for the balance which the cashier told him was due the firm, in fact there was less due the firm, it was equally an overdraft, by mutual mistake of the parties, and the bank could recover it back out of the plaintiff as a member of the firm. But the bank had no right to charge up against the individual account of a member of a partnership a balance due it on the firm's account. Such right of set-off only exists between the same parties, and in the same right. *Morse, Banks*, § 334. The bank has no lien on the deposit of a partner for a balance due from the partnership. *Bolles, Banks*, § 385. The reason is thus given by Lord Langdale, master of the rolls, in *Watts v. Christie*, 11 Beav. 555: "It is of the nature and essence of transactions between banker and customer that a customer, having a balance in the hands of his banker, should have full power over it, and be able to command payment at sight. If, where there is an account between a firm and the bank, and another account with one particular member of the firm, it be once held that the bank has a lien upon the balance due upon the separate account of the individual partner for a balance due to the bank from the firm, there would be an end to some transactions which it is most important to commerce should be continued." Inasmuch as the members of the partnership can draw in the name of the firm, if their overdrafts can instantly be charged up against the individual account of a member of the firm, no partner would be safe in keeping his private account in the same bank where the partnership account is kept. Otherwise, his private funds, deposited perhaps for special engagements he may have in view, would be liable at any time to be swept away by checks drawn by another for his own personal ends, but in the name of the firm, and the partner's checks on his private account would go to protest, to his damage and inconvenience. Then, too, in case of insolvency and an assignment by

the partner or of the partnership, his available cash could be subject to appropriation by the bank in this shorthand mode to his partnership liability, notwithstanding his or the firm's election in the deed of assignment to prefer another, or to share the assets *pro rata*; and this, also, would deprive the individual partner, having a sum to his credit, using it as his personal property exemption as against the indebtedness of the partnership to the bank. It is true, in the present case, the plaintiff being liable to the bank for the overdraft of the firm, the bank could sue him therefor, and hence, of course could have pleaded it as a counterclaim, instead of bringing an independent action. But the bank did not plead a counterclaim. It claimed the right to charge up against the individual account of the plaintiff the overdraft of the firm, and hence pleaded the general issue that it was not indebted. This it cannot do. The difference between a counterclaim and a payment is not merely technical, but substantial. Some of the differences are pointed out above. There are others, among them the cases in which the statute of limitations might be pleaded to the counterclaim. In the present case it is still open to the bank, as it did not plead the counterclaim, to bring an action against the plaintiff for the balance due by the firm. It is not yet barred by the statute of limitations, and, if the plaintiff has property in excess of his exemptions, the bank has lost nothing except the bill of cost in this case. While not concurring altogether in the reasons of his honor, we reach the same conclusion, and declare the judgment affirmed.

KIGER v. HARMOND.

(Supreme Court of North Carolina. Nov. 28, 1893.)

CLAIM AND DELIVERY—WHEN LIES—INSTALLMENT MORTGAGE—PLEADINGS.

1. The action of claim and delivery for the possession of property under a chattel mortgage providing for payment of weekly installments may be maintained for the installments past due and unpaid at the date of the writ.

2. A demand for possession of the property, and for judgment for the debt secured, may be joined in an action of claim and delivery under a chattel mortgage.

Appeal from superior court, Forsyth county; E. T. Boykin, Judge.

Action in claim and delivery by S. L. Kiger against E. T. Harmond for the possession of property under a note and mortgage. There was judgment for defendant, and plaintiff appeals. Reversed.

E. B. Jones, for appellant.

CLARK, J. Though the note sued on purports to be due one day after date, the mortgage and contemporaneous agreement contain a stipulation that it should be paid in installments of \$10 per month. Upon the trial the plaintiff was permitted, without ob-

jection, to amend so as to allege and prove that the agreement was to pay \$10 per week. The note and mortgage must be construed together, and as making one contract. With the amendment allowed, (if the jury should find there was such a mistake as justified correcting the mortgage,) the weekly installments of \$10, beginning July 1, 1892, when the first weekly installment was to have been paid, down to October 7, 1892, when this suit was instituted, would have amounted to \$150. The third section of the complaint admits that \$130 had been paid within that time. According to the complaint, there would have been, therefore, a balance due on the installments of \$20 when suit was brought. The court erred, therefore, in holding that the action was premature. The plaintiff had a right, under the mortgage, to claim possession of the property to be applied on the installments due. It not being alleged and shown that the property was worth "not more than \$50," the superior court alone had jurisdiction, as it would have had it concurrently with a justice of the peace, if of less than \$50. *Noville v. Dew*, 94 N. C. 43; Code, § 887. It will be noted that there was no agreement here that, upon failure to pay one installment, all the installments should become due and payable, as in *Capehart v. Dettrick*, 91 N. C. 344; *Kitchin v. Grandy*, 101 N. C. 86, 7 S. E. 663; *Whitehead v. Morrill*, 108 N. C. 65, 12 S. E. 894. The verified complaint not having been answered, the plaintiff was entitled to judgment for balance due on installments up to issuance of the writ, and for possession of property, that it might be sold, (or so much as was necessary,) to be applied on the judgment then obtained. *Moore v. Woodward*, 83 N. C. 531. But, as it was alleged that the property had been wasted since the bond in claim and delivery had been given, the value of the same, unless admitted to be as much as \$20, is the subject of inquiry before a jury. *Rogers v. Moore*, 86 N. C. 85. The demands for possession of property and for judgment for the debt secured thereon are properly joined. *Clark's Code*, (2d Ed.) pp. 210-214, and cases cited. Even if this had been a misjoinder, the objection was waived if not taken by demurrer or answer. *Finley v. Hayes*, 81 N. C. 368; *Burns v. Ashworth*, 72 N. C. 496; *McMillan v. Edwards*, 75 N. C. 81. Error.

STATE v. BARBER.

(Supreme Court of North Carolina. Nov. 28, 1893.)

JURORS—WHEN EXCUSED—CHALLENGE FOR CAUSE—RECEIVING STOLEN PROPERTY—INDICTMENT—ELECTION—INSTRUCTIONS.

1. The court may, in its discretion, excuse a juror, at his own request, as a favor to him, and before he is accepted as one of the panel.

2. It is sufficient ground on which to challenge a juror that he is attending court in the

expectation of being called as a witness for the opposite party, the danger of bias not being removed by showing that he expects to testify only as to the character of a defendant charged with felony.

3. On a criminal trial the court charged "that they [the jury] might convict on the unsupported testimony of an accomplice, but that it was dangerous and unsafe to do so; but if the story of the accomplice, taken with the other facts and circumstances in the case, carry conviction to the minds of the jury, then it is their duty to convict. The jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant, before they can convict." *Held* not objectionable as tending to mislead the jury as to the weight to be given to an accomplice's testimony.

4. On a trial of several defendants under an indictment containing two counts, where there is evidence that some of the defendants stole the property, and that defendant B. received it, knowing it to have been stolen, it is within the court's discretion to determine whether it will compel the state to elect on which count to proceed against B.

Appeal from superior court, Rowan county; Winston, Judge.

Charles Barber and others were tried under an indictment containing two counts,—one for larceny, and the other for receiving stolen goods, knowing them to have been stolen. Defendant Barber was convicted on the second count, and appeals. Affirmed.

C. M. Busbee and S. F. Mordecai, for appellant. The Attorney General, for the State.

AVERY, J. A talesman was called, who, upon being challenged for cause by the solicitor, stated that one of the defendants had spoken to him about the case, and had requested him to attend as a witness to prove the character of that defendant, who had stated nothing but the fact that he was indicted; that he had agreed to become a witness for the defendant, and was attending the court without having been summoned to appear. Two jurors had already been challenged peremptorily for the state, but the defendants had 28 peremptory challenges, which were not exhausted by them. The prosecuting officer asked the court, in the exercise of its discretion, to excuse the juror, and he was so excused. The authority of the court, in the exercise of a sound discretion, to excuse a juror at his own request, as a favor to him, and before he is accepted as one of the panel, it seems to us, cannot be seriously questioned. If, however, taking the whole statement together, it is susceptible of the construction that the judge meant to excuse the juror because he was voluntarily attending for the purpose of being examined to prove the good character of one of the defendants, we think it equally clear that it was not error to sustain a challenge to the favor by either of the parties to an action upon the ground that the juror was attending the court, whether under subpoena or not, in the expectation of being called upon as a witness for the opposite party. The danger of bias is not removed by showing that the witness has no knowledge of the more mate-

rial facts bearing upon the issue, and expects to testify only as to the character of a defendant charged with a felony. 1 Bish. Crim. Proc. §§ 767, 768.

The jury could not have been misled as to the weight to be given to the testimony of an accomplice. The defendant had no just ground to complain of the instruction "that they [the jury] might convict on the unsupported testimony of an accomplice, but that it was dangerous and unsafe to do so; but if the story of the accomplice, taken with the other facts and circumstances in the case, carry conviction to the minds of the jury, then it is their duty to convict. The jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant, before they can convict." *State v. Mitchener*, 98 N. C. 689, 4 S. E. 28; *State v. Miller*, 97 N. C. 484, 2 S. E. 363; *State v. Stroud*, 95 N. C. 626. "The unsupported testimony of an accomplice, if it produces entire belief of the prisoner's guilt, is sufficient to warrant a conviction; and the usual direction to the jury not to convict upon it, unless supported by other testimony, is only a precautionary measure to prevent improper confidence being reposed in it, and the propriety of giving this caution must be left to the discretion of the judge who tries the cause." *State v. Holland*, 83 N. C. 625; *State v. Haney*, 2 Dev. & B. 390. In *State v. Morrison*, 85 N. C. 561, Justice Ruffin, delivering the opinion of the court, says: "The common-law rule is that if an indictment contains charges distinct in themselves, and growing out of separate transactions, the prosecutor may be made to elect, or the court may quash. But when it appears that the several counts relate to one transaction, varied simply to meet the probable proof, the court will neither quash nor force an election." "The same rule applies when there is but one count, and testimony as to several transactions, either of which will be relied on to make a case under that count, and when there are several counts, containing distinct charges, and growing out of separate transactions, all punishable in the same way." *State v. Parish*, 104 N. C. 689, 10 S. E. 457. In this case the testimony tended to show that several other defendants, who were convicted of larceny on the first count, had been stealing tobacco from the same owner at various times, and had been disposing of it to the defendant, who knew it to have been stolen, at a price much below its market value. The defendant Barber, who alone appeals, was convicted, on the second count, of receiving. It was within the discretion of the trial judge to determine whether he would compel an election, and his ruling is not reviewable in this court. *State v. Harris*, 106 N. C. 682, 11 S. E. 377; *State v. Allen*, 107 N. C. 806, 11 S. E. 1016. The appellant certainly has no ground for complaint, since the jury were told that all of the defendants must be convicted, if at all, upon the evidence relating to a single transaction.

and that so many of the defendants as did not participate in the particular transaction upon which the verdict should be founded must be acquitted. Bish. Crim. Proc. § 210. Where the jury find a defendant guilty of larceny in a particular case, the law construes the verdict as if the words, "in manner and form as charged in the indictment," were added to it; and where the finding as to another defendant is, "Guilty of receiving, knowing the tobacco to have been stolen," it must be interpreted in the same way. The verdict as to the defendant Barber, taken in connection with the indictment, is sufficiently clear and intelligible to show that it is a conviction upon the second count. It was not essential that the jury should mention the property received, or, certainly, that they specify it directly instead of by implication arising out of the words, "knowing the said tobacco to have been stolen," when read in connection with the charge contained in the second count. *State v. Horan*, Phil. (N. C.) 571, 576.

Upon an inspection of the whole record, we find no sufficient ground for arresting the judgment. It is not clear that the judge who tried the case below intended to waive the objection that the prayer for instructions was offered too late. It does not follow from the fact that he gave a part of the instruction asked, and refused other portions of it, that he intended to make such a concession. But we have considered the principal objections to the charge given, and to the refusal to give instructions prayed for, as if the exception had been well taken. There is no error.

STATE v. CARTER.

(Supreme Court of North Carolina. Nov. 28, 1893.)

LARCENY—VERDICT—SPECIFICATION OF COUNT—AIDED BY VERDICT.

1. As Code, § 1191, permits the joining in an indictment of a count for larceny with one for receiving stolen goods, knowing them to have been stolen, a general verdict of guilty, under an indictment charging both offenses, is good.

2. A general verdict of guilty under an indictment containing two counts will support a judgment of conviction if either count be good.

3. Where, on a trial for the larceny of a bank note, the ownership of which is laid in C., "agent of the Farmers' Exchange," there is no exception that the evidence fails to show a special property in C., a verdict of guilty establishes C.'s ownership, and on appeal the words, "agent of the Farmers' Exchange," will be treated as surplusage.

Appeal from superior court, Davie county; Boykin, Judge.

Thomas Carter was convicted of larceny, and appeals. Affirmed.

The Attorney General and T. B. Bailey, for the State.

CLARK, J. The case on appeal states that there were no exceptions to the admission or refusal of testimony, nor to the charge, and

that no special instructions were asked. The judgment must be affirmed, unless there is error upon the face of the record proper. *State v. Bell*, 103 N. C. 438, 9 S. E. 548, and other cases cited in Clark's Code, (2d Ed.) p. 582.

The defendant was indicted for larceny, with a second count for receiving stolen goods, knowing them to have been stolen. There was a general verdict of guilty, without specifying upon which count. The Code, § 1191, permits the joining of the two counts; and a general verdict was held good, without specifying upon which count it was rendered, in *State v. Speight*, 69 N. C. 72; *State v. Baker*, 70 N. C. 530; *State v. Jones*, 82 N. C. 685. These cases were decided when the first count (larceny) was a felony, and the second (for receiving) was only a misdemeanor. A fortiori, a general verdict is valid, since the act of 1891, c. 205, which makes both charges felonies. The second count is not defective, though using some unnecessary phraseology. But, if it were defective, the court would place the verdict to the good count. *State v. Toole*, 106 N. C. 736, 11 S. E. 168, and cases there cited.

The charge of the theft of five dollars in money, of the value of five dollars, is good under the Code, § 1190, and was sustained by proof of the theft of any amount of coin or treasury or bank notes, without proof of the particular kind of coin or treasury or bank notes. *State v. Freeman*, 89 N. C. 469. The property is laid in "W. A. Clements, agent of the Farmers' Exchange." There is no exception that there was a variance, or that the evidence failed to show a special property in Clements. The verdict establishes all the material facts charged in the indictment, including that of the ownership. The words, "agent of Farmers' Exchange," are mere surplusage. This differs from *State v. Jenkins*, 78 N. C. 478, in that there exception was taken on the trial that the evidence did not show any special property in the railroad agent in whom the ownership was laid. His possession being merely, on the evidence, the possession of a servant, he had no property therein, and the ownership should have been laid in the corporation. There being no error on the face of the record, the judgment is affirmed.

WILSON v. CANTRELL.

(Supreme Court of South Carolina. Nov. 27, 1893.)

TAX SALE—VALIDITY—RIGHTS OF PURCHASER—BURDEN OF PROOF.

1. Though plaintiff was the attorney of the mortgagor in proceedings to foreclose, such fact will not make him his agent, and so defeat his title as purchaser of the mortgaged land at a public sale thereof, made pending the foreclosure, for taxes assessed against the mortgagor, where plaintiff was not the mortgagor's general agent, but represented him in the foreclosure only, and at the time of the sale the mortgagor was not in the country, and had not left any money or directions with plaintiff to

pay the taxes or buy in the land, and the mortgagor, after the purchase, made no objections thereto.

2. 19 St. at Large, p. 884, § 10, provides that if taxes for 1887-88 are not paid on or before December 15, 1888, the county treasurer shall collect the same, and if the amount of such taxes are not collected by January 2, 1889, then the same shall be treated as delinquent, and shall be collected by sale of property. *Held*, that the failure of the treasurer to make an effort, between December 15th and January 2d, to collect unpaid taxes for such fiscal year on certain land, would not invalidate a sale of the land made by virtue of a treasurer's warrant, issued January 23, 1889, directing the sheriff to levy on the land, and sell it.

3. A finding by the trial court that the owner of certain land had no personal property against which a levy could be made to satisfy taxes assessed against such owner, being a question of fact, will not be reviewed on appeal.

4. Though 19 St. at Large, p. 863, § 2, relating to the collection of delinquent taxes, authorizes the sheriff to seize and sell only so much of the taxpayer's land as may be necessary to pay the taxes assessed thereon, the fact that the sheriff sold an entire tract, without making any effort to divide it, will not invalidate the sale, in the absence of fraud or collusion.

5. Under 19 St. at Large, p. 884, § 10, providing that, when the taxes and assessments charged against any property or party are not paid before a certain time, such taxes shall be treated as delinquent taxes, and shall be collected by sale of realty, a sale of land for unpaid taxes is not void because there was included in the treasurer's warrant directing the seizure and sale an unpaid poll tax assessed against the owner of the land, even though section 6 of such statute makes the failure to pay a poll tax a misdemeanor.

6. Under 19 St. at Large, p. 863, § 2, making a sheriff's deed at tax sale only prima facie evidence of the regularity of the tax proceedings prior to its execution, the burden is on one who seeks to defeat the deed to show that there has not been a compliance with the law.

Appeal from common pleas circuit court of Spartanburg county; James F. Izlar, Judge.

Action by Stanyarne Wilson against Fielding Cantrell for the recovery of land. From a judgment for plaintiff, defendant appeals. Affirmed.

The decree of the circuit court is as follows:

"The plaintiff commenced this action on the 7th day of July, 1890, to recover the possession of the tract or parcel of land described in the complaint. It was referred to the master of said county to hear and determine all the issues. The master, after taking the testimony offered and hearing argument, filed his report on the 23d day of September, 1892, holding that the plaintiff is entitled to recover the possession of the land in dispute, together with two hundred dollars damages. To this report the defendant filed exceptions imputing error in the findings of the master, both as to law and fact. The case was heard by me at the October term, 1892, of the court of common pleas for said county, on all the papers in the case, including the testimony taken by the master, the master's report, and the exceptions of the defendant thereto. In order to obtain a clear comprehension of the questions raised by the ex-

ceptions of the defendant, I deem it necessary to state more fully the facts established by the evidence than the master has done in his report. From the testimony, it appears that one W. H. Gowan, in September, 1883, was the owner of the land in dispute; that, being largely indebted to one B. F. Bush, he, (W. H. Gowan,) on the 13th day of September, 1883, to secure said indebtedness, executed to the said B. F. Bush his promissory notes and a mortgage of said land; that afterwards certain of said notes, and the mortgage securing the same, were assigned to Fielding Cantrell, the defendant herein; that Fielding Cantrell, after the condition of said mortgage had been broken, advertised the mortgaged premises for sale under the power contained in the mortgage; that thereupon W. H. Gowan filed his complaint in this court against the said Fielding Cantrell to restrain the sale under the said power; that the defendant, Fielding Cantrell, answered the complaint, and the issues raised by the pleadings were referred to the master; that the master heard the case, and filed his report therein, recommending that the said lands be sold, and the proceeds applied to the debt of the said Fielding Cantrell; that the said W. H. Gowan, through Stanyarne Wilson, his attorney in said cause, filed exceptions to the report of the master; that the exceptions were heard on the 14th day of August, 1889, and overruled; that, under the decree made in the cause, the mortgaged premises were sold by the master on the 7th day of October, 1889, and were bid in by said Fielding Cantrell for the sum of six hundred and fifty-five dollars; and that, the said Fielding Cantrell having complied with the terms of sale, the master executed to him a conveyance of said land. It further appears from the evidence that the land mortgaged as aforesaid was listed and assessed for the taxes of the fiscal year, commencing November 1, 1887, in the name of W. H. Gowan; that the taxes and assessments charged against him on the tax duplicate for said fiscal year were not paid by him, or collected, by distress or otherwise, on or before the 2d day of January, 1889, and the same became delinquent; that on the 23d day of January, 1889, the county treasurer for said county issued his tax warrant or execution in the form required by law for the collection of delinquent taxes against the said W. H. Gowan; that the return of the sheriff indorsed upon said warrant or execution is to the effect that the said W. H. Gowan had no personal property out of which the taxes charged could be made, and that he had seized, levied upon, and taken possession of one hundred and fifty acres of land, the property of W. H. Gowan; that the land so levied on by the sheriff is the land in dispute in the present action; that the amount of the taxes, assessments, and penalties stated in the warrant or execution is twenty-six

dollars and forty-two cents; that, after due advertisement, the land levied on as aforesaid was sold by the sheriff on the sales day in August, 1889, before the courthouse door in said county, during the legal hours of sale; that, at said sale, Stanyarne Wilson, the present plaintiff, became the purchaser, he being the highest bidder therefor; that he complied with the terms of the sale, and the sheriff executed to him a conveyance to said land, bearing date the 10th day of August, 1889, which was duly recorded in the register's office for said county on the 3d day of September, 1889; and that the sheriff put Stanyarne Wilson in possession of said land under said purchase and conveyance. It further appears from the evidence that, after the purchase at the master's sale by the said Fielding Cantrell, he entered into the possession of the said land, and was at the commencement of this action, and is now, in possession of the same; that said land is worth from eight to ten dollars per acre; that the rental value is one hundred dollars per annum; and that said land could have been divided and sold in several tracts. In addition to the foregoing facts, an effort was made on the part of the defendant to show that the said W. H. Gowan owned, on the 15th day of December, 1889, and at the time of the tax levy, sufficient personal property to pay and satisfy the taxes, assessments, and penalties charged against him. I have examined the testimony on this point very carefully, and must say that I concur fully in the conclusion reached by the master thereon. The facts as recited show that the parties claim through W. H. Gowan as a common source of title. The plaintiff claims through the tax sale under sheriff's deed. The defendant claims through the foreclosure sale and under the master's deed.

"The main question presented and to be determined is, which of the parties has the better title to the land in dispute? If nothing further was made to appear, there would hardly be room for doubt that the conclusion reached by the master is correct, for it is expressly declared by statute (Gen. St. § 170) that all taxes, assessments, and penalties legally assessed shall be considered and held as a debt payable to the state by a party against whom the same shall be charged, and such taxes, assessments, and penalties shall be a first lien, in all cases whatsoever, upon the property taxed, etc.; and hence the lien for taxes would have been superior to the lien of the mortgage under which the land in question was sold by the master, and the purchaser at the tax sale would have taken a title free and discharged from the incumbrance created by the mortgage. But the tax deed of the plaintiff is attacked on the grounds (1) that the failure of the treasurer to make an effort to collect the taxes due by Gowan, between the 15th of December, 1888, and the 2d of January, 1889, rendered the deed to the plaintiff null

and void; (2) that at the time the tax execution against Gowan was issued, as well as at the time the land was levied upon, he was the owner of personal property, and that it was the duty of the sheriff to have levied upon and sold this before levying upon and selling the land, and that his failure to do so rendered the deed to the plaintiff null and void; (3) that the property levied upon and sold by the sheriff to pay the taxes due by Gowan was more than was necessary to pay said taxes, and that a sale of all the land owned by Gowan, without an effort to divide and sell a part, renders the deed of the plaintiff null and void; (4) that, at the time the plaintiff bought the land at tax sale, he was attorney for Gowan in a suit then pending between Gowan and the defendant, in which the identical land was involved; and that, when he bid off the same, he did so as the agent of Gowan, with full knowledge of the equities of the defendant, and that his title is fraudulent and void as against the defendant; and (5) that the lien of the defendant's mortgage is an older and better lien than that for taxes.

"What I have already said disposes of the second and fifth grounds of attack upon the tax deed of the plaintiff. The conclusion reached by the master ought not to be disturbed by anything contained in these grounds. Neither do I think there is anything in the third and fourth grounds to affect the conclusion of the master. Section 8 of the act to raise supplies and make appropriations for the fiscal year commencing November 1, 1887, approved December 24, 1887, (19 St. pp. 870-885,) declares 'that all taxes herein assessed shall be due and payable from the 15th day of October, to the 15th day of December, 1888, and the several county treasurers shall collect the same in the manner prescribed by law.' Section 10 prescribes 'that when the taxes and assessments of any portion thereof charged against any property or party on the duplicate for the present fiscal year, shall not be paid on or before the 15th day of December, 1888, the county treasurer shall proceed to collect the same, together with the penalty of fifteen per centum on the amount so delinquent, and if the amount of such delinquent taxes, assessments and penalties shall not be paid on or before the 2d day of January, 1889, or collected by distress or otherwise, then the same shall be treated as delinquent taxes on such real and personal property and shall be collected by sale of such real and personal property according to law.' Under this act, the county treasurer was required to begin the collections of the taxes for the fiscal year 1887-88 on the 15th day of October, 1888, and to continue to collect, without penalty, until the 15th day of December, 1888. After this latter date he is required to proceed to collect the taxes and assessments charged against any property or party on the duplicate, together with a penalty of

fifteen per centum on the amount delinquent, until the 2d day of January, 1889; and if, between the 15th day of December, 1888, and the 2d day of January, 1889, the amount of such delinquent taxes, assessments, and penalties shall not be paid or collected by distress or otherwise, then the same shall be treated as delinquent taxes on such real and personal property, and shall be collected by sale of such real and personal property according to law. The law then in force regulating the sale of real and personal property for delinquent taxes is found in the act of 1887, in relation to 'forfeited lands, delinquent lands and collection of taxes,' (19 St. p. 862.) This act directs that, 'immediately upon the expiration of the time allowed by the law for the payment of taxes in any year, the county treasurer of each county shall issue in the name of the state a warrant, or execution against the defaulting taxpayers,' etc. In the construction of this act the language 'upon the expiration of the time allowed by law for the payment of taxes' is not altogether free from doubt. Two periods of time are fixed by the act to raise supplies for the fiscal year commencing November 1, 1887, within which the taxpayer is allowed to pay,—one embracing that period in which there is no penalty; the other after the penalty attaches. But giving the defendant the benefit of the doubt, and assuming that it refers to the former period,—that immediately after the 15th day of December, 1888, it was the duty of the county treasurer to issue a warrant or execution against the defaulting taxpayer,—I am of the opinion that a warrant or execution issued thirty-seven days after said date would not be such an irregularity, if irregularity at all, as would avoid a tax deed made in pursuance of a sale thereunder. The act of 1887 in relation to the sale of property for delinquent taxes prescribes no specific time for tax sales. It only requires the sheriff to sell, after due advertisement, before the courthouse door of the county on a regular sales day, within the usual hours of public sales. The evidence shows that the taxes, assessments, and penalties charged against W. H. Gowan for the fiscal year 1887-88 were not paid, or collected by distress or otherwise, on or before the 2d day of January, 1889; that the land in dispute was levied on and sold, after due advertisement, before the courthouse door in Spartanburg county, during the legal hours of public sales; that the land levied on was then and there purchased by the plaintiff; that it only brought a sufficient sum to pay the taxes, assessments, and penalties charged against the property of W. H. Gowan; that the purchaser at said sale complied with his bid, and received a conveyance to said land from the sheriff, and was put into possession of his purchase. Under this state of facts, I cannot hold that the mere fact that the county treasurer did not issue a warrant or

execution against W. H. Gowan, the defaulting taxpayer, between the 15th day of December, 1888, and the 2d day of January, 1889, (even if the time for collecting taxes for said fiscal year had not been extended by the comptroller general,) makes the sale thereunder irregular, and renders the tax deed in question null and void.

"In this connection it may be well to dispose of another question raised in the argument by the defendant's counsel. It is contended that the treasurer issued his warrant and execution for an amount including the poll tax; that the amount due for poll tax, with the fifteen per cent. penalty thereon, is not a lien on the land, and that the land was in no sense liable therefor; and that the levy on the land for this amount renders the deed void. It is true that the act approved December 24, 1887, (19 St. p. 882,) in providing for a sale of the defaulting taxpayers' property for taxes, does not mention specifically the poll tax. Section 6 of this act, however, provides 'that there shall be assessed upon all taxable polls in this state a tax of one dollar.' Section 10 provides that if the amount of delinquent taxes, assessments, and penalties charged against any property or party on the duplicate shall not be paid on or before the 2d day of January, 1889, or collected, by distress or otherwise, the same shall be treated as delinquent taxes on such real and personal property, and shall be collected by a sale of such property according to law. The poll tax is a tax assessed against the party. The taxes, assessments, and penalties charged against any property or party on the duplicate, and not paid within the time allowed by law, are to be treated as delinquent taxes on the real and personal property of the defaulting taxpayer, and such property may be sold to satisfy the same. This view does not appear to me to be in conflict with sections 11 and 12 of said act; and the fact that section 6 makes it a misdemeanor for any person to fail or refuse to pay his poll tax does not take away the right of the state to enforce the collection of such tax by distress or sale of the real and personal property of the defaulting taxpayer according to law. The county treasurer, therefore, properly included in his warrant or execution against W. H. Gowan the amount of the poll tax and the penalty thereon, and the tax deed of the plaintiff is not rendered null and void by reason thereof. This disposes of the first ground of attack on plaintiff's deed.

"The seventh exception of the defendant to the master's report must now be considered. This exception charges the master with error 'in holding that by the failure of Gowan and of Cantrell to comply with the requirements of section 3 of the act in relation to forfeited lands, delinquent lands, and collection of taxes, (19 St. p. 864,) they must be deemed to have waived all irregularities.' I do not think the case falls within the class

intended to be included in section 3 of said act. This act has been recently construed by the supreme court in the case of *Bull v. Kirk*, 16 S. E. 151. In this case the court say: 'As we think, it appears that the legislature had in mind the classes of taxpayers alleged to be in default: One, where the land of the taxpayer had already been sold, and he was, within the two years allowed him, to bring this action. This class was manifestly intended to be covered by section 2. Another class, where the taxpayer was allowed, not commanded, to make application in a summary way (20 days) to have the sale of his lands suspended upon his alleging that the assessments were improperly made against him, or that the taxes had been paid. This class was intended to be covered by section 3, and all the requirements of that section were made with reference to that class, and intended to be limited to them.' The present case falls within that class covered by section 2 of said act. This being so, the tax deed of the plaintiff is only prima facie evidence of the regularity of the preliminary proceedings prior to its execution, and may be attacked in the present action. But, while this is so, the burden is upon the defendant, who seeks to avoid the conveyance of the plaintiff, to prove that some of the essential requirements of the law have not been duly and fully complied with, and that the proceedings have not been regular. This, I think, he has failed to do. While, therefore, the master erred in holding that by the failure of Gowan and Cantrell to comply with the requirements of section 3 of said act 'they must be deemed in law to have waived all exceptions to the omissions, errors, and irregularities (if any there be) in the assessment of said tax, and in all preliminaries to said sale,' etc., yet the conclusion reached by him in his report, that the plaintiff is entitled to recover the land in dispute, is in my opinion correct. It is therefore ordered, adjudged, and decreed that the exceptions of the defendant to the master's report be, and the same are hereby, overruled; and that said report, as herein modified, be, and the same is hereby, confirmed; and that said report, as thus modified, stand as the judgment of the court. Let the judgment for the plaintiff be entered accordingly."

Duncan & Sanders, for appellant. Nichols & Moore and Bomar & Simpson, for respondent.

McGOWAN, J. This is a law case, pure and simple, the sole purpose of the action being to recover a tract of land in Spartanburg county, described in the complaint as containing 150 acres. The judgment of the circuit judge contains a statement of the case, so full and clear that any attempt to restate it could add nothing, and might possibly tend to confuse. (The circuit decree ought to appear in the report of the case.)

First. The plaintiff's abstract of title, as claimed, is very simple, as follows: (1) Both parties claim through a common source, one Wade H. Gowan, who originally owned the land; (2) that the land in question was assessed for taxes of the fiscal year commencing November 1, 1887, in the name of W. H. Gowan; that the taxes and assessments charged against him on the tax duplicate for said fiscal year were not paid by him, or collected, by distress or otherwise, on or before January 2, 1889; that the county treasurer for said county issued his tax warrant or execution in the form required by law for the collection of delinquent taxes against the said W. H. Gowan; that the return of the sheriff indorsed upon said warrant or execution is to the effect that the said W. H. Gowan had no personal property, out of which the taxes charged could be made, and that he had seized, levied upon, and taken possession of 150 acres of land, the property of the said W. H. Gowan, (the same here in controversy;) that the amount of the taxes, assessments, and penalties stated in the warrant or execution is \$26.42,—twenty-six dollars and forty-two cents; that, after due advertisement, the land levied on, as aforesaid, was sold by the sheriff on the sales day of August, 1889, before the courthouse door in said county, during the legal hours of sale; that, at said sale, Stanyarne Wilson, the present plaintiff, became the purchaser, as being the highest bidder therefor; that he complied with the terms of sale, and the sheriff executed to him title, bearing date August 10, 1889, which was duly recorded September 3, 1889, and he was let into the possession thereof under this title. Afterwards, his tenants attorned to the defendant, and he brought this action to recover the land.

Second. The grounds on which defendant Cantrell resists recovery are as follows: That, at and before the land was sold under the aforesaid tax execution, he (Cantrell) was conducting legal proceedings against the said Gowan to foreclose a mortgage which he owned upon the identical land now in dispute, said mortgage bearing date as far back as 1883; that in said proceeding he obtained a confirmation of the master's report, a final judgment, and an order for the sale of the land on August 14, 1889, and it was again sold by the master under that order on October 7, 1889, and, he (Cantrell) being the highest bidder, for \$635, the master made him title, and let him into possession; and he now claims that, although the sheriff's deed to the plaintiff under the tax execution is older than his from the master, yet that, as his mortgage, under which the order of sale was made, had a lien before the tax execution existed, he has the better title. We suppose that such might have been the case, as against the lien of any ordinary junior judgment; but, as against the lien of the tax execution, the law de-

clares that "all taxes, assessments and penalties legally assessed shall be considered and held as a debt payable to the state by a party against whom the same shall be charged; and that such taxes, assessments and penalties shall be a first lien in all cases whatever upon the property taxed," etc.; so that, if this were all, there could be no doubt that the plaintiff would be entitled to recover the land. But the defendant makes vigorous defense, alleging irregularities and illegality in the tax proceedings, and the purchase and acceptance of title thereunder by the plaintiff. In his answer, among other things, the defendant states as follows: "Defendant admits that he claims the land described in the complaint through one Wade H. Gowan, said title being derived from a sale of said lands under an order of this court for the foreclosure of a mortgage over said land, in a proceeding instituted in this court by the plaintiff, as attorney for the said Wade H. Gowan; that said mortgage is an older and prior lien on said land than the lien through which plaintiff claims title to said land; that, pending proceedings for the foreclosure of said mortgage as hereinbefore stated, the said land was levied upon by the sheriff of this county, advertised, and sold for taxes, and the same bid off by the plaintiff, who was at the same time the agent for the said Gowan, and, if the plaintiff has any valid deed to said land, he holds the same as agent of the said Gowan; that, when the plaintiff bid off said land, he did so with full knowledge of the rights and equities of the defendant. Defendant further says that the deed through which the plaintiff claims said land is defective and void on account of the noncompliance with the laws of this state, but that, notwithstanding this fact, as well as the others heretofore stated, defendant, wishing to avoid the expense of a lawsuit, offered to pay to plaintiff any money he may have paid out on account of taxes due on said land, but that said offer was refused," etc. The cause was referred to the master to hear and determine all issues, and report his conclusions to the court, with leave to any party to except thereto. Accordingly, the master took the testimony, including the whole record in the foreclosure proceedings in the case of *Cantrell v. Gowan*, as well as the tax execution, and the sheriff's return of nulla bona as to personalty, and his advertisement of the sale and conveyance under it. After stating the important facts in the case, which appear in his report, he held "that the plaintiff was entitled to recover possession of the land in dispute, together with two hundred dollars damages. The case seems to be a hard one, but the defendant had his remedy in buying the property at the tax sale, or in paying the taxes before sale," etc.

Upon exceptions to this report, the cause came on for trial before his honor, Judge

Izlar, who, concurring in all the facts found by the master, and in his law except upon one point, pronounced judgment that the exceptions of the defendant be overruled, and that the report, as modified, be confirmed, and, thus modified, stand as the judgment of the court, etc. From this judgment the defendant appeals to this court upon numerous exceptions, which are all printed in the brief, (30 in number;) but as some of them are long, and state the same matter in different forms, we think that the points made may be more satisfactorily considered by condensing them into the following propositions, in their natural order:

1. "That his honor erred in not ruling that, where the plaintiff bid off the land at the tax sale, he was the attorney for W. H. Gowan, the then owner of the land, in a case then pending in the court between Gowan and the defendant in this action, involving the identical land, and the foreclosure of a mortgage given by Gowan thereon, and that his act in bidding off the land, and taking a deed therefor to himself, was unauthorized, illegal, and void," etc. It is very true that the relation of attorney and client is a responsible and delicate one, and the books of reports are full of evidence of the determination of the courts to maintain with scrupulous care the integrity of that relation, at all times and under all circumstances. But we cannot think it necessary, in this case, to comment on the numerous cases from different states which the research of the defendant's counsel has enabled him to bring to our attention on the subject. The general doctrine is nowhere better stated, as we think, than in 1 Amer. & Eng. Enc. Law, p. 939, as follows: "The relation of attorney and client being quasi fiduciary, all transactions between them, to be upheld, must be aberrima fides, and to establish that such is the case rests with him who would uphold the transaction. The jealous care and scrutiny over such transactions extends to all gifts, conveyances, and contracts by the client, and all securities given by him pending the relation. The foundation of the rule is the influence arising from the relation. So long, therefore, as the influence exists, the rule, of course, applies," etc. As we understand it, the above is only another form of stating the principle as it has been declared in this state. See *Miles v. Erwin*, 1 McCord, Eq. 549, where Chancellor David Johnson closed his well-considered decree in the following words: "I conclude, therefore, that all contracts between attorney and client in relation to the property in litigation are not necessarily void on the ground of that relationship, but that, to render it so, it must appear that it was used to the prejudice of the client. As a matter of proof, it is impossible to lay down any rule as to what will or will not constitute sufficient evidence of it," etc. Taking this as the settled prin-

ciple, did Mr. Wilson show the necessary good faith to his client? The master found the facts as follows: "Mr. Wilson was representing Mr. Gowan in the foreclosure suit of Cantrell against him, when the land was sold for taxes, but he made purchase at sheriff's sale for himself, and Mr. Gowan is contented and satisfied with such purchase. Mr. Gowan has never made any complaint to the sheriff concerning the sale, nor did he do so while said land was advertised." In these findings the judge concurred, and they are beyond review by this court. *Miller v. Railway Co.*, 33 S. C. 359, 11 S. E. 1093. Mr. Wilson was not the general agent of Gowan, but had been engaged to make the legal defense in the mortgage suit, and, as it seems, he did his duty in that character until the cause had been practically lost after the report of the master against Gowan in that case; and Gowan was not in the country, leaving neither money nor directions nor agent to pay the taxes on the land, or to buy it. Having discharged his duty in the foreclosure suit without success, Mr. Wilson had no dealing with his client, but bid off the land publicly at sheriff's sale, paid the purchase money, and received titles. "The law looks with proper jealousy upon contracts between an attorney and his client, to the disadvantage of the client; but here there was no contract with the client." *Le Conte v. Irwin*, 19 S. C. 558. And when it is further considered that, instead of the sale being to the disadvantage of Gowan, he makes no objection, but is "contented and satisfied" with the sale, and testified as a witness in behalf of the plaintiff, we must concur with the circuit judge that there is nothing in this exception to affect the conclusion of the master. "In order to give these rules effect, it is necessary that the relation of attorney and client should exist between the parties. The mere fact that the opposite party was an attorney, etc., is not enough. He must then have been the attorney of the complaining party." See *Mechem*, Ag. § 879.

2. "That the failure of the treasurer to make an effort to collect the taxes due by Gowan between the 15th of December, 1888, and the 2d of January, 1889, rendered the deed to the plaintiff void," etc. It appears that, while the contest over Cantrell's mortgage was going on, the land in dispute was

listed and assessed for the taxes of the fiscal year, commencing November 1, 1887, in the name of W. H. Gowan, amounting to \$26.42; and the same, remaining unpaid, became derelict on January 2, 1889. The county treasurer issued his warrant on January 23d; and the sheriff, having made return to the effect that the defaulting taxpayer, Gowan, had no personal property out of which the taxes and penalties charged could be made, seized and sold the land on sales day in August, 1889. In this state of facts, the complaint is made that the treasurer should have issued his warrant sooner, viz. on December 15, 1888, or on January 2, 1889. The master found as follows: "The time for the payment of taxes was extended in 1887, and hence the treasurer was not compelled to make effort to collect taxes between December 15, 1888, and January 2, 1889, nor, indeed, could he have done so. The facts show that he issued papers from his office as soon as he could do so according to law," etc. The judge, after stating fully the law upon the subject, held as follows: "Under this state of facts, I cannot hold that the mere fact that the county treasurer did not issue a warrant or execution against W. H. Gowan, the defaulting taxpayer, between December 15, 1888, and January 2, 1889, (even if the time for collecting taxes for said fiscal year had not been extended by the comptroller general) makes the sale thereunder irregular, and renders the tax deed in question null and void," etc. We cannot say that this was error of law.

3. "That the judge erred in not holding that at the time the tax execution against Gowan was issued, as well as at the time the land was levied upon, he was the owner of personal property, and that it was the duty of the sheriff to have levied upon and sold this before levying upon and selling the land, and that his failure to do so rendered the deed to the plaintiff null and void." This was a question of fact, and it cannot be necessary to say more than to state the finding of the circuit judge upon the subject, as follows: "In addition to the foregoing facts, an effort was made on the part of the defendant to show that the said W. H. Gowan owned, on the 15th of December, 1889, and at the time of the tax levy, sufficient personal property to pay and satisfy the taxes, assessments, and penalties charged against him. I have examined the testimony on this point very carefully, and must say that I concur fully in the conclusion reached by the master therein," etc. Exception disallowed.

4. "That the deed is void because the sheriff levied upon and sold the entire tract of one hundred and fifty acres of land without first making an effort to divide it, and sell a part," etc. It is true that there is considerable disparity between the quantity of land sold under the tax execution and the amount of taxes paid; but that may have

¹ 19 St. at Large, p. 884, § 10, provides: "That when the taxes and assessments or any portion thereof, charged against any property or party on the duplicate for the present fiscal year (1887-88) shall not be paid on or before the fifteenth day of December, 1888, the county treasurer shall proceed to collect the same together with the penalty of fifteen per centum on the amount so delinquent; and if the amount of such delinquent taxes, assessments and penalties shall not be paid on or before the second day of January, 1889, or be collected by distress or otherwise, then the same shall be treated as delinquent taxes on such real and personal property, and shall be collected by sale of such real and personal property according to law."

resulted from several causes,—possibly from the low estimate generally placed on tax titles, or the neglect of the parties in interest to attend the sale, and pay the taxes or purchase the land. The question now is whether, in a case where no fraud or collusion is charged, that circumstance alone should be considered sufficient to invalidate the sale and the deed made under it. It seems that at one time it was the law of the state that, in selling lands for taxes, the collecting officer was limited to “the person offering to pay the taxes thereon, for the least quantity thereof,” to be cut off from the northwestern corner of the tract. As we understand, however, such is not now the law, but the warrant of the treasurer is lodged with the sheriff, to be executed like other process in his hands, “by distress and sale of the personal property, and, if sufficient personal property cannot be found, then by distress and sale of the land of the defaulting taxpayer,” etc. See *State v. Turner*, 32 S. C. 348, 11 S. E. 99, and *Shell v. Duncan*, 31 S. C. 567, 10 S. E. 330. In the latter case of *Shell*, 1,200 acres of land was sold in a body to collect \$113.70 for taxes, and no objection was made on that ground to the title. It is true the act of 1887, (19 St.),¹ so often herein referred to, authorizes “the sheriff of the county to seize and take exclusive possession of so much of the defaulting taxpayer’s estate, real or personal or both, as may be necessary to raise the sum of money named therein, and after due advertisement to sell the same. * * * And after deducting from the proceeds of sale the amount of taxes and charges, to pay the excess, if any there be, to the defaulting taxpayer,” etc. It is very obvious that the main object of this act was to collect, at all events, the taxes due the state. But we do not understand that in doing so it was intended to limit the sheriff, on pain of destroying his own deed, to buying and selling only “so much” of the land as would produce the precise sum necessary to pay the taxes; for the act expressly provides that “if there is any excess it shall be paid over to the defaulting taxpayer.” This certainly contemplated the possibility of an excess. Of course, a sacrifice of property is always to be avoided, if possible. It would seem difficult, if not impracticable, for the sheriff, a ministerial officer, without the necessary machinery of law for that purpose, to determine in advance, with any degree of certainty, how much land (to be sold under a tax execution) would produce the precise sum required, and no more. But if, as argued, the power to sell “so much as may be necessary,” etc., imposed upon the sheriff the duty of determining in advance what property he should sell,—the whole, or some part thereof, as in his discretion he might think best,—it seems that he exercised that

discretion by offering for sale the whole tract of 150 acres. The result showed that the sale produced the exact amount required, leaving no excess. Under these circumstances, we cannot say that he so abused his discretion as to avoid the sale. As was said by the master: “The form of execution set out in the statute provides that the sheriff sell so much of delinquent’s property as may be sufficient to pay the taxes and costs, and it is urged that in this case the land could have been divided, and sold in separate tracts, and that either one of them would have been sufficient. The best answer to this is that, under the circumstances, the whole tract brought only enough to pay the taxes and costs. It is not what the land is really worth, but what it would bring, that should guide the sheriff in estimating how much he should sell,” etc. Both the master and circuit judge found that the levy and sale were not excessive, and that the advertisement of the sale was regular; and therefore we are constrained to agree that there is nothing in the levy, advertisement, or sale which should invalidate the plaintiff’s deed.

5. “It is contended that Mr. Floyd, the county treasurer, issued his warrant and execution for an amount including the poll tax, with the 15 per cent. penalty thereon, and that the same was not a lien on the land, which was in no sense liable therefor, and that the levy on the land for this amount rendered the deed void,” etc. The poll tax not paid, and therefore put into the warrant, with the penalty, was a small item; and, even if it should be stricken out as not allowable, I confess I do not see how that could invalidate the title of the purchaser, for the remainder of the execution would be unaffected, and, as I suppose, be sufficient to sustain the sale. But we think that the circuit judge, in his decision below, shows very satisfactorily that the treasurer was right to include the “poll tax” among the other items in the warrant. After citing the acts upon the subject, he states his conclusion as follows: “The poll tax is a tax assessed against the party. The taxes, assessments, and penalties charged against any property or party on the duplicate, and not paid within the time allowed by law, are to be treated as delinquent taxes on the real and personal property of the defaulting taxpayer, and such property may be sold to satisfy the same. This view does not appear to me to be in conflict with sections 11 and 12 of said act, and the fact that section 6 makes it a misdemeanor for any person to fail or refuse to pay his poll tax does not take away the right of the state to enforce the collection of such tax by distress or sale of the real and personal property of the defaulting taxpayer according to law,” etc. We cannot say that this was error. We think that making the failure to pay the tax a misdemeanor was intended to be “cumu-

¹ 19 St. at Large, p. 863, § 2.

lative." We also agree with the circuit judge in holding that this case does not fall under section 3, but section 2, of the act of 1887, so often referred to, and is ruled by the case of *Bull v. Kirk*, 37 S. C. 395, 16 S. E. 151, which decides that, under the circumstances of this case, the sheriff's deed is only prima facie evidence of the regularity of the tax proceedings prior to its execution, and may be attacked. But, while this is so, the burden is upon the defendant to prove that one or more of the essential requirements of the law have not been complied with, and that the tax proceedings have not been regular, which the defendant in this case has failed to do. The case is in several respects a novel one, and involves an unusual number of points. The court has endeavored to consider all the important questions made, and feels excused for saying that it has been greatly assisted by the learned arguments of the counsel on both sides. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

SMITH v. RAY.

(Supreme Court of Georgia. Dec. 6, 1893.)

APPEAL—BILL OF EXCEPTIONS—BRIEFING EVIDENCE.

The only error complained of being the granting of a nonsuit, and there being in the bill of exceptions no brief of evidence, but instead thereof a full stenographic report of the trial, containing questions to the witnesses and their answers to same, colloquies between court and counsel, rulings made by the judge, objections and exceptions thereto, and much other entirely irrelevant matter, all in total disregard of the requirements of the supreme court practice act of 1889, the case has not been brought to this court as the law requires, and the writ of error must be dismissed. The statement of the presiding judge in these terms: "I think the evidence may be better understood, as I conceived it to be, and that the supreme court can better understand the error complained of, by having before them the evidence in full, as reported by the stenographer and incorporated in the foregoing bill of exceptions,"—is without effect, inasmuch as statutory requirements can neither be modified nor dispensed with on account of any opinion a member of the judiciary may entertain.

(Syllabus by the Court.)

Error from city court. Macon county; J. P. Ross, Judge.

Action by B. B. Smith against B. H. Ray. From a judgment of nonsuit, plaintiff brings error. Dismissed.

Laws 1889, p. 114, § 1, provides: "That no case shall be taken to the supreme court by bill of exceptions, except in the following manner: If the case is not one in which a motion over new trial is to be renewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, and shall incorporate in the bill of exceptions a brief of so much of the written

or oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the record as are material to such understanding. If none of the evidence is material to elucidate the errors complained of, this fact shall be stated and the evidence omitted. The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and contain all the evidence, and to refer to all of the record necessary to a clear understanding of the errors complained of, and he shall require the clerk to send up only so much of the record as he may certify is material," etc.

M. G. Bayne, for plaintiff in error. Dessan & Hodges, L. D. Moore, Hardeman & Son, and R. D. Smith, for defendant in error.

PER CURIAM. Writ of error dismissed.

BEACH et al. v. NETHERLAND.

(Supreme Court of Georgia. Nov. 27, 1893.)

FRAUDULENT CONVEYANCES—HUSBAND TO WIFE—EVIDENCE—INSTRUCTIONS.

1. A request to charge, which is not adjustable to any correct theory of the evidence, was properly refused.

2. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Burke county; H. M. McWhorter, Judge.

Action by Beach & Farmer against W. P. Netherland. There was judgment for plaintiffs, and an execution was levied on property, to which M. J. Netherland, wife of defendant, interposed a claim of ownership. From a verdict for claimant, and an order denying a new trial, plaintiffs bring error. Affirmed.

The following is the official report:

An execution from a judgment of June 13, 1892, against Netherland, was levied November 15, 1892, on certain property which was claimed by Mrs. Netherland, the wife of the defendant in execution. The jury found for claimant, and the plaintiffs excepted to the refusal of a new trial. The claimant introduced a bill of sale to her from her husband, dated December 4, 1891, reciting a consideration of \$780.80, covering all the personal property of the husband which was on the plantation owned by her and where they resided. The paper contains the following: "This bill of sale is intended to cover all personal property owned by the said W. P. Netherland on the plantation aforesaid, and is sold subject to a crop mortgage and a bill of sale on said personal property given by said W. P. Netherland to Wilkins, Neely & Jones, to wit, a bill of sale dated Feby. 2, 1891, and a crop mortgage dated October 30, 1891, both of which are recorded in the clerk's office, Burke county. The payment of this balance due said Wilkins, Neely & Jones,

about \$400, more or less, on said bill of sale and mortgage, which balance has been assumed by said Mary J. Netherland, is hereby made a part consideration of this bill of sale, in addition to the consideration first above mentioned. The property hereby conveyed is mine, and subject to no other incumbrance than those above mentioned." Netherland, the defendant in execution, testified: "I owed my wife \$200 insurance money she got on her father's life, and let me have it, and then I rented out some of her land to tenants, and collected the rents, and she let me have the money. All these amounts aggregated the sum of \$780.80. And then she took up the amount I was owing to Wilkins, Neely & Jones of \$400, and these amounts are the consideration of this bill of sale. It was not made to defraud any one, but was a bona fide debt I owed my wife. I conveyed to her all the property I owned. I remember Mr. Farmer coming to see me before the time this suit was begun, and I told him, if he pressed me, I would make over all my property to my wife, as I owed her and Wilkins, Neely & Jones both, and that would have to be paid. I deny positively that I ever told Mr. Farmer that I didn't owe my wife, but would owe her if he pressed me. On the contrary, I distinctly told him that I did owe her at that time. [Witness testified to the various items of indebtedness, consisting of money loaned, rents collected and appropriated to his use, etc., which make up the total of \$780.80 named as the consideration of the bill of sale.] I gave my wife due bills for the money borrowed and for the rents appropriated. The property conveyed by the bill of sale is not worth exceeding the sum of \$780.80, named as the consideration, and not that much." J. R. Roberson testified: "Mrs. Netherland is my sister. I know of her letting her husband have the \$200 insurance money. I also know that her husband rented out the land she was in possession of, and he kept the rents, and used them for himself. She was in possession of this land before my father's death, in 1886, and part of this rent is for that time. Netherland rented the land in his own name, and took the rent notes to himself, but he gave his wife duebills for the rent after he would collect it. Since our father's death, Mrs. Netherland has retained the land the same as before, and Mr. Netherland has appropriated the rents." L. R. Farmer testified: "Went to see Netherland about the time this suit was filed, and he threatened, if I sued him, he would sell out to his wife. I talked with him some time, and asked him if he owed his wife. He said, 'No,' but he would let her take up Wilkins, Neely & Jones' debt, and he would owe her then, as they held a mortgage, and it must be paid." The motion for new trial alleges that the verdict is contrary to law and evidence; that the court erred in allowing the claimant to introduce the bill of sale, over objection of plaintiffs' counsel; and that the court erred

in refusing to give the following charge to the jury: "If you believe from the evidence that the only real consideration in the bill of sale from W. P. Netherland to his wife was the \$400 paid Wilkins, Neely & Jones, then this was a void consideration, and cannot alone support the bill of sale, it being conceded that the other named consideration of said bill of sale was more than the value of the property covered thereby."

Phillips & Phillips, for plaintiffs in error.
Johnston & Brinson, for defendant in error.

PER CURIAM. Judgment affirmed.

SIMPSON v. STATE.

(Supreme Court of Georgia. Nov. 20, 1893.)

INTOXICATING LIQUORS—SALE TO INTOXICATED PERSON—INSTRUCTIONS—NEW TRIAL.

No error was committed on the trial. There is no merit in the ground of newly-discovered evidence. The verdict was right, and the court properly refused to grant a new trial. (Syllabus by the Court.)

Error from criminal court of Atlanta; T. P. Westmoreland, Judge.

J. W. Simpson was convicted of selling intoxicating liquors unlawfully, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

Simpson was tried in the city court on an accusation of selling liquor to J. I. Clay, who was intoxicated or drunk at the time. After verdict of guilty, the defendant's motion for a new trial was overruled, and he excepted. (1) The first special ground of the motion is that the court charged thus: "If, after you have considered the evidence in the case fairly and impartially, with a desire to arrive at the truth, you believe, beyond a reasonable doubt, as I have explained to you, that this man is guilty, you are authorized to convict him." The error specified is that the court failed to couple the prisoner's statement with the evidence, in this instruction. (2) The court charged that "a juror cannot raise a doubt in his own mind, and then acquit on it." This is complained of as error, because "each juror should decide for himself, upon his oath, as to what the verdict should be, and should not be hampered with the charge of the court." (3) During the argument of the state's solicitor, he called the court's attention to the distinction between the terms "intoxicated" and "drunk," and evoked from the court this statement, in the presence of the jury: "There is, I think, a distinction between the terms 'intoxicated' or 'drunk.'" Thereupon, defendant's counsel made a written request of the court to give the following instructions to the jury, and the court's refusal to do so is assigned as error: "I charge you that there is no distinction between the terms 'intoxicated' or 'drunk.' Neither term means that a man must be down.

and unable to walk, but if his conduct is such that a man whose duty it is to know whether or not a man is intoxicated or drunk, and this he must ascertain by the exercise of ordinary diligence. (Define the term of 'ordinary diligence.') You must look to the circumstances, and ascertain for yourselves as to whether or not Clay was intoxicated or drunk. You can look at the circumstances of no arrest on the occasion testified about. You can look at the circumstances that no witnesses were introduced, except the kin-folks of Clay." (4) The motion also contains the ground that the verdict is unsupported by the evidence, and a ground of alleged newly-discovered testimony. The evidence at the trial consisted of the testimony of Clay's wife, and his brother and sister. From this it appears that, on two occasions within the past two years, he bought liquor from the defendant, and was drunk at the time he bought it. On the first occasion, he staggered as he went into, and when he came out of, defendant's barroom; and, after he came out, his wife, who was waiting for him, prevailed on him to give the bottle to her, which she carried back to the counter, and delivered to the defendant, with the admonition not to sell her husband any more whisky. The defendant gave her the money which he had received for the liquor, and she took her husband home. On the way, he stopped at a store, and cursed the storekeeper, without apparent cause. His wife soon afterwards got him upon a street car, which took them to their home, where he lay across the bed, and could not be got up until the next morning. His wife testified that she did not remember seeing or meeting any policeman after leaving the barroom, and that her husband was not arrested, or in any way interfered with. Clay's sister testified that when he is drinking he is very wild, and when he is drunk he is like a dead man. His brother testified that Mrs. Clay sent him to watch her husband in last June, to find out, if possible, where he got his liquor. Witness watched him for more than three hours. He was in and about a wagon yard opposite defendant's place of business, and, while in this yard, witness saw him break an empty flask, and then take his money and scatter it on the ground. Between 7 and 8 o'clock that evening, witness saw him cross the street, and enter the defendant's barroom, which was crowded with negroes, and soon afterwards saw him walk up to the counter, and receive from the defendant a half-pint flask of white liquor, which he put into his pocket and went out. Part of the time, he walked straight; and part, he would stagger. He was drunk. Witness saw no more of him until he came home the next morning, about 4 o'clock. The occurrences related took place near the station house on Decatur street, "recognized as a pretty tough street." Witness saw policeman, but did not ask Clay to go home with him, or threaten to have

him arrested if he did not, and said nothing to defendant about it. When Clay is drinking, he is pretty wild and talkative, and anybody can tell he is intoxicated or drunk. The defendant introduced no evidence, but made this statement: "I have been in the whisky business four or five years, and this is the first time I have ever had a case made against me. I try not to violate the law, if I know it, and I do not recollect ever selling any whisky to J. I. Clay when he was intoxicated or drunk. This is all I have to say." The newly-discovered testimony is contained in an affidavit of Clay that he has never been arrested for being drunk but twice, on the first of which occasions he was fined by the city recorder for drunkenness and disorderly conduct, and on the latter was acquitted; "that he always drinks more or less, but, when he feels his whisky, no one not intimately acquainted with him can tell that he has been drinking, and in that particular he is not unlike a great many other men;" that "in the past three years he has bought and paid for a home, now worth \$1,100, by his own labor, the sum of \$500, except \$75, and supported himself, wife, and two children; that he has been married 12 years, and has never stayed away from home but 2 nights during that time;" and that he never said anything about these facts to the defendant or to his attorney until after the conviction. Accompanying this were affidavits,—one by M. J. Priscock, that he is acquainted with Clay, and knows him to be a man of good character and worthy of belief; and one, each, by the defendant and his counsel, that they did not know of the evidence contained in Clay's affidavit until after the trial, and that their failure to discover the same before the trial was by no lack of diligence on their part. This showing was met by a counter showing on the part of the state to the effect that Clay was under the influence of liquor when he made the above affidavit, and did not understand what he was swearing to, and that the statements made therein are not correct in fact. There were three affidavits produced by the defendant in rebuttal of the counter showing, to the effect that, if Clay was under the influence of whisky when he made the affidavits, the affiants did not detect it, but his speech and behavior were such as to impress a witness to the contrary.

R. J. Jordan, for plaintiff in error. Lewis W. Thomas, for the State.

PER CURIAM. Judgment affirmed.

OWEN v. SMITH.

(Supreme Court of Georgia. April 17, 1893.)

DEED—CONSTRUCTION—CONSIDERATION—GIFT—INSTRUCTIONS.

1. Where it is doubtful whether an instrument in the form of a deed, attested and de-

livered as such, and showing upon its face that it was made partly for value, and partly for love and affection, be testamentary or not, some of its language importing a present conveyance, with reservation of a life estate, and some indicating a purpose to postpone the vesting of title until the death of the maker, the safer and better construction of the instrument is that it was intended to pass an interest at the time of delivery, and to postpone only the possession and use.

2. On the trial of a case involving capacity to make a deed of conveyance, the court is not bound to give in charge to the jury the law of testamentary capacity.

3. Where, according to the face of the conveyance, it is founded upon a mixed consideration, consisting in part of love and affection, and in part of money or services, mere inadequacy of the latter part is no cause for setting the conveyance aside, and raises no presumption against the capacity of the maker, or against the good faith and fair dealing of the beneficiary. A widow, who, during the lifetime of her husband, voluntarily put herself in loco parentis to his bastard son, and has so continued since her husband's death, may extend her bounty to such son, by a deed of gift, as if he were her own offspring.

4. In view of the evidence, and of the charge as given, there was no error in refusing to charge as requested, whether the requests be taken severally or all together. The evidence, though in some respects conflicting, warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Thomas county: A. H. Hansell, Judge.

Action by James T. Owen, guardian, against William T. Smith, to cancel a deed. There was judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

A bill in equity was brought in 1887, on behalf of the grandchildren of George E. Smith, deceased, to set aside an instrument of conveyance to William T. Smith, an illegitimate son of George E. Smith, executed by the wife of George E. Smith, the grandmother of plaintiff's wards, shortly before her death. The grounds of attack on the instrument were that it was not a deed, but was testamentary in its character, and was void for being attested by only two witnesses, and that it was void as a deed because the maker was mentally incompetent to make it, she being feeble in mind and body from old age; because she was easily controlled and influenced by the defendant, William T. Smith, who did exert undue influence over her to induce her to make the conveyance, when she would not otherwise have made it; and because the consideration was grossly inadequate, and the execution of the paper was procured by the defendant by fraudulent promises, persuasions, and practices, etc. The court construed the paper to be a deed, and submitted the issues made by other allegations to the jury, who found in favor of the defendant. The plaintiff moved for a new trial, which was denied, and he excepted. The instrument in question is dated October 1, 1887, and is between Sarah Smith, of the one part, and Willie T. Smith, of the other part. It re-

cites that whereas, in the division of the estate of George E. Smith, deceased, there was an agreement that Sarah Smith should have all the real estate belonging to him that lay in Thomas county, and the heirs of her son L. D. Smith, represented by their guardian, J. T. Owen, should have the lands in Mitchell county, which agreement and division were ratified and confirmed by Sarah Smith, widow of George E. Smith, J. T. Owen, guardian of the children of L. D. Smith, deceased, and R. B. Mardre, administrator of George E. Smith, and a consent decree of the superior court is to be taken, ratifying and confirming this agreement and division so made, "the said Sarah Smith hath given, granted, bargained, and sold unto the said Willie T. Smith, in consideration of the sum of ten dollars (\$10.00) to her in hand paid, as well as for the natural love and affection which she has and bears towards the said Willie T. Smith, upon the conditions and reservations and limitations hereinafter named, [certain described land;] also, all of her personal property, consisting of various kinds of stock and household and kitchen furniture. The terms, conditions, and limitations upon which the aforesaid property is to vest in the said Willie T. Smith are as follows: She reserves to herself a life estate in the whole of it, with power to direct, manage, and control it as she sees proper during her lifetime; and she is to be consulted by the said Willie in all things, and, if they differ in opinion as to the management of matters or things, her views are to control; and the said Willie is to live with her, care for and provide for her, supply her necessary wants, take care of and protect the property and herself as a dutiful and affectionate son would take care of an old and invalid mother; and, upon compliance with these terms upon the part of said Willie T. Smith, whatever, at her death, is left, together with the natural increase thereof, and such addition as may be made thereto by the thrift and industry and care of the said Willie T. Smith, is to belong to the said Willie T. Smith, his heirs, assigns, executors, and administrators, in fee simple." There was testimony for the plaintiff to the effect that the maker of the deed was an invalid, and not capable of attending to ordinary business, at the time it was made; that the defendant had great influence with her, and had stated that she was mentally incapable; that she did nothing of consequence without consulting him, etc. She died about three weeks after the deed was executed, in her seventy-seventh year. On the other hand, the testimony for the defendant was that her mind was strong and clear; that she was capable of attending to her affairs, and did so; that she directed the drawing of the deed, after the division was made between her and the plaintiff's wards of her own volition, and without any suggestion from the defendant, and it was

drawn exactly in accordance with her wishes; that it was read over to her at the time of execution, and she said it was just as she wanted it, and afterwards stated that she wanted the defendant to have her share of the property, and had so fixed it, and that Dow's children (plaintiff's wards) had property of their own, and she thought it was enough for them. The defendant was raised from infancy by her and his father, in their house, as one of their children, and had always behaved as a dutiful son, etc. The grounds of the motion for new trial, besides those alleging that the verdict is contrary to law and evidence, are that the court erred in refusing to give in charge the following, as requested: "In case of wills, if the testator or testatrix is of weak mind, and is moved to make a will, and the legacy is great, the law presumes the moving is not right or lawful; a presumption to be repudiated only by bringing something sufficient to show the will to be such as a person of average mind, morals, and family love might be supposed to be willing to make. Great inadequacy of consideration, when joined with great disparity of mental ability in contracting a bargain, may justify a court of equity in setting aside a sale or other contract. Although the natural influence arising from the relation of parent and child by those who possess such influence to obtain a benefit for himself in a matter of gift among the living will be held to be an undue influence, though such influence may be used in obtaining a legacy, provided the testator or testatrix understand what he or she is doing, and is a free agent. While inadequacy of price is no ground for a rescission of contract of sale, unless it is so gross as, combined with other circumstances, to amount to fraud, yet, if the inadequacy be great, it is a strong circumstance to show fraud. When the party making a deed is weak in mind, and liable to be imposed upon, if the evidence shows the least spark of imposition or fraud, the deed will or ought to be set aside. Whenever there is great weakness of mind, though not amounting to absolute disqualification, arising from age, sickness, or any other cause, in a person executing a conveyance, and the consideration given for land is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party or his representative or heir, set aside the conveyance." At the conclusion of the general charge, the plaintiff's counsel orally requested the court to charge that, if the jury should determine to set aside the deed, they could then proceed to divide the property between the two heirs at law. This the court refused, and charged that the jury could find only for or against the deed. This refusal is assigned as error.

W. M. Hammond, MacIntyre & MacIntyre, and J. H. Lumpkin, for plaintiff in error.
J. R. Alexander, for defendant in error.

v.188.E.no.14—34

BLECKLEY, C. J. 1. The instrument to be construed shows on its face that it was made in consideration of \$10 and of love and affection. It shows, also, that future services to be rendered by the grantee to the grantor were contemplated as a part of the consideration. It is certainly doubtful whether the instrument is testamentary or not. Some of its language imports a present conveyance, with the reservation of a life estate, and some indicates a purpose to postpone the vesting of title until the death of the grantor. We think the trial court adopted the safer and better construction in holding that the instrument was a deed, and not a will. It is manifest that the maker did not intend to confer a mere bounty, but expected to receive some compensation for the conveyance, in the way of services rendered to her, and to be rendered as long as she lived. It is equally manifest that she intended the grantee to be owner of the property at some time, and that she intended to retain possession, and a supervision over the control and use of it, during her own life. A reasonable supposition as to her real intention is that an interest was to pass to him at the time of the delivery of the deed, with a postponement only of the possession and use until she should be dead.

2. After holding the instrument to be a deed, the court was not bound to give in charge to the jury anything whatever as to the law of testamentary capacity. The capacity in question was of a higher order; and while the court, in expounding its requisites, might have referred, not improperly, to the lower capacity requisite to make a will, the refusal to do so was not erroneous.

3. The consideration being a mixed one, consisting in part of love and affection and in part of services, to say nothing of the \$10 expressly mentioned, any disproportion between the value of the services and the value of the property conveyed would raise no presumption against the capacity of the grantor, or against the good faith and fair dealing of the grantee. Any such disproportion or inadequacy would be fully covered by the other part of the consideration, namely, love and affection. That would be sufficient to uphold the whole conveyance, irrespective of the value of the property. Nor would this part of the consideration be vitiated or weakened by the fact that there was no blood relationship between the parties. The maker of the deed, Mrs. Smith, was the widow of the grantee's father. During her husband's lifetime she had put herself in loco parentis to this bastard son, and after his death had so continued. According to the evidence, there was between them the regard and affection of parent and child. This being so, she could make a deed of gift to him, the same as if he were her own offspring.

4. We have carefully examined the evi-

dence and the whole charge of the court, as given. In view of these, there was no error in refusing to charge as requested, no matter whether the several requests be considered separately or collectively. In some respects the evidence was conflicting, but the jury settled the conflict, and upheld the deed. The verdict was warranted, and there was no error in refusing a new trial. Judgment affirmed.

ADAMS et al. v. WILDER.

(Supreme Court of Georgia. April 17, 1893.)

DOCUMENTS—PAROL EVIDENCE AS TO LOSS OF SEAL.

Without some evidence of the genuineness of an unsealed document offered in evidence as a plat and grant from the state, the exclusion of the evidence of a witness that "the wax and seal had been attached to said plat and grant, and was lost," was not erroneous.

(Syllabus by the Court.)

Error from superior court, Dooly county; W. H. Fish, Judge.

Action in ejectment by J. J. Adams and others against John H. Wilder. From a judgment of nonsuit, plaintiffs bring error. Affirmed.

The following is the official report:

An action of ejectment was brought upon the demises of J. J. and James Adams, which was amended by striking said demises, and inserting in lieu demises of Jephtha Pickett, J. H. Wilder was the defendant. The bill of exceptions states that plaintiffs tendered in evidence, as a part of their chain of title, a plat and grant from the state to one Sanders, conveying the land; that defendant objected to the plat and grant, on the ground that the wax and seal were not attached thereto; that plaintiffs offered to prove by one J. N. Brooks that the wax and seal had been attached to the plat and grant, and was lost; that the court ruled that plaintiffs could not prove the loss of the wax and seal by parol evidence, but would have to prove the same by certified copy, to which ruling plaintiffs excepted; and that, the court having ruled out the plat and grant, plaintiffs closed, whereupon the court granted a nonsuit, to which ruling also plaintiffs excepted. In a note to the bill of exceptions, the court says: "The court did not rule that the loss of the wax and seal would have to be proved by a certified copy of the grant, but ruled as follows: The defendant objected to the plat and grant, because they were torn or worn into many pieces, and were unintelligible, and because there was no seal attached. They were badly mutilated, but might have been intelligible, possibly, by carefully putting the many pieces together. The court held, upon these facts, that there should be proof of the existence of the original grant by the production of a copy from the secretary of state's office, before the oral evidence of the loss of the seal was admissible."

Hudson & Blalock, for plaintiffs in error.
Martin & Smith, for defendant in error.

BLECKLEY, C. J. The document tendered in evidence as a plat and grant from the state to Sanders was in ruins. It was a mass of fragments, which may or may not have been intelligible had they been carefully put together. There was no proof of their genuineness, or that the instrument, which might possibly have been reconstructed by a proper arrangement of the several fragments, was ever executed. The effort was to verify and authenticate the mass by showing "that the wax and seal had been attached to said plat and grant, and was lost." This evidence would have been admissible had there been proof by a certified copy from the secretary of state's office, where all grants are recorded, and in which the record of all plats, as well as of the grants, is now preserved, under the public laws of the state, showing, by necessary inference, that a genuine plat and grant had once existed. There can be no doubt that for this purpose such a copy would have been competent and appropriate evidence. The very object of attaching the great seal of the state to a plat and grant is to authenticate their official execution by the proper officers. The genuineness of the seal itself is always determined by the court from inspection, and, the seal being genuine, it vouches for the genuineness of the document to which it is attached. But, when the seal is not produced, no inspection by the court can take place, and the mere testimony of a witness that the wax and seal had been attached to the document could be no substitute for inspection by the court as a means of inferring genuineness of the document. There can be no trial by inspection on a past inspection made by a witness. There must be a present inspection made directly by the court. In *Doe v. McKilvain*, 14 Ga. 252, the absence of the seal was accounted for by parol evidence, but there was other evidence from which the genuineness of the document could be inferred. Judgment affirmed.

NEAL et al. v. REYNOLDS et al.

REYNOLDS et al. v. NEAL et al.

(Supreme Court of Georgia. April 24, 1893.)

AMENDMENT OF PLEADINGS — APPEAL FROM JUSTICE'S COURT — OBJECTIONS TO JURISDICTION — USURY.

1. When an appeal is pending in the superior court from a judgment rendered by a justice of the peace, the summons is amendable in matters of substance as well as matters of form, provided there is enough to amend by. There was enough to amend by in this case, and, the requisite amendments being made, the defects complained of were not cause for dismissing the action.

2. On the hearing of an appeal in the superior court, it is immaterial whether the judgment appealed from be void or valid, if the ap

pellee recognizes the appeal as duly taken, and raises no question touching the validity of the judgment below. The appellant, by entering the appeal, recognizes the judgment as the basis of it, and as something needful to be appealed from. Nor can he urge that the appeal was entered too late. The amount and date of the judgment need not be inquired into at the instance of the appellant.

3. After several appeal cases have, with the consent of parties, and by order of the appellate court, been consolidated into one case for trial, it is too late for the appellant, by plea or motion, to attack the jurisdiction as to one of the consolidated cases on the ground that the amount involved therein was too small to bring it within the statute allowing appeals. If the appellant regarded it as too small, he should not have entered the appeal, nor should he have consented to the consolidation, so as to make that case abide the final judgment in the consolidated case.

4. Promissory notes, given when there was no statute on the subject of usury, and no limit as to the amount of interest, are not usurious, no matter how much past interest or usury was embraced in them as a part of the principal. If the debt was good and valid as to the principal, and was mature at the time the notes were given, and by the notes the day of payment was postponed, this postponement was a sufficient consideration, both for the interest and usury embraced as a part of the principal, and for future interest at the rate expressed in the face of the notes.

(Syllabus by the Court.)

Error from superior court, Bartow county; Shelby Attaway, Judge pro hac.

Six actions by T. B. Neal and another, executors, against P. H. Reynolds and others. When the cases reached the superior court, they were consolidated, and plaintiffs had judgment. Plaintiffs and defendant Reynolds each bring error. Affirmed.

The following is the official report:

Six justice's court suits were brought by Neal against Branson, Reynolds, and Tumlin, and judgments were rendered against the defendants. They appealed to the superior court, where their cases were consolidated and tried together, being referred to a special master. To his report, exceptions were filed by both sides. All of these, but one, were overruled, and judgment in favor of the plaintiffs, the executors of Neal, was rendered. Reynolds brought his bill of exceptions, and a cross bill of exceptions was taken by the plaintiffs. The suits were on five notes for \$100 each, and one for \$30, dated December 12, 1873, due October 25, 1874, stipulating for interest at 18 per cent. per annum, and signed by the defendants. In the superior court were filed pleas setting up usury, apparently on behalf of the defendants, but sworn to be Branson only. After the plaintiffs had put in evidence before the master the original notes sued on, Reynolds moved to dismiss the appeals because it did not appear from the record that the same were entered within four days from the date of the rendition of the judgments in the justice's court from which the appeals purported to have been entered, nor at what date the judgment was rendered in the justice's court in either of the cases, nor

that any judgment was rendered. He further moved to dismiss the appeal in the suit on the \$30 note because the amount claimed was less than \$50. He further moved to dismiss the actions as to himself (averring that he had never appeared or pleaded thereto, except for the purpose of insisting on the following grounds) because (1) the summons did not command him to appear in the justice's court from which the appeal was entered; and (2) did not mention any militia district in or for which any justice's court was to be held; and (3) was not made returnable to any court, nor did it command him to appear at any court, nor recite that any court would be held on the date on which it was made returnable, nor that the place of return mentioned therein was the usual place of holding justice's court in and for the 952d district, G. M.; (4) no judgment was rendered in the case in the justice's court of the 952d district, G. M., on February 3, 1877, the date on which the summons was made returnable, nor does it appear that any justice's court was held on that day, nor any action taken in the case in said court on that day; (5) the summons was not directed to defendant Reynolds, nor did it command him to appear anywhere at any time, but was only directed to, all and singular, the constables of said county, and commanded them to appear. The following is a copy of one of the summonses in question: "Georgia, Bartow county. John Neal v. J. C. Branson, P. H. Reynolds, and Thomas Tumlin, sect'y. To All and Singular, the Constables of Said County: You are hereby required to appear, personally, or by attorney, at my office, in Kingston, on the 3d day of Feb'y, 1877, to answer the plaintiff's demand in action of debt due by note for one hundred dollars, as in default thereof the court will proceed as to justice may appertain. This Jan'y 8th, 1877. L. Burrough, J. P. [L. S.] The others contained the words, "To the defendants," just before the words, "You are hereby required," etc., and the words, "as per copy below," immediately after the words, "note for one hundred dollars." Over objection, the master allowed the plaintiffs to amend the summonses by inserting at the proper places therein the words, "952d Dist. G. M.," and the words, "to execute and return," and the words, "To the defendants," and the words, "at the usual place of holding justice courts in said district." To the allowance of this amendment, and to the overruling of the motion to dismiss, Reynolds excepted. He pleaded that on February 3, 1877, L. Burrough, J. P., without his consent, and in his absence, continued the cases to a date more than 10 days afterwards, and hence the suits, if valid as to him, as commenced, thereby lapsed and became discontinued, and the so-called "judgments" rendered on February 23d were, as to him, null and void; he never having consented to the trial on the day

the judgments were rendered, nor to the continuance, nor was he present, nor did he, then or previously, appear or plead, or in any manner waive his right of objection to said proceedings. He also pleaded that he was only surety on the notes, though the word "surety" was omitted after his name; further, that the judgments were rendered against him at a day other than that upon which he was summoned to appear, and not upon the regular day set for the court for the trial of these cases, nor upon a regular court day, nor had he his day in court, and that, as to two of the cases, he was not in any manner summoned to appear, nor did he appear and plead, nor waive summons or service.

The master found that a justice court was held in and for the 952d district, G. M., at Kingston, by L. Burrough, J. P., on February 3, 1877; that the cases were regularly continued on that day; and that, while the testimony is somewhat conflicting as to the number of continuances, the justice's docket shows only one continuance. And the master reports that there was but one, and that it was from February 3d (Saturday) to February 23d, (Friday.) He holds that, under the then existing laws and practice in justice courts, this was simply an irregularity, and would not invalidate the judgments. He further finds that they were rendered on a regular court day, and are valid and binding against all the defendants, and, though Reynolds was not present when the cases were continued, he was informed by the justice, after the court had adjourned, February 3d, that the cases were continued to the next regular court day. The evidence does not show that he was informed what day that would be, nor that he inquired, or took any steps to ascertain, but, when informed of the continuance by the justice, he did not dissent or object. The master reports that the place where these judgments were rendered was the usual and legally established place of holding justice courts in and for the 952d district, G. M., and that Reynolds did not appear or plead on February 3d. These findings are excepted to by Reynolds because, as he alleges, the justice court had no authority to continue the cases for more than 10 days, and hence the judgments rendered on February 23d were null and void, the court having lost jurisdiction. He further says that under the law, as then existing, there were no regular court days in justice courts, and that the day on which the judgments were rendered was not a regular court day. The master further reported that the appeals in these cases were entered within four days after the judgments were rendered; also, that the appeal from the judgment on the \$30 note was properly and legally appealed, for the reason that the sum claimed, principal and interest, with accrued costs, amounted to more than \$50. Reynolds assigns error because the principal and in-

terest, at the date of the judgment in the justice's court, amounted to a few dollars less than \$50, and no evidence appeared before the master as to the amount of cost accrued, and insists that, the principal and interest then being less than \$50, the case was not appealable to the superior court, whether the cost added would make the sum over \$50 or not. On the question of usury the master found, as a fact, that the six notes in question were given in renewal of four notes aggregating \$350, executed in 1871, while usury laws were of force; that the original amount loaned on the first notes was \$300, and the original notes were usurious; that afterwards, December 12, 1873, the usury laws having been repealed, these six notes, aggregating \$530, covering and including the original loan of \$300, were executed, adding to the \$300 interest at 18 per cent. per annum, making the \$530; that the original notes were then long past due, and indulgence or forbearance was granted by Neal, and the new notes made to fall due October 25, 1874; and that they included the original loan of \$300, with 18 per cent. interest from March 7, 1871, to December 12, 1873. As a matter of law, he reported that on December 12, 1873, no usury laws were of force, and parties could legally contract for any rate of interest they saw proper, and the usury contracted to be paid while usury laws were of force could be included in the new notes without the taint of usury attaching to the new promises, and that the forbearance or indulgence granted by Neal was a sufficient consideration to support the transaction and new promise, and the defendants were bound thereby. This finding is assigned as error by Reynolds, because, he says, it did not appear from the evidence that the usurious interest accruing on the original loan was included in the new loan by any express agreement of the parties that it should form any part of the consideration for future forbearance by Neal, and that in the absence of such understanding the notes sued on were invalid, to the extent of the usury accruing from March 7, 1871, to December 12, 1873, and remained tainted thereby, and were pro tanto without consideration, and should have been reduced. Reynolds also filed exceptions of fact involving substantially the same questions as appear from his exceptions of law. As a further exception of fact, he says that the master erred in reporting that there was no evidence before him to show that Reynolds was only security for Branson on the notes sued on. It is alleged that the testimony of Mark A. Hardin clearly shows that the notes sued on were given in renewal of notes given for a former loan made by Neal to Branson early in 1871, for which former loan Branson gave his notes with Thomas Tumlin and one Gillman as security; that the consideration of the notes now sued on was received by Branson, and not by Reynolds; and that

the object of the signature of Reynolds to the renewal notes was to secure a debt of Branson, which he previously owed Neal, on which former notes Reynolds was in no way liable. From which testimony, as well as from the whole testimony before the master, it is alleged that he should have found Branson liable, if at all, only as security. This was the only exception to the master's report that was sustained.

The plaintiffs assign error upon the ruling of the auditor admitting the testimony of Mark A. Hardin over their objection on the ground that Neal was dead, and the facts testified to by Hardin could have been testified to by Neal, were he alive, and were facts of which Neal had knowledge, and that Hardin was the agent of the defendants in the transaction, and especially of Branson. The master found that Hardin was not connected with the notes sued on, nor with the transaction, in any way, when Reynolds became a party thereto. And the plaintiffs further except to the judgment of the court in overruling the master's finding that Reynolds was not a surety on the notes. Other assignments of error by the plaintiffs are as follows: In the finding that the notes sued on were given in renewal of four notes aggregating \$350, executed in 1871; plaintiffs contending that no such fact was proved by the evidence. In the finding that the original amount loaned on the first notes was \$300; plaintiffs contending that the evidence did not disclose what was loaned upon them, nor when due, nor whether they bore any interest. In the finding that the cases were continued in the justice's court more than 10 days, which continuance was but an irregularity,—plaintiffs contending that such was not irregular, but entirely regular; that the master should have found that the suit on the \$30 note was properly appealed to the superior court, not only for the reason given by him, but because the defendants were estopped from moving to dismiss the appeal, or from excepting thereto, on the ground that the amount did not exceed \$50 at the time of judgment. In the finding that the original notes for \$350 were usurious; there being no evidence that they bore interest, nor when they were due or dated, and the evidence showing no usury therein. In the finding that there was but one continuance in the justice's court, and that the same was for more than 10 days; plaintiffs contending that the evidence showed that there were two or more continuances, no one of which was for more than 10 days. In the judgment of the court refusing to strike the defendants' pleas of usury on plaintiffs' demurrer thereto because they set up no sufficient defense, and showed no usury.

Denn & Smith, Neel & Swain, and Harrison & Peeples, for plaintiffs. John W. Akin, for defendants.

BLECKLEY, C. J. 1. When a case is on appeal in the superior court from a justice's court, any amendment of the summons whether in matter of form or of substance, may be made, which could have been made while the case was pending in the primary court. The only restriction on either court is that there must be enough to amend by. Code, § 3479. There was enough to amend by in the present case, and the amendments made cured the defects complained of.

2. Surely, the appellant should not be allowed to break up his own appeal by urging that he had taken it too late, or from a void judgment, or from one too small in amount. After securing the delay incident to the appeal, he might well bide the election of the other party on such questions as these. What the appellate court might do on its own motion, for its own ease or protection, need not be considered. Certainly, it is not obliged to take notice of such things at the instance of the appellant, but can assume, without inquiry or examination, that the appeal was well taken, the other party being satisfied with it.

3. The consolidated case was not subject to be reopened or remodeled or defeated by looking into the amount involved in one of the separate cases embraced in the consolidation. The order or judgment of consolidation was passed at the instance of both parties. Why should it be disregarded at the instance of one of them? Besides, the one who sought to recede was the appellant,—the same party who brought all the cases into the superior court, and caused that court to be troubled with them. For this reason, the principle of the ruling just made under the preceding head of this opinion applies here, also.

4. On the question of usury, it is to be observed that there was no usury law in force when these notes were given. This being so, there was no obstacle to charging interest, to an unlimited amount, for the future use of money then due from the debtor to the creditor, and for future forbearance to require or enforce payment; and it mattered not whether a part of the interest so charged was added to and made a part of the principal of the notes, and a part covered by a rate named in the notes as that which the principal, thus enlarged, was to bear, or whether the amount actually and legally due when the notes were given, and that only, was made principal, and the whole interest provided for by naming in the notes a rate of interest on that principal which would produce, by the time the new term of credit expired, an aggregate sum for interest equal to the total interest charged. It is matter of indifference, when there is no usury law in force, whether interest, the whole or a part of it, be added to the principal, or whether the principal, pure and simple, be expressed in the note, and the rate of interest named in the instrument be made high enough to

produce all the interest agreed upon. In the notes now under consideration, a part of the sum charged for interest, and agreed to be paid, was incorporated with the principal, and a part was to accumulate as interest, *eo nomine*, at the rate mentioned on the face of the notes. But the two controlling facts are: First, there was a sum actually and legally due as the principal of prior notes at the time the new notes were given; and, secondly, a new term of credit was agreed upon, and the day of payment of the money already due was postponed accordingly. This postponement was a sufficient consideration for all the interest agreed upon and promised in the new notes,—both that which was embraced in the notes as principal, and that which was not so embraced, but was provided for by the rate of interest which the notes specified. True, this would give interest upon interest, to the extent of so much of the nominal principal as was made up of interest; but compound interest is not usury, any more than simple interest is usury, when no usury law is in existence. Thus far, we have treated the case without reference to the fact that the notes now in controversy were given in renewal of prior notes which were infected with usury. Did the infection of the first set of notes taint the second? We think not. The usury of the first set did not taint the principal of that set, but left it pure and collectible. That principal went into the second set. As there was no usury law, the granting of further time for paying that money upon a new agreement was the same, in effect, as receiving on the first notes that amount of money in payment, and then loaning it again for the new term of credit, and taking therefor these new notes. Had this course been pursued, no one would suspect or imagine that any of the interest covered by the new notes would have been usury. With a good principal, the term of credit to serve as a consideration for unlimited interest, and no usury law, how is it possible to make a contract which can rightly be held to be tainted with usury, either as to the whole of the interest, or any part of it? *Ballard v. Bank*, 61 Ga. 458. Judgment affirmed. Cross bill dismissed.

SHOMO v. RANSOM.

(Supreme Court of Georgia. May 22, 1893.)

ACTION FOR BREACH OF CONTRACT—NONSUIT.

The declaration alleging an unconditional contract for the sale of 500 cases of eggs, and the evidence not establishing such a contract, but one materially variant therefrom, there was no error in granting a nonsuit, whether the affidavit which the court considered was properly in evidence or not.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action for breach of contract by A. M. Shomo against A. B. Ransom. From a

judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

Shomo sued Ransom for damages because of the failure of Ransom to deliver eggs according to an alleged contract between the two. After hearing the evidence for plaintiff, a motion was made for a nonsuit, upon the grounds: (1) The case came under the statute of frauds, in that it was a case of a sale of goods over the value of \$50, without any writing to bind either party; 2) because the evidence failed to show any completed and definite contract on the part of defendant, and that defendant only agreed to ship 500 cases, or as many as he could; (3) because plaintiff was not bound to accept the goods, and could not have been held in a suit by defendant against him. The nonsuit was granted generally on the ground that plaintiff had failed to make out his case, and to this decision plaintiff excepted. He also excepted as to the ruling that the contents of an affidavit, hereafter to be mentioned, were in evidence, which ruling, made on the argument of the motion for nonsuit, was made over objection of plaintiff's counsel, but no objections were made to the admission of said evidence. In behalf of plaintiff, one Hudgins testified: Was a broker in Atlanta, and had represented Ransom in some business. Had some correspondence with Ransom as to the sale of 500 cases of eggs to Shomo, and had written Ransom if he could fill and accept such order. The order was 500 cases to be delivered, at 10 cents, between the 1st and 25th of July, in Atlanta. He did not know how many letters he wrote Ransom. At the time of his letter of June 30th, eggs were going down to 10 cents a dozen. In his letter asking Ransom about witness' customer for 500 cases of eggs to be delivered between the 1st and 25th of July, at 10 cents, no name was given, and no name was mentioned in the letters before the 30th of June. Witness sent the telegram dated July 1st. At the time of the sale to Shomo, witness represented Ransom, and submitted the offers from Shomo to Ransom, expecting to be paid by Ransom. Had no conversation with Shomo in regard to the offer, except that Shomo asked him to make Ransom the offer. Shomo mentioned it a month before, some time in June. Shomo knew witness had written Ransom and Odell & Co. Witness told him so in the conversation about the submission of the offers. Up until July 1st, Ransom refused to accept the order, for the reason that eggs were continually fluctuating. Witness wrote him on the 30th of June, and the next thing Ransom wired him to know who wanted 500 cases of eggs, and witness answered by wire, giving Shomo's name. Shomo told witness to submit the offers to Ransom and Odell & Co. Witness represented Odell & Co. at that time. Witness had written Ransom about the offer

of Shomo before the telegram of July 1st. The conversation about that offer occurred between Shomo and witness about the 1st of July. In the letter of June 30th, witness wrote Ransom that he had a customer for 500 cases of eggs, to be delivered between the 1st and 25th of July, in Atlanta, at 10 cents a dozen; cases to be returned. Whatever contract was made for Ransom by Shomo was concluded by the latter stating the condition of the offer. In the first letter witness wrote Ransom, he wrote that Shomo wanted 500 cases, and in the next letter mentioned Shomo as his customer. The first letter mentioned no name. This offer was declined until the 1st of July. Shomo submitted this offer or order about the 1st of June. Witness had written Ransom before the telegram from Ransom, asking witness who the customer was, but could not say that Ransom had not forgotten it. Ransom telegraphed witness, because witness wrote him a letter, and asked what about order for eggs. Witness wrote on the last day of June, and next morning received the telegram asking who it was that wanted the eggs. Witness had written, "What about my customer for five hundred cases of eggs?" saying nothing of the person. Did not remember that he mentioned the price, and does not remember all that was in the letter on the subject. The time of delivery, between the 1st and 25th of July, was in the letter. Witness cannot remember definitely whether it was in his last letter or not. There was read to witness an affidavit made by him on October 20, 1891, to the effect that on July 1, 1891, witness called at Shomo's place of business, and Shomo asked witness to buy for him (Shomo) eggs, witness being a broker; that Shomo knew witness would have to send out orders for them to produce men; that witness telegraphed on July 1, 1891, to Ransom for 500 cases, or as many as Ransom could sell, but made no positive contract for any definite amount for Shomo; that, so far as witness knew, Ransom had never at any time agreed to deliver Shomo, on deponent's order, the full amount of 500 cases of eggs, but only so many as he could; that there was never any contract that Ransom should deliver any specific number of boxes or cases of eggs by witness; that witness sold 500 cases conditionally, provided the order could be filled in 30 days, and the further condition that Ransom would agree to fill the order; that witness sent the telegram annexed, to wit, "A. M. Shomo, 500 cases, or as many as you can," which was all the contract made, so far as witness knows; that witness acted as broker, but had no agreement from Ransom that Ransom would fill his orders to any definite amount. The witness stated that the signature to this affidavit was his, and that the statement in it was correct; that he could not make contract; and that, in pursuance of Shomo's request, he wrote Odell and

others. The reading of this affidavit to the witness, and asking him if the statement therein was correct, was not objected to by plaintiff's counsel. The witness further testified: The words "my customer," in the letter of June 30th, referred to Shomo, and Ransom could know this from a previous letter witness had written him, which he presumed Ransom had; that the date of the first letter was in June, but he did not remember whether the letter of June 19th was the first written; that his recollection was he had written a letter, and given Shomo's name; that, judging from the letter of June 19th, it seemed to be the first letter written Ransom on the subject, but he could not say whether the letter in which Shomo's name was given was before or after. Ransom did not send witness to Shomo, and did not know about his going to get the order for 500 cases. Did not send him particularly to Shomo, but to sell him, (witness,) and, when witness sold, he would report and settle up. At that time there were 30 dozen eggs to the case. The following telegrams and portions of letters were introduced: Letter of June 18, 1891, from Cason & Hudgins to Ransom, stating that the writers had customer for 500 cases, to be delivered 1st to 20th July; that his offer was 10 cents for Atlanta, and return cases, and, if Ransom found he could place any of the amount, let the writers hear from him. Telegram of July 1, 1891, from same to same: "A. M. Shomo, 500 cases, or as many as you can. Must be good." Letter of July 1, 1891, from same to same, stating: "We wired you this evening to commence shipping A. M. Shomo eggs as per our letter of yesterday. We trust the trade will be a satisfactory one in every way." Letter of July 7th, from Ransom to Cason & Hudgins, stating that their order for 500 cases for Shomo was received; that he wrote Shomo "to-day" regarding terms, etc., and shipped him 18 cases the day before, and would ship him regularly to July 25th, until notified differently. Letter from Ransom to Shomo of July 7th, stating that Ransom had shipped Shomo that day, as per C. & H.'s order, 18 cases of eggs, and would ship more until July 25th, provided his terms, etc., were satisfactory with Shomo; that his terms were as stamp stated, and he guaranteed everything to be right; that he would ship Shomo regularly up to the 25th, unless notified differently, and Shomo would please return cases; that he would make draft on Shomo for invoice the next day; that he thanked Shomo for his order, and hoped to do considerable business with him, etc. Letter of July 7th, from same to same, stating: "Inclosed find bill of lading and invoice of eggs shipped to-day. Will send you considerable more to-morrow." Letter from same to same of July 10, 1891, inclosing bill of lading and invoice of eggs, and stating: "Will ship you regular next week, and will try

and get you in a big lot of eggs. * * * Will make draft for same, which please honor." Shomo testified: Prior to these letters and telegrams, he had given an order for eggs to Hudgins. About June 1st, Hudgins asked him if he wanted to buy eggs, and he told Hudgins he would take 500 cases delivered in July, and Hudgins said he would endeavor to get them up. In about a week, Hudgins said he could not get anybody to make prices at that time, but would by the 1st of July. Then witness told him, he thinks, he was willing to pay for eggs 10 cents delivered, and would return cases. About July 1st, Hudgins told him he had gotten the eggs from Ransom, whom witness does not know. Witness answered the letter of July 7th the same or the next day, and told Ransom everything was satisfactory, and to let the eggs come as rapidly as possible. He received 42 cases. When Ransom's contract expired, eggs were worth 14 cents a dozen. There were 30 dozen to the case. Knows nothing about the telegraphic order, as he sent none, and had no conversation with Ransom. Did not know what the letter dated July 1st referred to, but based the order on another letter from Hudgins. Ransom had until July 25th to ship the eggs, and witness supposed Ransom understood the matter. Ransom was bound, and witness was not, and witness did not know whether, if he had refused to take the eggs, he could have been sued. He never asked for any written contract, only through Hudgins. Ransom may have been bound to this agent. Witness never signed, nor expected to sign, any proposition, but wrote the letter to Ransom.

Mayson & Hill, for plaintiff in error.
Glenn & Maddox, for defendant in error.

BLECKLEY, C. J. The facts appear in the official report. There can be no doubt that the contract alleged in the declaration for the sale of 500 cases of eggs was an unconditional contract. It is equally certain that no such contract appears in the evidence, for the contract to which that points was conditional and the condition was of such a nature as to render the variance material. Putting aside other questions raised and discussed in the case, this is a decisive one. With or without considering the affidavit which was before the court, the judgment of nonsuit was correct. Judgment affirmed.

PRITCHETT v. STATE.

(Supreme Court of Georgia. June 12, 1893.)

HOMICIDE — WARNING TO JURY — ABSENCE OF JUDGE DURING TRIAL — RESISTING ARREST — INSTRUCTIONS.

1. It appearing that in a trial for murder the jury were kept together in charge of an officer from the time they were impaneled until the verdict was rendered, there was no error in

not instructing them at recess, and when the court adjourned at night, not to discuss the case among themselves, nor allow any one else to speak to them about it.

2. It is not proper for the presiding judge to absent himself from the court room during the trial of a murder case without suspending the trial during his absence, but such conduct on the part of the judge will not necessitate the granting of a new trial where it appears that he was absent only a few moments, for a necessary purpose, during the argument of defendant's counsel, it not appearing that any injury resulted therefrom to the accused, or that a motion to have a mistrial declared was made. In *Hayes v. State*, 58 Ga. 35, a new trial was granted, not alone because of similar conduct on the part of the judge, who absented himself during the examination of a witness for the state, but also because of serious errors in the charge. The ruling made in the case at bar is supported by *O'Shields v. State*, 6 S. E. 426, 81 Ga. 301.

3. Whether, under all the facts in evidence, an attempt by an arresting officer and his posse to commit a serious personal injury on another will reduce to manslaughter a homicide committed by the latter, is a question for the jury under a proper charge from the court, and not a question of law to be decided in the first instance by the presiding judge.

4. Where two instances of resisting an arrest stood in immediate connection one to the other, if the first was by a combination of several persons, some of whom participated in the second, the circumstances and conduct attending the first are admissible in evidence against a person who was not connected therewith, but who did participate in the second as a friend of the individual sought to be arrested, and a charge of the court which explains to the jury the reason for admitting the evidence is not erroneous.

5. Where the evidence of a homicide is not wholly circumstantial, a request to charge the jury, based on a contrary theory, should be denied.

6. A charge which relates to the turning points of a case, if not erroneous as to the points specified in the motion for a new trial, the other points not being referred to in the motion, is no cause for a new trial.

7. A charge that the state claims so and so, even when its propositions are not in the most natural order, but are inverted, and somewhat involved, does not infringe on the rule of law forbidding the judge to intimate his opinion on the evidence, or what it establishes.

8. Where counsel goes out of the evidence, and states an irrelevant fact, which he contends he arrives at by inference from the evidence, it is not cause for a new trial that the presiding judge, in interdicting a repetition of the statement, says that of his own knowledge the real truth of the irrelevant matter was thus and so.

9. When the court inadvertently omits to instruct the jury as to the form of the verdict in case they find the accused not guilty, the omission may be repaired by recalling the jury after they have retired to their room, and then suggesting the proper form.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

Brack Pritchett was convicted of murder, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

Pritchett was tried in February, 1893, upon a special presentment charging him, Lovejoy, and Harralson, alias Harrison, with the murder of Hurst. (The presentment was made at the February term, 1888, of De

Kalb superior court.) Lovejoy had been previously tried, and found guilty, and, his motion for new trial being overruled, brought the case to this court, by which the judgment of the court below was reversed. See 82 Ga. 87, 8 S. E. 66. Harralson or Harrison was also tried, and found guilty, and the judgment of the court below refusing him a new trial was by this court affirmed. See 83 Ga. 129, 9 S. E. 542. Pritchett was found guilty, with a recommendation to imprisonment for life. His motion for new trial was overruled, and to this ruling he excepts.

The motion contained the general grounds that the verdict was contrary to law, evidence, etc. Also, because the court erred in refusing to rule out the evidence of a witness (Rogers) relating to the rescue of Hubert; the objection to the evidence being that it was not shown that defendant was present, or in any way connected with it; and the same objection being made to the same evidence by witnesses Coffey and Hutchinson. What the objectionable evidence was is not set out in the motion.

Because the court erred in not instructing the jury at recess, and when the court adjourned at night, not to discuss the case among themselves, nor allow any one else to speak to them about the case. Also in failing to instruct the officer in charge of the jury as is usual in such cases, but only saying, "The sheriff will see that you are taken care of." In reference to this ground the judge states that the jury was kept together from the time the first juror was chosen until the verdict was rendered.

Because the court erred in leaving the bench and the court room pending the first argument, and going down into the lower story of the courthouse and out into the yard, to the water-closet, without suspending proceedings during the court's absence. As to this ground the judge states he has no remembrance of leaving the bench at any time while the case was being tried, but, as both counsel for defendant have made affidavit that he left the bench while one of them was making his argument, he accepts that as true, and accompanies it with this explanation: It is his practice, when he must leave the bench to attend to the lighter call of nature, and defendant's counsel is speaking, to go out quietly, to keep from interrupting his argument, which, as every lawyer knows, may seriously impair the argument and its effect. If counsel for the state is speaking when he has to leave, he first gets the consent of defendant's counsel, so as not to impair his argument. In this case it seems he went out when one of defendant's counsel was speaking, and cannot see how what was intended for a benefit, and was a benefit, could be converted into an error.

Error in refusing to charge the following written requests, made by defendant: "If you believe from the evidence that the defendant shot and killed J. E. Hurst, and that

the killing was without malice, either express or implied, and was done without any mixture of deliberation whatever, but was voluntary, upon a sudden heat of passion; and if you believe further from the evidence that there was an attempt on the part of the posse of white men then and there to commit upon him, the defendant, a serious personal injury, or if you believe from the evidence that there were other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied, you could not find the defendant guilty of murder. If you believe from the evidence that the defendant and another, by the consent of the sheriff of said county, were taking away Wesley Hubert, and after such consent the three had left, and were then violating no law, and at the instance of one of the white citizens of your county the arrest of Wesley Hubert was demanded, and, being armed with pistols, pursued the defendant and Wesley Hubert, and, overtaking them, attempted the arrest of said Hubert, and in such attempt undertook to do violence to the person of the defendant, he would be authorized in law to protect himself against such violence, and you could not find him guilty of murder, nor of any other offense." The evidence being circumstantial in this case as to who killed said Hurst, before you can convict the defendant on it the circumstances must be so strong as to exclude every other reasonable hypothesis except that of the defendant's guilt. If you believe from the evidence that the defendant did not kill Hurst, but that he was killed by some one of the white men, intentional or otherwise, the defendant would not be guilty, and you should acquit him."

Error in charging: "I have permitted introduction of evidence before you as to the first arrest, and I have done so with the view that you might have all the facts necessary for you to determine whether there was a combination by Wesley Hubert and his friends to resist the officers; and that, if you believe it was a forcible resistance in the first instance, and that when it was attempted to arrest him again there was another forcible resistance, that it was necessary for you to have it before you to throw light upon it, that you may judge whether the second arrest and resistance, and what occurred on the second arrest, was done for the purpose of resisting the officer in making the arrest; that is all. It is not material that all the parties who were engaged in the first resistance to the arrest should be engaged in the second resistance. It is only for you to determine whether there was first a rescue and a resistance to the second arrest,—a rescue at first, and the same thing continued afterwards,—to hold these persons responsible who were engaged in the second resistance. But if the testimony should not be so strong as to produce upon your minds the conviction

beyond a reasonable doubt that the defendant, Brack Pritchett, actually fired the shot which killed Hurst, then see whether that testimony satisfies your minds, and beyond a reasonable doubt, that Brack Pritchett was one who was forcibly resisting the officers, and that he fired his pistol in furtherance of that resistance. If he did so, it does not matter who fired the fatal shot, and you should believe, moreover, of course, there was a combination between these men to resist these officers; that they were all actuated by a common intent to do so. And I charge you upon that part of it that it does not excuse Hubert, nor these other men who were aiding him, if they were aiding him, to resist the arrest, because some one said to them that Mr. Austin, or any one else who was pursuing them for the purpose of the arrest, said that they could leave, and that they would not arrest them then. The officer, even when he said that, had the right to change his mind; and the arresting officer had the right to adopt a different policy,—the whole thing being based upon the right to arrest Hubert. Because the officer declines to arrest at a particular time does not bind him to give up his right to arrest, even in a short time afterwards; and hence it is no defense,—that circumstance, if you should believe it from the evidence, is no defense, always provided that the man, Wesley Hubert, had laid himself amenable to the law; that Rogers was the constable, and had a warrant; and that Hurst was the lawful marshal of the town of Decatur. So, if those things are correct, why, they would have had the right to have made the second arrest in the way they did, just as they would have had to make the arrest if they had not desisted from the arrest."

Error in charging: "Well, those two points that I have given you in charge are the turning points in this case, provided, of course, as I said to you twice, that the arrest was a legal one, as I have described to you. Did this defendant, Pritchett, fire the shot that killed Hurst?" Alleged to be error in that the court expressed an opinion as to what were the turning points in the case.

Error in charging: "A circumstance given in evidence here, and which you have the right to consider, is that this defendant fled in the first instance, and that in the second instance he successfully made his escape, and that that was done last August five years ago, and that within the last few months he has been apprehended. Now, that is what the state claims; that those are the facts that are given in evidence before you, and from which you must come to your conclusion." Alleged to be error, as clearly expressing an opinion.

As to the exceptions to the charge and refusals to charge, the judge states that they must be considered with the whole charge, which is made a part of the record.

Error in not ruling out the following testi-

mony of Austin, objection having been made at the time: "About that time Mr. Pattillo came up. Mr. Pattillo was one of the councilmen at that time, and Tobe thought he had to obey him." It is not stated in this ground what objection was made to the evidence. Tobe was Hurst, the man who was killed, and who was engaged with others in attempting to arrest Hubert because of drunkenness and disorderly conduct in the town of Decatur, of which town Hurst was marshal. As to this ground the judge states: "Counsel for defendant, when Austin was testifying, said merely, 'I object,' without stopping the witness, or calling on the court for a ruling, and the court supposed he had waived his objection, as he permitted the witness to continue his testimony, and made no motion afterwards to rule that out."

Error in the following: One of defendant's counsel, while making the concluding argument relative to defendant's flight, referred to the fact that defendant was fearful he would be mobbed unless he left; and in addition to what defendant in his statement said relative to that, counsel stated further that defendant, when he was apprehended, was not put in De Kalb county jail, but in Fulton county jail, and there retained until within a few days since; and from that state of facts counsel was about drawing an inference that there was ground for the defendant's belief that he would be mobbed, when the court abruptly and most emphatically stated to counsel: "Stop, Mr. Jordan; there is no such evidence, and I know the contrary to be true;" and counsel in reply stated he thought he had a right to draw an inference from a given state of facts, but the court said that he would not permit it. As to this ground the judge states: "In trying to explain defendant's flight, Mr. Jordan stated it was because he was afraid of personal violence being done him by the citizens of De Kalb county, and then stated in verification of that as a fact that when apprehended he was placed in Fulton county jail, to make him safe from the citizens of De Kalb." At this point the solicitor general arose, and made the point to the court that Mr. Jordan had no right to state that. The court inquired from the bench if there was any evidence of that before the jury, and received for answer, without contradiction, that there was none. The court then stated he was placed in Fulton jail by the court's order, because quite a number of prisoners had in a body escaped from De Kalb jail. That is all there is of it, and should be taken in lieu of the ground of the motion.

Because the court actually forgot to charge the jury as to the form of their verdict in case they found the defendant not guilty, until after the jury had retired to their room, when the court stated to counsel that he believed he had failed to charge the jury as to the form of the verdict in case they found defendant not guilty, and directed that the

jury be brought in, when the proper charge was given.

Jordan & Robinson, for plaintiff in error.
J. S. Candler, Sol. Gen., for the State.

BLECKLEY, C. J. 1. We are aware of no law which constrains the judge who presides in a trial for murder to instruct the jury not to discuss the case among themselves, nor allow any one else to speak to them about it. The judge may give such instruction, when he thinks proper to do so; and the presumption is that he will give it whenever he deems the circumstances call for it. In this case the jury were kept together in charge of an officer from the time they were impaneled until the verdict was rendered. There is no cause for suspecting that they either discussed the case among themselves improperly, or that they were spoken to concerning it by any outside person, or that the officer in charge of them failed to perform his whole duty.

2. In relation to the judge leaving the bench, and absenting himself from the court room for a necessary purpose during a short interval, without suspending the trial on account of his absence, this is sufficiently treated of in the second headnote.

3. The actual grade of a homicide is to be ascertained by the jury on all the facts in evidence, and with the aid of a proper charge from the court touching the law of the case. It is not the duty of the court to decide in the first instance, as a question of law, whether an attempt by an arresting officer and his posse to commit a serious personal injury on the accused would reduce a killing done on the occasion to manslaughter. Under some circumstances it would, and under others the killing would even be reduced to justifiable homicide. The court's charge on the law should be such as to enable the jury to distinguish, one from another, all the grades of homicide which the jury, under the facts of the particular case, ought to investigate and consider, but beyond this the court could not go without trenching upon the province of the jury. They are to determine whether in the particular instance anything whatever done to the accused would make the killing manslaughter, rather than murder, or justifiable homicide.

4. Pritchett, the accused, did not participate in the first resistance offered to the arrest of Hubert. There were indications in the evidence that that resistance was made by a combination of several persons, and that some of these, together with Pritchett, participated in the second resistance. The second stood in close connection with the first in point of time, the interval between them being very short. We agree with the trial judge that the circumstances and conduct attending the first were admissible in evidence against Pritchett, who, al-

though he took no part in the first, shared with some who did in the work of making the second, and while so engaged committed the homicide. We also think that the court did not err in charging the jury upon the subject as set forth in the official report, though we must admit that as to mere style and clearness the charge was not altogether felicitous.

5. There was some direct evidence that the killing was done by the accused. This being so, the court properly declined to charge the jury as requested on circumstantial evidence, the request assuming that the evidence as to the person who did the killing was circumstantial only.

6. It is not error for the court in its charge to the jury to specify the turning points in the case, and designate them as such. The motion for a new trial, after stating what the court charged on this subject, complains of it as error, "In that the court expressed an opinion as to what were the turning points in the case." The motion fails to mention or suggest any others as turning points, or to say that these were not. The complaint is that the court expressed an opinion at all as to what were the turning points in the case. Were it alleged that those specified were not all the turning points, or that certain others should have been included in the enumeration, we might consider the criticism well founded, but this is quite a different matter from holding that the court cannot express any opinion, whether it be correct or incorrect, as to what are the turning points. The assignment of error does not call in question the correctness of the opinion, but only the right to express it. For the purpose of dealing with this assignment, there being no other turning points suggested, and those specified not being denied to be such, we can take what the charge affirms touching this as being correct, and, so taking it, the charge can be upheld.

7. At first view, what the court charged on the subject of flight, escape, and recapture does certainly appear as infringing upon the rule of law which forbids the judge to intimate his opinion on the evidence, or what it establishes; but when the whole paragraph is read to its close it is reasonably apparent that the court meant to state to the jury not what the evidence was, or what it proved, but what the state claimed it was and established. To express this meaning the terms of the proposition contained in the paragraph must, it is true, be taken in an order which is inverted, and not the most natural. What should have been in the court's mind first was expressed last, but this does not vitiate the instruction if the meaning at which we have arrived is the true one, and we think it is.

8. In silencing the defendant's counsel touching an irrelevant fact not in evidence, which was as to the object of confining the accused in Fulton county jail, rather than

that of De Kalb county, the presiding judge stated from his own knowledge what the object was; the confinement in that jail having been by the court's order. Undoubtedly this trivial matter is no cause for a new trial.

9. In charging the jury as to the form of their verdict, the presiding judge inadvertently omitted to say what form they should use in case they found the accused not guilty. On discovering the omission after the jury had retired to their room, he recalled them, and supplied the omission with the proper instruction. This was correct.

None of the points or questions raised by the motion for a new trial, whether mentioned in this opinion or not, furnish any legal reason for trying the case over. The court did not err in refusing a new trial. Judgment affirmed.

FARMERS' LOAN & TRUST CO. v. CANDLER et al.

(Supreme Court of Georgia. June 26, 1893.)

AMENDMENT OF VERDICT—CONSTRUCTION OF RAILROAD—CONTRACTOR'S LIEN.

1. A verdict finding and declaring a lien upon a part of a railroad is void, and is not amendable at a term of the court subsequent to that at which it was rendered, so as to make it assert a lien upon the whole of the railroad. The verdict not being amendable, a judgment conforming thereto is not amendable.

2. It creates no equity in favor of a railroad contractor, as against the lien of a mortgage upon the railroad, duly recorded and foreclosed, that the contractor, in performing his contract of building the road, supplied all the materials which went to make up its real value, and that the debt owing to him, and embraced in a general judgment against the company, junior to the mortgage, arose from the supplying of said materials and the performance of said work.

3. Judgment in the main case reversed, and, on the exceptions filed pendente lite, affirmed.

(Syllabus by the Court.)

Error from superior court, Hall county; George F. Gober, Judge.

Contest between the Farmers' Loan & Trust Company and Allen D. Candler and another to establish priority of claims against the Gainesville & Dahlonega Railroad Company. From a judgment for Candler, the trust company brings error. Reversed in part.

Following is the official report:

This case was before the supreme court at the March term, 1891. 87 Ga. 241, 13 S. E. 560. At the July term, 1891, of the superior court, Candler filed a motion to amend his verdict and judgment of foreclosure of lien so as to embrace the whole, instead of a part, of the railroad. This motion was granted by a judge pro hac vice appointed by the clerk to preside in place of the judge of the circuit, who was disqualified. Before the present case was called, at the July term, 1892, Candler filed a supplemental petition or claim, and afterwards an amendment thereto,

setting up additional reasons why the fund in court should be awarded to him. To these the Farmers' Loan & Trust Company demurred on the grounds that they set forth no sufficient cause why the money should be awarded to Candler, and that, the case having been once tried, and the questions of fact either agreed upon, or submitted to and passed on by a jury, it was too late to set up new grounds for relief, and moved that the court enter a decree awarding the money to movant on its mortgage, which had been foreclosed, on the ground that it was superior to Candler's judgment. This demurrer and motion were overruled by the presiding judge, and the movant excepted. At the same time the judge made the following ruling touching the amendment of Candler's verdict and judgment: "Under the ruling in 87 Ga. 241, 13 S. E. 560, there is no special lien. The motion to amend the verdict was not served upon the defendant to said verdict. It was not served on the Farmers' Loan & Trust Company. Neither is bound by it. As an original proposition upon the facts, I do not think it can be amended." To this ruling, Candler excepted pendente lite, alleging that no notice of a motion to amend the verdict was required by law; that on the facts the verdict could be, and was rightly, amended; and that the money should be applied to his amended special lien. Candler's supplemental claim sets up the following: On June 5, 1882, he entered into a contract with the authorities of the railroad company to build and construct its railroad to the Ochestatee river for \$68,938. He soon entered upon the execution of the contract, laying out large sums of money, and doing a great deal of valuable work. The railroad company, finding itself unable, from lack of money, to carry out its part of the contract, afterwards agreed with him that his work should terminate at the Chattahoochee river, for which he should receive \$16,348.03, which work he fully completed according to the contract on May 28, 1883, when all of said sum became due to him. The railroad company paid him a portion, leaving a balance due of \$3,540, with interest. On June 23, 1883, as railroad contractor and material man, he filed, and had recorded, his claim of lien on all of the railroad. On January 29, 1884, he commenced his proceeding to enforce his lien. A verdict and judgment in his favor were rendered by consent at the August term, 1884, finding the sum due him to be \$2,395.13 principal, and \$195.00 interest, and finding him to be entitled to his lien. He waited for payment until 1889, when he undertook to enforce collection. The railroad, with its franchise and all its property, was sold by order of the court, and the litigation which was pending was transferred to the fund arising from the sale, and in course of the proceedings various parties were withdrawn, until, at the time of the trial, the only parties contesting for the fund were Candler and the

Farmers' Loan & Trust Company. Upon said trial the fund was awarded first to the payment of fees and expenses, and, of the balance, \$2,669.05 to Candler, and \$719.40 to the Farmers' Loan & Trust Company, to which judgment that company excepted, and the same was reversed by the supreme court upon the sole ground that the verdict and judgment purporting to set up and declare a lien in favor of Candler as a railroad contractor and material man was void because it attempted to set up and declare said lien upon a part of the railroad, instead of the whole of it. Then Candler moved to amend the verdict and judgment in the foreclosure proceedings by making the same conform to the pleadings; that is to say, the claim of lien, as filed and recorded, and as set out in the declaration, was upon the whole of the railroad, and so was the declaration, and the prayer was for the foreclosure of the lien upon the whole road and its property, and by mistake, inadvertence, or other cause, the verdict and judgment, as originally entered, attempted to set up and declare the lien upon a part of the railroad. The motion was granted, reference being made to the proceedings, which are exhibited. Candler avers that whatever doubt the court might entertain as to the authority to amend the verdict, it is certain that the verdict does find the fact that Candler was entitled to his lien, and the judgment will be molded so as to give effect to said finding according to law. He further submits that the railroad derived all its value from the work which he did, and the material which he furnished, for which he has not been paid; that upon every principle of equity, justice, and right, the fund should be decreed to him in payment for the very property from the sale of which the fund in court was derived; that he had furnished and laid upon the road the iron and the spikes and fastenings from the terminus of the road, in Gainesville, to the Chattahoochee river, which iron and spikes and other fastenings constituted the sole object of value, without which the receiver would not have received any of the fund in court; and that the Farmers' Loan & Trust Company stood by, and saw him perform the labor and furnish the material in constructing the road, without any knowledge on his part that said company had any mortgage on the road or its property, and yet it delayed to enforce its claim, notwithstanding the failure to pay the interest on the bonds, until the railroad and all its property had gone into ruin and total worthlessness, except the iron, spikes, and fastenings which had been furnished and put upon the same by Candler. He therefore prays that the fund be awarded to him; that his lien as a railroad contractor and material man be declared superior to all other claims to the fund; that he be allowed to submit evidence to sustain the facts herein set forth, unless they be admitted; and for general relief.

Reid & Stewart, M. L. Smith, H. H. Dean, and H. H. Perry, for plaintiff in error. S. C. Dunlap, J. B. Estes, R. H. Baker, W. A. Charters, and W. P. Price, for defendants in error.

BLECKLEY, C. J. 1. The verdict in favor of Candler against the railroad company, which declared a lien upon a part of the railroad, was held by this court, in *Trust Co. v. Candler*, 87 Ga. 241, 13 S. E. 560, to be void. If this decision was correct,—and it must be taken to be so,—the verdict was not amendable, so as to make it assert a lien upon the whole of the railroad. The jury having expressly restricted the lien to a part of the railroad, the amendment made is absolutely repugnant to the verdict itself. If the verdict was not void, but only needed an amendment to make it certain, the pleadings could be resorted to for that purpose. But there is as much certainty that the verdict limits the lien to a part of the railroad as there is that any verdict was rendered. The amendment does not change uncertainty to certainty, but substitutes one certainty for another certainty. It is as impossible to doubt that the verdict, as found by the jury, did not declare a lien on the whole road, as it is to doubt that the amendment does declare such a lien. The judgment originally entered up conformed to the verdict, and, as the verdict is not amendable, neither is the judgment amendable; for the two must correspond as to the extent of the lien which the one finds, and the other seeks to enforce.

2. The scheme of the Code, §§ 1979, 1980, is to give to contractors for building railroads a lien for work done or materials furnished, on certain prescribed terms, and the mode of enforcing the lien is also prescribed. *Id.* § 1990. It seems to us plain that the object of the Code would be frustrated, and virtually defeated, if a contractor who has secured a lien, but failed to enforce it in the manner prescribed, can abandon that lien, and fall back upon an alleged equitable lien involved in the very same state of facts out of which his legal lien arose, and thereby postpone or defeat a mortgage upon the railroad, duly recorded and foreclosed; this mortgage being of older date than the general judgment which the contractor has obtained for the amount of his debt. We entertain no doubt that the law contemplates that a contractor to whom it gives a legal lien upon a railroad, and who has nothing to do in order to take the benefit of it but to enforce it in the way prescribed, shall have no other lien, either in addition to it, or as a substitute for it. He cannot cover his failure to comply with the statute as to the enforcement of the lien by abandoning that lien and asserting another one, nor can he assert his legal lien otherwise than in the mode prescribed. We need not rule, and do not, whether, if there were no statutory sys-

tem of liens in behalf of railroad contractors, there would be any equity in favor of the contractor against the mortgage, under the circumstances of this case, or not. But with that system, and the relation to it which this contractor occupies, we deem it perfectly clear that he is restricted to his statutory lien, and must enforce that, or none at all. The judgment of the court below on the exceptions taken pendente lite is affirmed. On the main bill of exceptions, judgment reversed.

KENNEDY v. HARDEN et al.

(Supreme Court of Georgia. June 28, 1893.)

EVIDENCE—DEED RECORDED IN ANOTHER COUNTY.

1. In order for an issue as to the genuineness of a deed to be made up, under section 2712 of the Code, for separate trial, it is necessary that the deed should be recorded in the county in which the land in controversy lies. Its being recorded in an adjoining county, in which other land embraced in the same deed lies, is not sufficient, because such recording will not serve to render the deed admissible in evidence on the trial of the main case. Nor will it serve to admit in evidence on that trial a certified copy from the record after the original deed has been lost, even though this certified copy be recorded in the county in which the land in controversy lies, and in which suit for its recovery is pending; there being no statute which authorizes the recording of a certified copy of a deed, instead of the original, though it may be that an established copy could be recorded the same as the original.

2. As the whole proceeding was outside of the statute under which the issue was formed and tried, there was no error in setting aside the verdict; but, as a new trial would be idle and fruitless, direction is given that the affidavit raising the issue be dismissed.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; N. L. Hutchins, Judge.

Action in ejectment by William S. Harden and others against J. R. Kennedy. A special issue was joined, and tried separately, resulting in a verdict for defendant. This verdict having been set aside, and a new trial granted, defendant brings error. Affirmed, with directions.

The following is the official report:

An action of ejectment, upon the demise of Martha A. and Mary Bagley and William S. Harden, and upon other demises, against J. R. Kennedy, for certain land in Gwinnett county, came on to be tried; and, pending the trial, plaintiffs offered in evidence a certified copy of an agreement or deed made by the heirs at law and distributees of Robert Harkness to plaintiffs, as remainder-men, to the premises in dispute. Defendant filed an affidavit, under section 2712 of the Code, alleging that, to the best of his knowledge and belief, the deed was a forgery, whereupon the trial of the case was arrested, and a special issue on the affidavit made up and submitted to the jury, and a verdict rendered, finding the deed to be a forgery. Plaintiffs moved for a new trial upon the

grounds that the verdict was contrary to law and evidence, and because the court erred in overruling the motion of plaintiffs' counsel to dismiss the affidavit of defendant for the reason that a certified copy of an ancient registered deed or title paper could not be attacked in this way. This motion was granted, the court below, in the order granting the motion, stating that being in doubt as to the law of the case on the issue made, and the ends of justice seeming to require it, the motion was sustained. To this decision the defendant excepted. It does not appear what disposition has been made of the main case, or whether anything was done with it after the verdict on the special issue. There had been a previous verdict in favor of defendant upon his plea of the general issue, and a motion for new trial made by the plaintiffs was overruled, and the case brought to this court, by which the decision of the court below was reversed. 85 Ga. 703, 11 S. E. 1091. Upon the trial of the special issue as to the forgery of the paper, it was admitted that the courthouse and records of Gwinnett county, where the action was pending, were burned in 1871. The instrument in question purported to have been made in Forsyth county, by heirs and distributees of the estate of Robert Harkness, in settlement of the estate, making certain disposition of the lands which belonged to Robert Harkness, and which his widow acquired after his death, lying in Gwinnett and Forsyth counties; appointing R. W. M. Harkness trustee, etc., and bore date April 4, 1849. It appeared to be attested by one Connally, by Evaline E. Harkness, and by W. J. Lawrence, and to have been recorded in Forsyth county March 9, 1850, and in Gwinnett county July 25, 1887. The instrument was apparently signed by Dorcas, R. W. M., John C., and James P. Harkness, by W. J. and R. C. Lawrence, by William and E. A. Connally and W. J. Russell, former trustee, and appeared to have been attested by Gordon, a justice of the inferior court, as to Russell, separately from the attestation above mentioned. W. S. Harden testified that he believed the original of this agreement had been lost or destroyed; that the same was not in his power or custody; that the witnesses to it were all dead, except Connally, and he (witness) did not know whether Connally was dead or alive; that Connally moved from Georgia to Arkansas many years ago; that Elizabeth A. Harkness married William Connally; that the original never was in witness' possession, and he did not know that he ever saw it, but may have seen a copy. The following appeared from the evidence of W. S. and Harmon Bagley: Neither of them was present when the agreement was signed. R. W. M. and James P. Harkness and W. J. Lawrence, who married Rosanna C., stated to W. S. Bagley that they had made a settle-

ment, and that R. W. M. Harkness had been appointed trustee, instead of W. J. Russell. They knew the persons who witnessed the agreement. Evaline Harkness is dead. Connally is alive, or went to Texas. W. J. Lawrence went to California, and they did not know whether he was dead or not. Gordon is dead. The witnesses did not know what had become of the original agreement, and Harmon Bagley did not remember ever seeing a copy of it. W. S. Bagley, to the best of his recollection, saw a certified copy of the original in possession of R. W. M. Harkness between 1865 and 1870. Evaline Harkness was R. W. M. Harkness' wife. W. J. Lawrence was a son-in-law of Robert Harkness. W. J. Russell was trustee for Dorcas Harkness and her children, appointed by the will, for the property of the estate of Robert Harkness willed to his wife, Dorcas, and her children. It further appeared that the certified copy had been compared with the original record in Forsyth county, and found to be an exact copy, and that W. J. Russell is dead. For the defendant, only one witness, E. A. Connally, was introduced. He testified that he had never heard of an agreement, and never signed any agreement whatever; that he never signed any title to the lands; that he was acquainted with Wils Connally, one of the alleged attesting witnesses, with Evaline Harkness and W. J. Lawrence, and they were all dead, so far as he knew.

T. M. Peebles, for plaintiff in error. Sam J. Winn, for defendants in error.

BLECKLEY, C. J. The Code, in section 2712, provides that "a registered deed shall be admitted in evidence in any court in this state without further proof, unless the maker of the deed, or one of his heirs, or the opposite party in the cause, will file an affidavit that the said deed is a forgery, to the best of his knowledge and belief, when the court shall arrest the cause and require an issue to be made and tried as to the genuineness of the alleged deed." The issue which this provision contemplates can be raised only when there is a deed produced which is registered, and which, on account of its registration, is admissible in evidence on the trial of the main cause. Here no deed was produced which had been registered. The document produced was a certified copy of a deed registered in Forsyth county, the copy being authenticated as one made from the record of deeds in that county. This copy, as we infer from the transcript before us, had been recorded in Gwinnett, the county in which the suit was pending. But there is no statute, and never has been, so far as we are aware, authorizing a certified copy taken from the record of deeds in one county to be recorded in another county. The scheme of the recording acts is to record the originals of deeds, not copies of them,

though, probably, in the case of lost or destroyed deeds, a duly-established copy might be recorded the same as an original. Although the deed recorded in Forsyth county conveyed land lying in that county, as well as the tract lying in Gwinnett, and now in controversy, the original, even if it had been produced, would not have been admissible in evidence as a registered deed, so far as the land in Gwinnett county is concerned, for it had not been recorded in Gwinnett, but only in Forsyth; and, while this record was good as to the Forsyth lands, it had no efficacy as to the Gwinnett land, for the place of recording deeds is the county in which the land lies. Code, § 2705. Where the same deed embraces land in two or more counties, it must be recorded in each of the counties, in order to render it admissible in evidence as to all the land it covers. If recorded in one county only, that recording is good as to the land lying therein, but not as to the other lands. It is manifest, we think, that the section of the Code above quoted has been misconstrued and misapplied in this proceeding, the facts not being such as to warrant the raising or the trial of a separate issue of forgery.

2. The whole proceeding being outside of the statute under which the issue was formed and tried, it was not error to set aside the verdict, but a new trial would be idle and fruitless. Therefore, direction is given that the affidavit raising the issue be dismissed. Judgment affirmed, with direction.

HEADEN et al. v. QUILLIAN et al.

(Supreme Court of Georgia. June 26, 1893.)

TRUSTS—CONSTRUCTION—POWERS OF TRUSTEE.

A deed executed the 4th day of December, 1865, by which the grantor conveyed to E., his heirs and assigns, a tract of land in trust for the sole and separate use of H., the wife of the grantor, for and during her natural life or widowhood, and after her death to such children as she may have living by the grantor, "with power in the said H. to empower the trustee, by writing under her hand, to sell any part or the whole of said trust estate, and to reinvest the proceeds by her written consent in such other property, subject to the above described trusts, as he shall deem most for the interest of said trust estate," authorized the trustee, on the 4th day of May, 1877, with the written consent of H., to sell and convey, in fee simple, the land described in the deed; one or more of the children, at that time, not having arrived at majority.

(Syllabus by the Court.)

Error from superior court, Banks county; N. L. Hutchins, Judge.

Action by Headley E. Headen and others against William H. Quillian and others to cancel certain deeds, and for other relief. From a judgment sustaining a demurrer to the petition, plaintiffs bring error. Affirmed.

The following is the official report:

Headen and others, by their petition, alleged: They are the children of B. V. Head-

en and his wife, Eliza C. Their father is dead, and their mother is still living. Some time before his death, on December 4, 1865, their father executed a deed to M. Van Estes, by which, in consideration of his love and affection for his wife, he conveyed to Van Estes, in trust for her, certain land described, for her sole and separate use during her life or widowhood, and after her death to such children as she might have living by her said husband, share and share alike. By this deed, Van Estes was made trustee for Mrs. Headen, and no one else. She took an estate for life or widowhood, and was clothed with power to empower Van Estes, by writing, to sell any part or all of said trust estate, and reinvest the proceeds, by her written consent, in other property, subject to the trust. Neither Mrs. Headen nor Van Estes could legally sell or convey any larger estate than for the life or widowhood of Mrs. Headen. In May, 1877, Van Estes, as trustee of Mrs. Headen, executed a deed conveying in fee simple to one Owen part of the land, which conveyance purported to have the voluntary and unqualified written approval of Mrs. Headen. Owen went into possession, and made various improvements, and afterwards sold to Quillian & Co. Petitioners were not parties to these sales and conveyances in any way, and their estate in the property did not pass by them. The deed from their father was on record before either of these sales was made, and neither Owen nor Quillian & Co. were innocent purchasers. The execution of the conveyances to Owen and to Quillian & Co. were frauds upon petitioners. The petition contained various allegations of waste, value of the property for rent, etc., not necessary to be here set forth, and prayed for injunction, decree for damages, cancellation of the deeds to Owen and to Quillian & Co., except as to the estate of Mrs. Headen in the property, etc. The defendants named were Quillian & Co. and their tenants. A copy of the deed from Headen to Van Estes was attached as an exhibit to the petition. By this deed the land was conveyed to Van Estes, his heirs and assigns, "in trust, nevertheless, for the sole and separate use of Eliza C. Headen, wife of the said Blakely V. Headen, for and during her natural life or widowhood, and after her death to such children as she may have living by her present husband, Blakely V. Headen, share and share alike, with power of the said Eliza C. Headen to empower the said M. V. Estes, by writing under her hand, to sell any part or the whole of said trust estate, and to reinvest the proceeds, by her written consent, in such other property, subject to the above described trusts, as he shall deem most for the interest of said trust estate, and with the power to the said Eliza C. Headen to appoint and choose, by writing, another trustee, instead of the same M. Van Estes, whenever

he, the said M. V. Estes, shall wish to resign said trust, or shall die, leaving the same unfulfilled, or shall remove out of the limits of this state without an order from court, said trustee so appointed taking said trusteeship subject to the trust limited." The petition was filed August 28, 1891. It does not aver the age of the petitioners, except as to one of them, whom it states to be a minor suing by her next friend. It was alleged that at the time of their father's death, on December 6, 1872, they were all minors. To this petition the defendants demurred upon the grounds: (1) The petition and exhibits attached showed that the fee to the land was conveyed to Van Estes, trustee, and that such fee was conveyed to defendants, and is now in them. (2) Plaintiffs' mother having a life estate in the land, and it being stated in the petition that she is still in life, plaintiffs have no right of action. (3) If petitioners ever had any right of action, it accrued more than three years before the filing of the petition, and the same is barred by the statute of limitations. This demurrer was sustained, and plaintiffs excepted.

W. L. Marler, for plaintiffs in error. W. I. Pike and F. A. Quillian, for defendants in error.

BLECKLEY, O. J. The contents of the deed on which this case depends are, so far as material, set out in the official report, and the words creating a power of sale are substantially recited in the headnote. It is of no consequence whether the trustee, as such, was invested with the legal title to the estate in remainder, beyond what is involved in a power to sell and convey in his own name, or whether the remainder in behalf of children was vested or contingent. It is clear that a power of sale was created, to be exercised by the trustee, or not exercised by him, at the election of Mrs. Headen, the tenant for life. She could only evidence her election for a sale by writing under her hand, but when this was done the power of sale was complete in the trustee, whether he had any title or not, beyond what was necessary for executing this part of his trust. By the express terms of the deed, she could empower him to sell any part, or the whole, of said trust estate, and to reinvest the proceeds, by her written consent, "in such other property, subject to the above-described trusts, as he shall deem most for the interest of said trust estate." There can be no rational doubt that by the terms "said trust estate," as an object of sale, the maker of the deed intended and understood the land itself, which the deed conveyed. Whatever may be the correct legal construction of the conveyance, with respect to the extent of the trust, it is quite certain he thought there was a trust for the children, as well as for their mother; for, in speaking by the deed of reinvestment, he says, "subject to the above-

described trusts." He evidently thought there was more than one trust. To hold that he contemplated restricting the power of sale to the estate for life would attribute to him a technical narrowness utterly strange to his thoughts, and at complete variance with his real state of mind. He looked at the land as covered by a trust which could be contemplated as a double trust,—one for his wife, and one for his children,—and he applied the word "estate" to the land itself,—the thing that was the subject-matter of the trust, and might be, in whole or in part, the subject-matter of a sale. The power of sale was exercised in the lifetime of Mrs. Headen, and with her written consent, manifested both by signing the deed herself jointly with the trustee, and annexing to it or indorsing upon it a declaration of her assent and approval. To this declaration she subscribed her name. It may or may not be of importance to add that one of the children, at least, had not then arrived at majority; for one of them was a minor when the present suit was brought, and is represented in it by a next friend. Judgment affirmed.

DUTTON v. STATE.

(Supreme Court of Georgia. July 10, 1893.)
HOMICIDE — PLEADING MISNOMER AFTER COMMENCEMENT OF TRIAL — REVIEW — SUFFICIENCY OF EVIDENCE.

1. It was too late to file a plea of misnomer as to the Christian name by which the accused was indicted, the plea not being offered upon arraignment of the accused, nor until after a plea of not guilty, and a trial on the same, up to the close of the evidence introduced by the state.

2. Several grounds of the motion for a new trial complaining that evidence was admitted over objection, but not stating what the objection was, these grounds of the motion are not sufficiently definite to be considered.

3. Although the evidence to connect the accused with the offense was wholly circumstantial, and in some degree conflicting, there was enough in support of the verdict to render it proper for the supreme court to acquiesce in the finding after its approval by the presiding judge, his approval being signified by his refusal to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Bartow county; T. W. Milner, Judge.

Will Dutton was convicted of murder, and, his motion for a new trial having been overruled, he brings error. Affirmed.

M. R. Stansell, for plaintiff in error. A. W. Fite, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

BLECKLEY, C. J. 1. The accused was indicted under the name of Will Dutton. On arraignment he pleaded not guilty. Upon this plea the trial proceeded until the state had submitted its evidence and closed, when the accused moved to file a special plea in abatement, setting up that his name was not Will, but John, Dutton. The court

refused to allow this plea at that stage of the trial. Any one who seriously doubts the correctness of this ruling may readily solve his doubts by studying law.

2. Whether the court erred in admitting evidence over the objection made to its admission is so dependent upon the objection made that, unless the objection be disclosed to this court as it was to the trial court, it is impossible for this court to review the ruling intelligently. For this reason, the practice has been, and still is, to decline attempting any review in such instances. No good reason for departing from the practice in this particular case occurs to us, or has been suggested. All the complaints made in the motion for a new trial as to the admission of evidence are disposed of by these observations.

3. The fact of murder—murder most wicked and atrocious—was established at the trial beyond all possibility of question. The only problem for solution was, by whom was it committed? The evidence to connect the accused with the deed, and identify him as the perpetrator, was wholly circumstantial. In some respects it was conflicting, but, taken as a whole, while it leaves upon our minds some doubt and dissatisfaction, it was enough to support the verdict in so far as to render it proper, under the law, for this court to acquiesce in the finding; the same having been approved by the presiding judge, as conclusively appears by his refusal to grant a new trial. He was in the atmosphere of the trial, saw and heard the witnesses, heard the arguments of counsel, and was in a position to interpret and appreciate the evidence in all its shades of meaning better than we can do by merely reading and studying a written report of it. He had in his presence the living thing; we have but a dead image of it. We should be much more likely, in so close a case, to err by overruling his decision than by affirming it. The true spirit of the law requires us to do the latter. Judgment affirmed.

WILLIAMS v. ROBERTS et al.

(Supreme Court of Georgia. July 17, 1893.)
AUTHORITY OF HUSBAND—AGENT OF WIFE—TRUSTS.

A husband, when acting as agent for his wife, has no authority, merely by virtue of his appointment as agent, whether the agency be general or special, to receive in payment of a debt due to her real estate, and take the conveyance to himself individually, instead of to his wife; nor is the wife's debtor justified in accepting the bare word of the husband that his wife has authorized him so to do. Unless she has in fact given such authority, a conveyance by the debtor to the husband will constitute the husband a trustee for the debtor to hold or dispose of the title, but will neither discharge the debt nor constitute him a trustee for the creditor, unless the latter, with a knowledge of the facts, shall ratify the transaction. The court erred in not granting a new trial.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action by Dora Roberts and others against M. E. Williams. Judgment for plaintiffs. Defendant brings error. Reversed.

T. H. Whitaker and Longley & Longley, for plaintiff in error. P. H. Brewster, D. J. Gaffney, J. H. Pitman, and R. A. S. Freeman, for defendants in error.

BLECKLEY, C. J. These ladies, Mrs. Roberts and Mrs. Williams, dealt with each other chiefly through their husbands, respectively, as their agents. The result was that the distinction between principal and agent was sometimes lost sight of. There seems to be in husbands a strong propensity when dealing for their wives to take part as principals in the transaction, and the record now before us furnishes evidence that these husbands had that propensity, and wrought some mischief by it. Some of the controlling facts are beyond dispute. As the outcome of dealings with respect to the West Point property, Mrs. Williams put herself under obligation to convey that property to Mrs. Roberts upon the payment of a certain sum of money. The verdict in this case finds and directs that that conveyance be made, but there is no evidence that the money was ever paid. The transaction relied upon as payment was the conveyance by Mrs. Roberts to Williams, the husband of Mrs. Williams, of certain lands situate in Alabama. It is contended that the contract on which that conveyance was founded was made by Roberts as the agent of Mrs. Roberts with Williams as the agent of Mrs. Williams, and was to the effect that the conveyance should be a satisfaction of the debt owing from Mrs. Roberts to Mrs. Williams for the West Point property; either a satisfaction in and of itself, or as furnishing means whereby Williams through a sale of the land was to raise money to be paid to Mrs. Williams in satisfaction. But there is no evidence that Mrs. Williams ever authorized or ratified this transaction, except the declarations of Williams himself; and certainly these were not sufficient. The mere word of an agent cannot be accepted as evidence of authority to vest title in him as a payment, or as furnishing means of payment to his principal. Parties dealing with an agent must verify at their peril his authority to use his principal's assets for the purpose of acquiring title to property in his own name. If, in fact, he has no such authority, and therefore cannot hold the title for his own benefit, the trust which results is not one in behalf of his principal, unless the principal chooses to ratify, but is a trust in behalf of the maker of the conveyance. Under the most favorable view of the evidence in this case, Williams did not hold title to the Alabama lands for Mrs. Williams, but held either for himself on his individual pur-

chase or for Mrs. Roberts if he made no purchase for himself. This is a necessary conclusion from the evidence, and the law applicable to it. Consequently the verdict of the jury is undoubtedly wrong, and the court erred in not granting a new trial. Judgment reversed.

WILSON v. WRIGHT.

(Supreme Court of Georgia. July 17, 1893.)
MORTGAGE BY BENEFICIARY UNDER TRUST—RIGHT OF MORTGAGEE.

Land being in 1878 conveyed to a trustee in trust for the use, benefit, and advantage of a named woman and her children, and she having afterwards mortgaged the same to procure necessary supplies to carry on farming operations upon the premises, her interest in the land is subject to levy and sale under a judgment foreclosing the mortgage, as against a claim interposed by the trustee. If, by reason of the fund which paid for the land having been derived from assets disposed of by will, made prior to March, 1866, and covered by a trust which the will created, the interest of the woman consisted of an estate in her for life, with remainder to her children, according to the laws of distribution in Georgia, this life estate would be the interest subject to levy and sale under the mortgage *fi. fa.* The debt to secure which the mortgage was executed was a joint debt, contracted by the woman and her children, or some of them. This being so, it was her debt which the mortgage secured; and, even if she were a married woman, there being no restraint upon her power in the settlement, she would be competent to incumber her interest in the property so as to subject it, equitably at least, to the payment of the debt. In the present case there was equitable pleading on which equitable principles could be applied in molding the judgment.

(Syllabus by the Court.)

Error from superior court, Greene county; H. McWhorter, Judge.

Action by John W. Wright against Julia A. Jackson and others for the foreclosure of a mortgage. Plaintiff had judgment, and to the property levied on in execution thereof J. P. Wilson interposed a claim as trustee for defendant Jackson and others. From a judgment adverse to the claim, claimant brings error. Affirmed.

The following is the official report:

An execution issued upon the foreclosure of a mortgage executed by Julia A. Jackson et al. was levied on the life interest of Julia A. Jackson, and the remainder interests of the other defendants in execution, in certain land, and a claim was interposed by Wilson, as trustee for Julia A. Jackson and her children. The case having been submitted to the judge without a jury, he found that the life estate of Julia A. Jackson was subject to the execution, and ordered that it proceed to the extent of her life estate. To this ruling the claimant excepted. The land levied upon was purchased with funds arising under the will and codicils of Irby Hudson, the father of Julia A. Jackson. The other defendants are her children, and were 21 years of age when the mortgage was executed.

She has also several minor children. The claimant, trustee for her and her children, refused to sign the mortgage when the plaintiff asked him to do so, which was prior to furnishing the supplies for which the mortgage debt was created. The defendants other than Julia A. Jackson are married, and have children, save one. The consideration of the mortgage debt was supplies furnished by the plaintiff to the defendants in execution, who were the beneficiaries in the trust estate, for the use and benefit of that estate; the supplies being necessary to enable said beneficiaries, who were living on and cultivating the land levied on, to carry on a farm. If some other than the beneficiaries had not furnished such supplies, the farming operations could not have been conducted, and the beneficiaries could have realized no income or benefit from the estate. The claimant introduced a deed dated and recorded January 23, 1878, conveying the land levied upon to the trustee of Julia A. Jackson and her children "for the use, benefit, and advantage of the said Julia A. Jackson and her children, and at the decease of the said Julia A. Jackson to such child or children, or the representatives of child or children, as she may leave in life, * * * free from the debts, liabilities, and obligations of present or any future husband of said Julia A. Jackson." Also in evidence was the following codicil, executed before March, 1866, to the will of Irby Hudson: "I, Irby Hudson, being still of sound mind, and by way of codicil, wish to change the 3d and 4th items of my foregoing will, dated 6th September, 1863, so far only as to direct that the share given to my wife for life, and at her death to our children, be revoked, and that the same be left to her during life, to be disposed of by her at her death by will or otherwise; and I hereby now nominate and appoint her executor of my will and this codicil, and give to her as trustee and in trust the whole of my estate after the share to her is deducted, to and for the following use and trust, and so far as to alter the 3d item of my will, and revoke the bequest to our children, that she hold the same to their sole and separate use, free and exempt from the control of any husbands they may have, or the liabilities of their husbands during life, and at their death to their children, according to the laws of distribution in Georgia; and, in case of the marriage of my wife, then a competent trustee be appointed."

Columbus Heard, for plaintiff in error. H. T. Lewis and J. B. Park, Jr., for defendant in error.

BLECKLEY, C. J. What the court found subject to sale under the mortgage *fi. fa.* against Mrs. Jackson was her life estate in the premises levied upon. These premises were purchased with funds arising from assets disposed of by the will of Irby Hudson,

her deceased father. The terms of that will, so far as relevant, as well as the terms of the deed under which the trustee claims, are set forth in the official report. The two instruments are not necessarily inconsistent, for while the deed might be suggestive of a joint use in Mrs. Jackson and her children, and apparently adapted to the creation of a tenancy in common in the use during her life, the addition of the words, "and at the decease of the said Julia A. Jackson to such child or children, or the representatives of child or children, as she may leave in life," can be construed as indicating a purpose to conform the deed to the terms of the will so as to make the children's interest consist exclusively of a remainder, and leave the mother sole tenant for life, as the will provided. Be this as it may, as the fund which paid for the land now in question was a part of the trust estate created by the will, the will should govern as to the interest which the mother and children have respectively in the land. Tested thus, there can be no doubt that Mrs. Jackson has a clear life estate, and that the children have only a remainder. No reason exists under the law as it now stands in this state why Mrs. Jackson could not, with or without the consent and co-operation of the trustee, incumber her life estate in this property, at least equitably, by mortgaging the same to her own creditor. Whether a married woman or not, she has the right to mortgage her own property to secure her own debt; there being no restriction upon her power in the settlement. Under our claim laws an equitable title will suffice to support a claim, and such a title ought to suffice in like manner to defeat a claim. There can be no doubt that a woman who is the beneficiary of an estate is the equitable owner thereof, and with proper equitable pleading such estate as she has may be devoted to the payment of her just debts. In the present case there was such pleading, and equitable principles could be applied in molding the judgment thereon. The court committed no error. Judgment affirmed.

BRYAN v. SIMPSON.

(Supreme Court of Georgia. July 17, 1893.)

LIABILITIES ON APPEAL BOND.

On the withdrawal of a claim in the superior court, the case having reached that court by an appeal from a justice's court, the claimant being the appellant, no judgment can be entered up on the appeal bond against the claimant and his surety, except for costs in the claim case. To include in the judgment the amount due on the execution which was levied upon the property claimed was erroneous.

(Syllabus by the Court.)

Error from superior court, Terrell county; J. H. Guerry, Judge.

On execution levied in behalf of J. C. Simpson, C. N. Bryan interposed a claim. On ap-

peal to the superior court from a judgment for the execution creditor, claimant withdrew his claim. From a judgment on his appeal bond he brings error. Reversed.

Hoyl & Parks, for plaintiff in error.
Griggs & Laing, for defendant in error.

BLECKLEY, O. J. In a claim case, as well as in any other, the liability of the security on appeal is for the eventual condemnation money and costs. Code, § 3616. The eventual condemnation money is that, and only that, which is found by the verdict disposing of the appeal, or which becomes payable by some judgment of the court which can legally be entered up by the appellate court as a result of disposing of the appeal. In a claim case, whether the claim be withdrawn or tried, no judgment by the appellate court in favor of the plaintiff can possibly be rendered, except that the property levied upon is subject, and that the levy proceed, and that the plaintiff recover costs, unless damages for a frivolous appeal or for interposing the claim for delay, only, be awarded by the jury, in which case these damages can be embraced in the judgment. Here no damages were awarded, and the claim was withdrawn. Consequently, the appellate court could render no judgment whatever for money, either against the appellant or his security on the appeal bond, except for costs. Bryan, the claimant, did not owe any debt to the plaintiff in the mortgage execution. The debtors and mortgagors were G. C. & E. O. Melton. Why should Bryan pay their debt? It has never been heard of that, by interposing a claim to property levied upon under an execution, the claimant renders himself liable to pay the execution. The question which he proposes to litigate with the plaintiff is not his own liability for the debt, but his title to the property levied upon. He asserts that that property is not subject to sale under the execution. This was the question for trial in the justice's court, from which the appeal was taken. How could the question be changed in the superior court to one of personal liability of the claimant, and the security on his appeal bond to pay the whole debt, or any part of it? The court certainly erred in allowing judgment to be entered up declaring such a liability. Judgment reversed.

WHIGHAM v. DAVIS et al.

(Supreme Court of Georgia. July 17, 1893.)

INJUNCTION—MANDAMUS—MISJOINDER.

The evidence adduced at the hearing not being briefed, and no attempt having been made to brief it, this court declines to scrutinize it minutely, immaterial matter being blended with the material. The plaintiff in error has not made it legally apparent that there was any abuse of discretion in denying the injunction and mandamus prayed for, more especially as the double remedy of injunction and mandamus

is not appropriate for one and the same case. *Dibble v. Pease*, 59 Ga. 618. (Syllabus by the Court.)

Error from superior court, Decatur county; A. H. Hansell, Judge.

Action by R. E. Whigham against W. A. Davis and others. From a judgment for defendants, plaintiff brings error. Affirmed.

A. L. Townsend, O. G. Gurley, Russell & Harrell, and Harrison & Peeples, for plaintiff in error. Donaldson & Hawes and G. F. Westmoreland, for defendants in error.

PER CURIAM. Judgment affirmed.

ANDREWS v. ATLANTA REAL-ESTATE CO.

(Supreme Court of Georgia. July 17, 1893.)

DEED—DESCRIPTION OF GRANTEES—SURPLUSAGE.

Where the vendees in a deed of conveyance, founded upon a valuable consideration paid by them, were described as trustees, no trust being declared and no beneficiary named, the word "trustees" is mere surplusage, and the vendees took the title for their own use, free from any trust whatsoever.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action between the Atlanta Real-Estate Company and A. B. Andrews to construe a deed. From a judgment for the company, Andrews brings error. Affirmed.

N. J. & T. A. Hammond, for plaintiff in error. J. L. Hopkins & Sons, for defendant in error.

BLECKLEY, O. J. The deed to be construed purports on its face to have been made by Henry B. Plant and Margaret J. Plant, his wife, parties of the first part, in consideration of the sum of \$102,625.70 to them in hand paid by William T. Walters, the same Henry B. Plant, and Benjamin F. Newcomer, trustees, parties of the second part. It purports to have been signed, sealed, and delivered by the two persons named as parties of the first part. The receipt of the consideration is acknowledged on the face of the deed. The property is conveyed to the persons mentioned as parties of the second part, the simple word "trustees" being added to their names, to have and to hold, unto them and their successors and assigns, to their only proper use, forever; and "the said parties of the first part, for themselves, their heirs, executors, and administrators, the said tracts or parcels of land, with the appurtenances, unto them, the said parties of the second part, and their successors and assigns, against themselves, the said parties of the first part, and against all persons claiming under them, shall and will warrant and forever defend by virtue of these presents." There is no declaration of any trust, and no suggestion of any trust, except the

bare use of the word "trustees" after the names of the parties of the second part, and the omission of any mention of their heirs, executors, and administrators, and in place thereof the use of the words "their successors and assigns." As Henry B. Plant, one of the vendors, is also named as a vendee, and is one of the declared usees, the question is whether there is an implied trust in favor of the other vendor, Mrs. Plant, or in favor of some unnamed person or persons. Code, § 2316, subd. 4, provides: "Where a trust is expressly created, but no uses are declared, or are ineffectually declared, or extend only to a part of the estate, or fall from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." Here no trust is expressly created. The premises are not conveyed in trust expressly, but the vendees are only described by the word "trustees." The conveyance is not even made to them as trustees. Besides, as Mrs. Plant, according to the face of the deed, has been paid for the conveyance, her husband both joining with his coveendees in paying the money and with her in receiving it, what ground is there for any conjecture that a trust for her benefit was intended, more especially as her husband was included amongst the declared usees of the deed, and she was not? We think the conveyance does not by its own terms fall within the third paragraph of the same section of the Code, that paragraph being in these words: "Where, from the nature of the transaction, it is manifest that it was the intention of the parties that the person taking the legal title should have no beneficial interest," trusts are implied. No transaction is brought in sight by this deed which indicates in the slightest degree an intention that the persons taking the legal title should have no beneficial interest. On the contrary, the transaction purports to be a sale for value to the vendees, and the deed itself declares expressly that the property is to be held for their use and the use of their successors and assigns. The word "successors" in this deed could well be construed as the equivalent of the word "heirs;" but it is not necessary to ascribe to it this meaning, for, as is well known, the use of the word "heirs" is wholly unnecessary in the conveyance of realty situate in this state, the statute declaring that, if a less estate is not expressed, any conveyance whatever passes an estate in fee simple. Code, § 2248. The result is that while we may conjecture from the use of the word "trustees," and the phraseology "their successors and assigns," that beneficiaries other than vendees themselves may possibly have been in contemplation,—for otherwise why the vendees were described as trustees is not easily accounted for without looking outside of the deed,—yet this bare possibility furnishes no legal ground for disregarding the use expressly declared in the deed, and for holding that the vendees

were not the beneficiaries, and the sole beneficiaries, in whose behalf the conveyance was made. The better and safer construction is to hold that the word "trustees," wherever it occurs in the deed, is mere surplusage, and ought to be rejected in reading the conveyance and adjudicating on its legal effect. With this word rejected, there could be no doubt that the parties of the second part acquired the equitable, as well as the legal, title to the premises, as against any theory of implied trust. Having ascertained that no trust can be arrived at by mere construction of the deed itself, it remains to be considered whether any such result can be reached by means of the extrinsic facts brought to light in the record. Before the execution of the deed, the property conveyed belonged exclusively to Mr. Plant, Mrs. Plant having no proprietary interest in it whatever. His ownership was derived by purchase from a third person, and was not derived from or through his wife, by marriage or otherwise. This being so, it was wholly unnecessary for her to join with him in the conveyance, or to manifest her consent to it in any manner. It was not necessary even for the purpose of barring dower. Code, §§ 1763, 1764, subd. 5. As she had no title to the property, and no interest, legal or beneficial, in it, no question as to her capacity to deal with her husband without the sanction of the proper court arises. And certainly no trust in her behalf could arise by implication from the mere fact that she joined with her husband in executing the deed, whether the purchase money was in fact paid to both, as the deed recites, or not. The conceded facts in the record clearly show that no such trust could possibly have arisen out of the transaction, in behalf of her or of any one else. The property belonged to Mr. Plant, and to him alone. His associates, Walters and Newcomer, by some contract or arrangement with him became interested therein, and, all three desiring that a corporation thereafter to be created for their benefit should ultimately be invested with the title, this deed was made as the first step in the execution of the scheme. This accounts for the introduction of the word "trustees" in the deed, as descriptive of the parties of the second part. The vendees and the beneficiaries contemplated were thus the same natural persons, and consequently they were seised to their own use, as the deed declares. The contemplated corporation was only the formal means by which they expected to realize the use. Had the corporation never been formed, or, after its formation, had they declined to convey to it, there would have been no breach of trust unless they had induced other persons to become members of the corporation on the faith of this property as corporate assets, in which event the trust element would have been brought in, not by the deed itself, but by the use made of it in

dealing with strangers. It may be added, finally, that according to the record the corporation was formed, and the title was conveyed to it, though not directly by Plant and his associates, but by Smith, to whom they made an intermediate conveyance, to enable him to pass title into the corporation. There can be no well-founded doubt that the corporation has an unclouded title, and can convey such to its own vendees. Judgment affirmed.

HART v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

CRIMINAL LAW—INSTRUCTIONS AS TO CREDIBILITY OF WITNESS.

Where the sole witness for the state is impeached, not only by evidence of bad character, and by contradictory statements with reference to the substance of his testimony, but by testimony tending to disprove the main fact on which guilt depends, the court should not charge the jury upon sustaining the witness by proof of good character, unless there is some evidence on which to base such a charge. In this particular case the error is cause for a new trial, as the jury may have understood that the court had reference to certain evidence tending to show that the witness was industrious and reliable as a work hand, and meant to treat this as evidence on which to base the charge.

(Syllabus by the Court.)

Error from city court of Monroe; J. B. Williamson, Judge.

Orange Hart was convicted of selling intoxicating liquors unlawfully, and, a motion for a new trial having been denied, he brings error. Reversed.

The following is the official report:

The defendant was convicted of selling liquor in Monroe county. He moved for a new trial, which was denied, and he excepted. The first special ground of the motion is that the court erred in charging the jury in the language of section 3875 of the Code, there being no evidence to warrant such a charge, and the court not explaining what was meant by proof of general good character. According to the brief of evidence, the only witness for the state was Charley Waller, who testified that on the first Sunday in May, 1892, at a church near Montpelier Springs, in Monroe county, he saw the defendant sell Bob Davis 10 cents' worth of rye whisky, for which he saw Bob pay him 10 cents. Knew it was rye whisky because he (witness) drank some of it. Several witnesses were introduced by the defendant to impeach Waller, and they gave testimony tending to prove contradictory statements made by Waller. One of them testified that his general character was bad, and from a knowledge of it the witness would not believe him on oath, though as a work hand the witness had found him satisfactory. Another testified that he was a very good hand, but his morals were bad, and from a knowledge of his character the witness would not believe him on oath if

he swore on any question alone. Never knew him on the stand to swear to a lie. As a work hand he was very good and reliable, but his moral character was very bad. Would not swear that he would not believe him on oath. The indictment charged that the defendant, "not being a practicing physician, did then and there sell a quantity of spirituous and intoxicating liquor, the same not being domestic wine." etc. The court charged the jury that if they believed from the evidence beyond a reasonable doubt that the defendant, in Monroe county, at any time within two years prior to the finding of the indictment, did sell, directly or indirectly, any quantity of alcoholic, spirituous, or malt liquors or intoxicating biters, this would be a violation of the local prohibition law of that county, and the jury would be authorized to convict him. This instruction is assigned as erroneous, because the indictment charged the sale of spirituous or intoxicating liquor only. The motion also alleges that the verdict is contrary to law and evidence, and that it was obtained on perjured testimony, as shown by an affidavit of Robert Davis, attached to the motion, stating that he never bought any whisky from the defendant on the first Sunday in May, 1892.

Berner & Bloodworth and Harrison & Peeples, for plaintiff in error. B. S. Willingham and M. W. Beck, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

VAUGHN v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

CRIMINAL LAW — NEW TRIAL — MISCONDUCT OF BAILIFF—NEWLY-DISCOVERED EVIDENCE.

1. That a bailiff attending upon the city court privately advised the accused to go to trial without counsel, and not to demand a jury, and expressed the opinion that he would not be convicted, is no cause for a new trial, the court having offered the accused to furnish him counsel, which offer was declined, and having fully informed him of all his legal rights.

2. The newly-discovered evidence was cumulative, of little probative value, and would not probably have produced a different result.

(Syllabus by the Court.)

Error from city court, Monroe county; J. B. Williamson, Judge.

Bryant Vaughn was convicted of disturbing a congregation assembled for divine worship, and, a motion for new trial having been denied, he brings error. Affirmed.

The following is the official report:

At the August term, 1890, of Monroe superior court, Bryant Vaughn was indicted for disturbing a congregation assembled for divine worship on July 10, 1890. The case was tried on April 25, 1893, in the city court of Monroe county. The evidence showed that the defendant disturbed the congregation assembled for divine worship at Brown's chap-

ed, in Monroe county, by standing about 30 or 40 yards from the church, with his coat and hat off, jumping up, cursing, and talking in a loud and boisterous manner, and acting as if he were intoxicated, attracting the attention of several inside of the church, who came out; this being on the day charged in the indictment. The defendant introduced a witness who testified that he was at Brown's chapel on the same day, and was with the defendant and Babe Keith, who had a difficulty at the spring. Witness did not think this could have been heard at church. Remained about the spring when they went towards church. Did not know what they did after leaving spring. They would have to go by the church to go to their homes. After conviction, the defendant moved for a new trial on the general grounds, because of newly-discovered testimony, and because he was induced by the misrepresentations of one Williamson, bailiff of the city court, to waive his right of trial by jury, and to go to trial without being represented by an attorney, and not to have witnesses present to sustain his defense. In support of this ground he brought forward a number of affidavits to the effect that the bailiff had represented to him and his friends that he knew defendant was not guilty; that he would be a witness for defendant; that he knew all about the charge; that defendant need not have any witnesses subpoenaed, and must not employ an attorney nor talk to one; that the bailiff was first cousin to the judge, who would do what he desired, etc.,—by which representations the defendant was misled and deceived. As to this ground the court makes the following statement: "When the defendant appeared in court for trial he was asked by the court if he was ready to go to trial, to which he responded, 'Yes.' He was then asked if he had a lawyer, to which he responded, 'No.' The court then told him, if he was not able to employ counsel, that he would appoint him counsel, to which he replied that he did not wish a lawyer, but preferred to go to trial without one. He was then asked if he wished a jury to try him. He replied, 'No;' that he wished to be tried by the court, and get through with it. Being asked again by the court if he was ready, he replied, 'Yes.' He was formally arraigned, and pleaded not guilty. He gave the solicitor general the name of the witness, and he was called and sworn with the state's witnesses. The trial was proceeded with regularly. The defendant, Bryant Vaughn, cross-examined the state's witnesses at length, and with such shrewdness as to impress the court with the fact that he realized his position, and was doing everything to make a good showing. He introduced his own witness, and examined him, great latitude being allowed him in the examination. The court does not believe that he could have possibly been misled, or that he labored under a misapprehension as regards the result of the

trial. Every right was zealously guarded for him by the court, and fully explained to him." The newly-discovered evidence was to the effect that the only disturbance created by the defendant or by Keith was some trouble they had at a spring about 250 yards from the church, which could not have been heard at the church, and that one of the witnesses for the state, who testified that he saw the disturbance near the church, was not present.

W. D. Stone, for plaintiff in error. O. H. B. Bloodworth and M. W. Beck, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

KEITH v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

CRIMINAL LAW—PLEADING GUILTY ON ADVICE OF BAILIFF.

The fact that a bailiff of the city court privately advised the accused to enter a plea of guilty, and that he acted upon this advice, is no ground for a new trial, it appearing that the court fully explained to the accused his legal rights, and that he deliberately entered the plea of guilty under circumstances that would charge him with knowledge of its consequences.

(Syllabus by the Court.)

Error from city court, Monroe county; J. B. Williamson, Judge.

Babe Keith was convicted of disturbing a congregation assembled for religious worship, and a new trial was denied. Defendant brings error. Affirmed.

The following is the official report:

Babe Keith was indicted at the same time, and for the like offense with that for which Bryant Vaughn was indicted, both indictments referring to the same time and place where the alleged offense was committed. (18 S. E. 550.) The court certified that Keith was present in the court room during the entire trial of Vaughn, and was familiar with the result of Vaughn's trial before he was tried. He was offered counsel by the court, and refused to allow counsel to be appointed for him, or to employ any himself, saying he would represent himself. He waived jury, and said he wanted the thing over, and wished the judge to try him at once. He was formally arraigned, and, when asked if he was guilty or not guilty, said, "I am guilty of a part of it." The court had the indictment read over again for him, explained to him fully its meaning, and told him he must either plead guilty or not guilty, or, if he preferred to remain silent and not reply at all, the court would have a plea of not guilty entered, and go ahead and try him. He then said he would plead guilty. There could have been no misunderstanding; everything was explained to him. He was given a similar sentence to that of Vaughn,—\$25 fine, or eight months in the chain gang. He moved for a new trial on the general grounds, and be-

cause the plea of guilty was made under a misapprehension of the facts, he having been misled by Williamson, the bailiff of the court, by whom he was deceived into believing that if he entered the plea he would be discharged without punishment; also, because the judgment is contrary to law, for the reason that he did not intend to plead guilty to the offense with which he was charged, but only that he was guilty of having a disturbance at the spring about 300 yards from the church. He made similar allegations as to the misconduct of the bailiff, and referred to the same affidavits in support thereof, as were made in the Vaughn Case.

W. D. Stone, for plaintiff in error. O. H. B. Bloodworth and M. W. Beck, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

SCHAEFER v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

HOMICIDE—SUFFICIENCY OF EVIDENCE.

1. Clear and undoubted evidence of the corpus delicti will serve to corroborate a confession made by the accused, and his confession thus supported will serve as sufficient corroboration of the evidence of an accomplice.

2. The evidence warranted the verdict, and the newly-discovered evidence would not be likely to change the result. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Henry county; C. L. Bartlett, Judge.

Jim Schaefer was convicted of murder, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

Jim Schaefer and Ben Bivins were indicted for the murder of Adam C. Sloan. Schaefer was convicted, with a recommendation to life imprisonment. A new trial was moved for, and refused, and the defendant excepted. The grounds of the motion are that the verdict is contrary to law and evidence, and on account of newly-discovered evidence tending to show that one Tomlinson did the killing. The evidence was voluminous and conflicting. Bivins gave testimony to the effect that he and Schaefer made a plot, and went at night, together with Henry Harrison, to Sloan's residence, for the purpose of burglary; that, on arriving at the premises, Bivins refused to go in, and Schaefer went alone; that Bivins saw Schaefer endeavoring to enter through a window, and walked away from the house a little distance, where he waited until, in a few moments, he heard the firing of a pistol, and ran off. It appeared that Bivins had on previous occasions sworn falsely about the matter, if his testimony at this trial was true. Other evidence tends to show that the house was actually entered

through the window, and that Sloan was shot while asleep by the burglar, who made his escape unseen. There was some testimony, of a contradictory nature, tending to show admissions by Schaefer that he had done the killing, and numerous circumstances appeared to support this theory. The only ground for new trial, besides the general grounds, is based on newly-discovered evidence, in brief, as follows: Bivins was tried and convicted, and, while a motion for a new trial in his behalf was pending, he told his counsel, in a consultation relating to a prosecution of this motion, that he knew Jim Schaefer had nothing to do with the shooting, but that he saw Ras. Tomlinson do the shooting. After this consultation, his counsel dismissed the motion. On the night before the killing, Ras. Tomlinson was seen in the town where Sloan resided, and seemed to be rather shy. In the month before the murder, he was heard to say that Sloan, calling him a vile name, was the cause of his serving out two terms in the chain gang and that he intended to kill Sloan. In support of this ground appeared, also, affidavits to the effect that certain tracks, appearing to have been found leading from Sloan's premises, in the direction in which Schaefer probably went, might as well have been made by Tomlinson, in going towards the house of some of his relatives.

G. W. Bryan and W. T. Dicken, for plaintiff in error. M. W. Beck, Sol. Gen., J. M. Terrell, Atty. Gen., and E. J. Reazan, for the State.

PER CURIAM. Judgment affirmed.

STANLEY v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

HOMICIDE—INSTRUCTIONS—EVIDENCE.

There was no element of voluntary manslaughter in the case. The evidence warranted the verdict, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Pike county; J. J. Hunt, Judge.

Will Stanley, having been convicted of murder, and a new trial denied, brings error. Affirmed.

The following is the official report:

The defendant was convicted of murder. He moved for a new trial on the general grounds, and "because the court erred in failing to give in charge to the jury the law touching voluntary manslaughter, and in failing to instruct the jury at all upon this grade of homicide." The motion was overruled, and exception was taken. The evidence was in conflict. That in behalf of the state made a strong case of murder, while a number of witnesses introduced by the defense gave testimony tending to prove an accidental shoot-

ing. According to the defendant's statement, also, the shooting was unintentional.

E. F. Dupree and J. F. Redding, for plaintiff in error. M. W. Beck, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

PER CURIAM. Judgment affirmed.

ADAMS v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

PERJURY—RULINGS ON EVIDENCE—TAKING EXHIBITS TO JURY ROOM.

1. On a trial for perjury, a witness for the state, after reciting what the accused testified when the alleged perjury was committed, may say that it was false, at the same time stating facts which conclusively show that it was false.

2. Unless it appears from the motion for a new trial or the bill of exceptions what the evidence was which was admitted, or what the fact was which was proposed to be proved, the admission of the one, or the rejection of the other, is no cause for a new trial.

3. There was no error in allowing the articles of clothing to which the testimony related to go in evidence, and afterwards to be delivered by the sheriff to the jury with the caution not to lose them. Nor was it error to allow evidence that the pants had been cut off after they were stolen.

4. The evidence warranted the verdict, and the motion for a new trial was properly overruled.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

Cy Adams, having been convicted of perjury, and a new trial denied, brings error. Affirmed.

Following is the official report:

The defendant was convicted of perjury, and excepted to the refusal of a new trial. The indictment is not a part of the transcript of record sent to this court, and hence it does not appear otherwise than from the brief of evidence what the defendant was charged to have sworn falsely. There is testimony to the effect that he was sworn as a witness for the defense at the trial of Napoleon Moss, who was charged with burglary of the house house of one Smith, and with stealing therefrom a pair of pantaloons belonging to Smith; that the defendant was sworn, and testified on that trial that he found the pantaloons, among other clothing, in a valise, three or four years previously, and gave them to Savannah Moss, the mother of Napoleon Moss. In addition to the general grounds, the motion for new trial alleges that the court erred in permitting Smith and his wife to testify that when the defendant swore on the trial of Moss that he, defendant, found the pants in Florida, four or five years before, and gave them to Savannah Moss, he swore what was not true. Objection was made to this testimony on the ground that it was a conclusion of the witness' mind, and that it was for the jury to say whether the defendant had sworn falsely. Another ground is that the court, over defendant's objection,

permitted his witness S. P. Maddox to testify on cross-examination what Savannah Moss testified on the trial of Napoleon Moss, where the defendant is accused of having committed perjury; the objection being that this testimony was not admissible to affect the rights of defendant. This ground does not state what testimony given by Maddox was objected to. Error is assigned on the refusal of the court to permit Hamp Moss, the husband of Savannah Moss, and father-in-law of the defendant, to testify what the defendant said to Savannah Moss when he gave her the satchel or valise containing the clothes. It is insisted that this evidence was part of the res gestae of that transaction, and explained where he got the clothes, and was part of his testimony on the trial of Napoleon Moss. It is further assigned as error that the court permitted the state's witness to testify, over the objection of defendant, that the pantaloons had been cut off at the bottom; the objection being that this was not material. The court admitted the testimony on the question of identification of the pantaloons. It appears that a pair of pantaloons were identified by several witnesses in the presence of the jury as the pantaloons which were stolen from Smith's house, and which the defendant, on the trial of Moss, had sworn he gave to Savannah Moss. The last ground of the motion for a new trial alleges that the pantaloons were handed by the sheriff to the jury after they retired, with direction to take them, and be sure not to lose them. It is insisted that the court erred in allowing them to go to the jury as evidence, and that their being carried by the sheriff to the jury room after the jury had retired may have had an influence on the jury unfavorable to the defendant.

Maddox & Starr, for plaintiff in error. A. W. Flite, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

HOOD v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

HOMICIDE—CONTINUANCE—EVIDENCE—SENTENCE AS GROUND FOR NEW TRIAL—SUFFICIENCY OF EVIDENCE.

1. Inasmuch as it did not clearly appear by the showing for a continuance that more than one of the absent witnesses resided out of the county, and what that witness would testify being fully admitted by the state, there was no error, under sections 3847, 3848, of the Code, in denying a continuance.

2. There being no evidence that the deceased sent any message by his brother to the accused, requesting the accused to meet him (the deceased) at a certain bridge, the fact of the oral delivery of what purported to be such a message was immaterial, and the exclusion of evidence on that subject is not cause for a new trial.

3. The exclusion of what was said by the prisoner's child on reaching a neighboring house, whither she had been sent by her father, cannot be held erroneous, it not appearing what

the child's declarations were. If they were a part of the *res gestae* at all, it would be on the ground that they were explanatory of some relevant act, and whether they had this character or not is unknown.

4. The sentence of the court, with reference to the term of punishment, cannot be looked to as a ground for a new trial.

5. In view of the presumption of law that a voluntary homicide by the use of a deadly weapon is felonious unless shown to be justifiable, the evidence warranted the verdict, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Fayette county; S. W. Harris, Judge.

Dan Hood was convicted of manslaughter, and a new trial denied. Defendant brings error. Affirmed.

Code, § 3847, provides that, on application of defendant in a criminal case, subpoenas shall be issued to obtain the attendance of witnesses in his behalf. Section 3848 provides that "no party failing to use the means provided in the preceding section, when within his power, shall be entitled to a continuance because said witnesses are not in attendance at the term of court when his case is called for trial, if he is prosecuted for the same criminal act."

The following is the official report:

Dan Hood was indicted for the murder of Charles R. Watts, and was found guilty of voluntary manslaughter. A motion for a new trial was made, and was overruled. In addition to the grounds that the verdict is contrary to law and evidence, the motion complains that the court erred in refusing to continue the case on the showing made by the defendant. It appears from the record that the killing occurred in December, 1892. The indictment was found at the March term, 1893, of Fayette superior court. The case was called for trial about 10 o'clock on March 23d, and the defendant moved that the case be continued on account of the absence of various witnesses, stating what he expected to prove by them; that they lived in Fayette and Coweta counties; that he did not make the motion for the purpose of delay, but to get these witnesses to testify in his behalf, and expected to get them at the next term of court; and that he had had no time to consult with his lawyers as to line of his defense since they were appointed, and could not go safely to trial without further preparation. He further stated that when he was first arrested he employed Mr. Clark, an attorney of Newnan, to defend him, and depended on him to have his witnesses subpoenaed; that Clark left, and defendant did not know where he went to; that he then tried to get other attorneys, who would do nothing until he could get their fee fixed, which he could not do; that he made other efforts to get his witnesses summoned, etc. His counsel stated that they had just been appointed to defend him; had had only a few minutes to confer with him; had not seen his witnesses, nor had time to

talk to him about his case; and were wholly unprepared to go to trial, and give him justice in his defense, on so short notice. At this juncture the court ordered the sheriff to get subpoenas for the witnesses, and serve them, and remarked that the case would be passed until the next morning. On March 24th the case was again called at 10 o'clock, and the defendant's counsel asked to amend their motion for continuance. The defendant was sworn, and gave the names of other absent witnesses whom he expected to get by the next term of court,—among them, Henry and Ellen Page and John Morrow. He stated that Henry Page lived on Hunnicutt's place, in Fayette county. "They tell me he lives in Carrollton. Expect to prove by him that he was next to the first man that came to my house after this took place; that he saw Mr. Watts lying there, and pistol with him, and the pistol was lying by his side. Ellen Page is wife of Henry Page. Expect to prove by her that she heard the three shots made; that there was two shots made right together, and then, in about twenty-five or thirty minutes, the last was made; that she was about 500 yards from the place. * * * The Pages and Mr. Morrow, Gale's brother, live in Coweta county. Why I did not give these names yesterday, was, I could not remember them. After I went back to jail, I went to where I put the names. I gave these names to Mr. Gollightly, lawyer, yesterday, before twelve o'clock. He came over to jail after I went back, and got the names. * * * Mr. Morrow lives at Mr. Pat Carmichael's place, just about a mile from where Mr. Watts lived, in Coweta county. * * * Mr. Martin and Jerry Morgan, last of my account, lived in Coweta county. After I went to Fulton jail, do not know whether they moved or not. Henry Page and Ellen Page live in Carroll county. Henry Page saw the pistol. * * * Expect to prove by Ellen Page and Milly Reaves that they heard the reports from three shots, and that they were about 500 yards from me. I expect to prove by Henry Page, Ellen Page, Milly Reaves, Mattie Martin, and Jane Bailey that they heard the three shots. * * * I suppose all here will testify to the same, to wit, Jane Bailey, Jane Reed, Tillman Sims, and Joe's wife, if she is here." The defendant also swore: "Dick Bridges lives in Senola. Expect to prove by him that he heard these parties, at Mr. Watts' gin house, making up their plans to come and kill me. * * * No other witness here that I can prove the same thing by that I can prove by Dick Bridges. Henry Page was the first man that got to Mr. Watts, and no other witness here that I can prove by that there was a pistol by Mr. Watts. * * * What reason I have to believe Dick Bridges will swear about the plot, I have reason to believe he will swear the truth about it. The day I left Senola to go to Fulton jail, he told me I had enemies talking about me."

It further appeared from the testimony of the sheriff and of the prisoner's counsel that on the previous day the counsel had gone to the jail to talk with the defendant; asked him about his witnesses, and got the names of those just mentioned by the defendant; was let out of jail about 3 o'clock, and immediately gave the sheriff subpoenas for the witnesses, and asked him to have them brought. The court stated that, as he understood the showing, all the witnesses called on the previous day were present, except Morgan and Morrow; that by Morrow the defendant desired to prove that a pistol was found by Watts after he was killed, and, by Morgan, that Watts told him his brother wanted to see him at the creek next morning, and he declined to go. The solicitor general stated that it was admitted that the pistol was found, and was Charles Watts' pistol. Two grounds of the motion alleged that the court erred in refusing to allow the defendant to prove by Jerry Morgan and two others that on Sunday before the killing of Watts, on Monday, they were at the house of defendant, and that Bud Watts went there, and told defendant that deceased had sent him to tell defendant to meet deceased and Bud Watts the next day at the creek; that they would have some whisky; that defendant told Watts he would go, or send his boy, and Watts remarked, not to send the boy; he wanted defendant to go in person. The defendant first offered to prove this by Reed, a witness for the state, on cross-examination, and before the state rested its case. The court held that the defendant could not make such proof, unless it could first be shown that Bud Watts was the agent of the deceased, and refused to allow the defendant to ask Reed such questions. Reed was not put upon the stand again, nor was he offered by the defense, nor did the court, at any time after this, mention to defendant that he could make such proof by Reed, although the court did afterwards, and while the defendant was offering his proof, change the ruling, and allowed him to make proof of these facts by Perry Gay. The defendant also mentioned such a conversation in his statement. After the defendant closed, the state offered Bud Watts in rebuttal, and he denied any such conversation, this being the first denial offered by the state. After the state had again closed, the defendant offered in surrebuttal John Morrow and others for the purpose of proving that such a conversation occurred on Sunday, and that Bud Watts did tell the defendant to meet him and Charles Watts at the creek the next day. The court held that such testimony was not then admissible, which ruling is assigned as error. While Jane Morgan was on the stand, she testified that the defendant's little girl came to the house of Joe Reed, running and crying, and that Joe Reed's house was in hollowing distance of the defendant's. His counsel proposed to ask her what the child

said when she first reached the house of Joe Reed. The court held that she could state that the child told Reed that defendant sent for him, but that any other words spoken by the child at the time were inadmissible. This ruling is assigned as error. It is further alleged as a ground for a new trial that the sentence imposed by the court was cruel and unusual, the same being imprisonment in the penitentiary for 20 years.

J. F. Gollightly, E. F. Weems, and J. W. Wise, for plaintiff in error. T. A. Atkinson, Sol. Gen., J. W. Shell, and Atkinson & Hall, for the State.

PER CURIAM. Judgment affirmed.

FLETCHER v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

BURGLARY—SUFFICIENCY OF EVIDENCE.

The evidence, though not absolutely conclusive, was sufficient to authorize the verdict; and, the same having been approved by the trial judge, this court will not control his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Tom Fletcher was convicted of burglary, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

This was a conviction of burglary, and the sole grounds for new trial are that the verdict is contrary to law and evidence. The burglary was established, and the issue was as to whether the defendant committed the crime. The evidence was conflicting, but there was testimony to the effect that the stolen pantaloons were found in a trunk on which the defendant was sitting, and which he unlocked, and said it was his wife's trunk; and that he acknowledged to have worn the pantaloons, although claiming that they were left at the place by one Jones.

Haralson & Gowdy, for plaintiff in error. O. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

MCGARR v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

CRIMINAL LAW—APPEAL—REVIEW.

1. Objections to the admission of evidence, not stating what the evidence objected to was, cannot be considered.

2. The evidence was sufficient to sustain the conviction, and there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

A. M. McGarr having been convicted of

being a common cheat and swindler, and a new trial denied, brings error. Affirmed.

The following is the official report:

McGarr was found guilty of being a common cheat and swindler, and his motion for a new trial was overruled. The indictment charges that by falsely and fraudulently representing to George Derst that a check purporting to be signed by W. J. Gibbons for \$51.60, drawn on the National Bank of Savannah, and dated about May 6, 1893, was good and would be paid when presented to the bank, the defendant obtained from Derst the sum of \$5, and did thereby defraud and cheat Derst out of that amount. The case was tried on accusation in the city court of Savannah. The motion for new trial contains the following grounds: "(1) The admission, over the defendant's objection, of secondary evidence as to an alleged fraudulent check, without showing that the same was lost, destroyed, or, if in the hands of the defendant, that notice had been served on him to produce it. (2) The admission, over the defendant's objection, of the evidence of one Snelson as to a certain check, not produced, but seen by him some time in the spring, in the possession of the defendant, the witness not remembering the date of its presentation to him, the date of the check, the initials of the drawer, or the bank on which it was drawn. (3) That the defendant was practically charged and convicted of forgery in a court having no jurisdiction of felonies. (4) Variance between the allegations and the proof, for that the accusation charges that the defendant did defraud and cheat Derst out of \$5, (five dollars,) whereas Derst testified, and the defendant showed by Derst's receipt, that at the time of his arrest he owed Derst but \$2.25, (two dollars and twenty-five cents.) (5) That the verdict was contrary to law, contrary to the evidence, and wholly unsupported by it, the state having utterly failed to show any intent to defraud, or to establish the identity of the alleged fraudulent paper on which the accusation is founded." George Derst testified that he was a storekeeper, and at one time McGarr was in the habit of trading with him. In May, 1893, McGarr came to his store with a check for \$51.60 on the National Bank of Savannah, signed by one Gibbons. Derst did not remember the initials of Gibbons or the date of the check. McGarr desired Derst to cash it, stating it was after banking hours, and that he needed the money. Derst refused to cash the check. McGarr then requested him to advance \$25 on it, which was refused; but finally he let McGarr have \$5.25 on it, McGarr to indorse the check, and leave it with him for collection. McGarr told him the check was perfectly good, and would be paid. This was Saturday afternoon, after banking hours. On Monday Derst went to the bank to cash the check, and was refused payment. He went to see McGarr, who told him there must be

some mistake about it, and agreed to go to the bank with him to look into it. They drove to the bank, and at the door Derst handed McGarr the check for presentment. He presented it, and payment was refused, they being informed that Gibbons had no account there. They went out, McGarr retaining possession of the check, and saying there must be some mistake; that he would go over and see Mr. Stovall, who he knew did have money in the bank, and that he would make it all right. The two started off in Derst's road cart, and had not gone far before Derst remembered there was a party he had to see. He got out, and told McGarr to stay there, and hold the horse until his return. He returned in a few minutes, but McGarr had gone, and carried the check with him. Afterwards finding him, Derst told him he did not want to have any more fooling, and that he must have his money. McGarr told him it would be all right, and referred him to Gibbons, a railroad contractor for whom he said he had worked, and who had drawn the check. McGarr then left, and Derst drove out to see Gibbons, who told him that McGarr had worked for him, but was not then employed by him, and that he had given him no check on any bank. Derst did not see McGarr for several days afterwards. When he did see him pass on the other side of the street he followed him, driving the road cart, but McGarr saw him, and eluded him by turning into a narrow lane into which he could not go with the cart. Derst went several times to find him at a house where he was staying, but without success. Finally he came up with him one day in the street, and told him that this thing had gone far enough, and he wanted his money. McGarr again assured him it would be all right; upon which he let him go. Several days after this McGarr came to his store, and paid him three dollars on the amount due, with which he was pretty well satisfied, as he thought he had done well to get anything; did not consider this a settlement of the crime. W. G. Gibbons testified that he was a railroad contractor, and the defendant had worked for him as foreman of his hands. He never had any money in the National Bank of Savannah, and never paid McGarr off in a check on that or any bank. He did not owe McGarr anything, nor have any money in trust or keeping for him. Morgan testified that he was county detective, and arrested McGarr after a chase. When he caught up with him he showed some signs of resistance, but surrendered on Morgan's drawing his pistol on him, saying that if he had his "thirty-eight" along he would not have been taken so easily. Morgan searched him, and took from him two papers in the form of bank checks,—one dated December 27, 1892, for \$25, payable to the order of John W. Crolley, and drawn on the National Bank of Savannah by D. P. Riggins & Co.; the oth-

er dated April 17, 1893, for \$41, payable to A. M. McGarr or bearer, and drawn on the Savannah Savings Bank by W. G. Gibbons. Snelson testified that he was a colored doctor; that McGarr had approached him some time in the spring, and requested him to cash a check, which he refused to do; that the check was drawn by one Gibbons, but that he did not remember his initials, the date of the check, or the bank on which it was drawn, though he believed it was on the National Bank of Savannah. The prisoner stated that he got the money from Derst as a loan, and intended to pay him back, but was not able to do so; that to secure the loan he left with Derst a check which was not on Gibbons, but on W. G. Riggins, another contractor for whom he had worked; that he did refer Derst to Gibbons, because he was a stranger and had worked for Gibbons, not referring to Gibbons as the man who gave him the check, but that Derst might find out who he was; that he tried to avoid Derst because he had no money to pay him, and as soon as he was able he went and paid Derst \$3 of the \$5.25 due, for which he held his receipt; that he did not know Morgan, and when Morgan arrested him he was in citizen's clothes, and did not at first say who he was, hence his attempt at "resentment;" but when the officer drew his pistol, and informed him who he was, he offered no further resistance.

Ed. R. McKethan, for plaintiff in error.
W. W. Fraser, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

DEAN v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—REVIEW.

1. Where there is no affidavit by the accused or his counsel that the alleged newly-discovered evidence was unknown at the time of the trial, a new trial will not be granted on the ground of newly-discovered evidence.

2. The evidence warranted the verdict. There was no error in any of the rulings or charges of the court complained of, nor in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county;
O. L. Bartlett, Judge.

Jim Dean was found guilty of burglary, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

The defendant was convicted of burglary, and excepted to the refusal of a new trial. The motion for new trial contains the general grounds, and sets up newly-discovered testimony as contained in an affidavit of Fannie Hill. There was no evidence for the defendant at the trial. From the cross-examination of the state's witnesses, and from the defendant's statement to the jury, it ap-

pears that the theory of the defense was that Henry Calhoun, and not the defendant, was the burglar. This was contradicted by the testimony of Calhoun and his mother. The evidence further disclosed that the burglary was committed in a hardware store, and that the articles stolen were knives, etc., some of which were recovered from the defendant and others, to whom he had delivered them, and some were never recovered. The affidavit of Fannie Hill is to the effect that she saw Henry Calhoun's mother in possession of certain new knives and forks about two or three months after the burglary, which she gave to a colored man, who took them away, this man having just remarked that she would get herself into trouble if she did not quit having negroes around her; that two days afterwards she whipped her son Henry, took from him a new pocketknife, and concealed it in her own pocket; and that the affiant did not communicate this information to defendant or his counsel, because she was not asked about it, had no connection with the case, and did not know until after the trial that the defendant had been arrested or charged with burglary. No other affidavit accompanies this ground. Henry Calhoun was introduced as a witness in rebuttal of the defendant's statement. On cross-examination he testified: "I have never been to the chain gang. I was found guilty of stealing chickens in the city court, but was paid out." This testimony was admitted without objection at the time it was given. Afterwards the solicitor general moved to rule it out, on the ground that there was higher evidence of the trial and conviction of the witness. The court asked counsel for the defendant what he had to say to that. He replied that he had no objection, as he would send and get the record. It is now insisted that the court erred in ruling out the evidence, as the defendant was entitled to the benefit of the impeachment of the witness, brought about by his own statement of his conviction. The court charged: "If the house was closed with blind shutters, and fastened or closed, and they were prized open, and the window raised out of its place, that would be such a breaking as the law would denominate a breaking in the case of burglary." It is said that under this charge the jury could have found the defendant guilty of burglary, although he did not enter the house, the effect of the charge being that prizing open the blind shutter, and raising the window, would amount to burglary. The court charged: "Possession of stolen goods, in case of burglary, recently thereafter, goods that were stolen at the time of the burglary committed, with no explanation by the defendant, or no satisfactory explanation by the defendant how he came by them, with clear proof of a burglary having been committed, and clear identification of the goods, may authorize the jury to convict the defendant upon such possession of stolen goods."

If that evidence satisfies their minds beyond a reasonable doubt of the defendant's guilt." It is contended that this was error, because the court gave the jury no legal standard for judging of recent possession; that the court stated a series of facts in an argumentative way, and following out the theory of the state, and then instructed the jury that these facts would authorize a conviction, whereas the court should have merely laid down the abstract rules of law governing this point, and left the jury to determine whether these facts constituted burglary. The court charged: "You see what he said about it when he was found in the possession of any property, if he said anything. See what he did with the property that was stolen at the time it was found in his possession, if any was stolen and found in his possession soon thereafter; what account he gave of it, if any." This is claimed to be erroneous, for the reason that the court did not instruct the jury as to the law of confessions, it being contended that the state sought to prove certain statements by the defendant at the time of his arrest, which statements he claims were in the nature of confessions. It does not appear from the brief of evidence that the defendant made any statement in the nature of a confession, or intended to make any. Policeman Jenkins testified: "When I arrested this boy, he didn't say anything about seeing Henry Calhoun in a hole with his feet up. He did not say anything about buying a dozen knives from him. He said he bought the knives he had from him. He said he had not sold any knives. We asked him about the knife he sold to Mose Green, and he said he hadn't sold any."

Estes & Fried, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

JACKSON v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

CRIMINAL LAW—BILL OF EXCEPTIONS—TIME OF SETTLEMENT.

The act of September 7, 1891, "To provide for the more speedy determination of criminal cases," having made the practice in reference to bills of exceptions in cases of injunctions applicable to bills of exceptions in criminal cases, the latter must be signed and certified within 20 days from the date of the judgment complained of; and it having been repeatedly ruled by this court, in cases of injunction, that this provision of the law is imperative, and that no excuse will be heard for a failure to comply with the same, it follows that where a judgment refusing a new trial in a criminal case was rendered on the 2d day of August, and the bill of exceptions was not signed and certified until the 9th day of September thereafter, the writ of error must be dismissed, although the judge certifies that he was absent from the state from August 22d to September 7th, and that the bill of exceptions was presented to him immediately upon his return. *Gray v. Field*, 60 Ga. 315; *Roberts v. Leonard*, 62

Ga. 209; *Hardin v. Swann*, 66 Ga. 244; *Sewell v. Edmonston*, Id. 353. See, also, *Markham v. Huff*, 72 Ga. 106.

(Syllabus by the Court.)

Error from superior court, Sumter county: W. H. Fish, Judge.

Romeo Jackson, having been convicted on a criminal indictment, and a new trial denied, brings error. Dismissed.

E. F. Hinton and Hudson & Blalock, for plaintiff in error. C. B. Hudson, Sol. Gen., and Harrison & Peeples, for the State.

PER CURIAM. Writ of error dismissed.

HINES v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

INTOXICATING LIQUORS—ILLEGAL SALES—SUFFICIENCY OF EVIDENCE—BURDEN OF PROOF—NEW TRIAL.

1. An allegation in an indictment that the offense charged was committed in the "714th district, Georgia militia," is sufficiently established by proof that the offense was committed in the "714th district, G. M." The initial letters "G. M." are commonly recognized and employed in this state as a proper abbreviation of "Georgia militia." Indeed, the act under which the indictment was found itself makes use of this identical abbreviation. Acts 1880-81, p. 591, § 1.

2. It was unnecessary, in order to justify a conviction, that the state should show that the accused did not come within the exception "that the provisions of this act shall not apply to any licensed physician in the regular practice of his profession, who may use liquors in making up his prescriptions, or compounding his medicines in cases of actual sickness." Proof of justification under this exception was a matter which properly devolved upon the accused, it being within his power to readily and easily establish the truth in this regard. *Amos v. State*, 34 Ga. 531.

3. Due diligence was not exercised to procure the evidence alleged to have been newly discovered.

(Syllabus by the Court.)

Error from superior court, Carroll county: S. W. Harris, Judge.

Bob Hines was convicted of selling intoxicating liquors unlawfully, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

Bob Hines was indicted for selling and furnishing malt and intoxicating liquor and intoxicating bitters in Carroll county on the 1st of August, 1892. He was tried on the 5th of December, 1892, and was found guilty. He moved for a new trial on the general grounds, and for newly-discovered evidence. The motion was overruled. At the trial, one Mitchell testified that about the first part of 1892, or the latter part of 1891, he went to the defendant's barber shop to be shaved. Asked defendant if he knew where witness could get any whisky. Defendant said there was some in Stewart's wagon yard; that a man from Alabama had some blockade there. Witness begged defendant

to go and get him some whisky. Defendant consented, and witness gave him 20 or 25 cents. Defendant left, and in a short time returned with half a pint of whisky. He charged nothing for going. Witness did not pay or offer to pay him anything for going. This occurred in Carroll county. Ben Crider testified that on Sunday morning, about the latter part of September, 1892, he and others were in his room, and he saw defendant on the street. He told defendant to go and bring some liquor up there, and after a while defendant came in, set a bottle on the mantel, and went out. Witness did not pay defendant anything for the whisky, or for going after it, nor did he know of any one else paying him. He had no whisky in defendant's barber shop on the night before. Did not know whether any of the others who were in his room had or not. Recalled, Crider testified it was not true that, a few nights, or at any time, before the furnishing of this whisky by defendant to him and the others, he had left any whisky in defendant's shop. He did not know where defendant got the whisky from. One Stewart testified that he was a member of the grand jury at the October term when this indictment was found; that in the case of Bill Benson the defendant swore to the grand jury that he had never sold or furnished Mitchell or Crider any whisky, and that he had never carried or furnished them with whisky. The defendant stated that the whisky he got for Mitchell was some he bought for him in Stewart's wagon yard, from a man who had it in a jug covered up in a wagon, and who said he lived in Alabama. This man was soon afterwards arrested for selling whisky. Two witnesses gave testimony tending strongly to corroborate this part of defendant's statement. As to the whisky he carried to Crider, he stated that Crider had been in his shop a night or two before the time he was told by Crider to go and get him that liquor, and had left some there in a bottle, and that, when Crider told him to get him some liquor, he went to his shop, got the liquor Crider had left there, carried it to his room, set it on the mantel, and left immediately. Several other boys were in the room. The newly-discovered testimony was embraced in an affidavit of Crider that on Sunday morning, in September, 1892, from his room, he saw the defendant on the street, called him, and told him to go to Bill Benson's and get him a pint of liquor; and that he had talked to defendant's counsel prior to that time, but never told them of that fact. As to this testimony the defendant made affidavit that, when Crider was on the stand, defendant thought he was testifying about a different transaction from the one he testified to, which was when Crider, or some one in his room, called defendant to go to his shop and get some whisky left there the night before;

that he was not thinking of the time Crider told him to go to Benson's and get whisky, as he thought the arrangement about the whisky obtained from Benson for Crider had been made beforehand; that he had entirely forgotten this, and never thought of it until after his trial, when Crider reminded him of it. There was an affidavit by defendant's counsel that they had been diligent in the preparation of his case, and did not know of the fact embraced in Crider's affidavit until after the trial, and an affidavit by W. I. Cobb that Crider's character was good, and he would believe him on oath.

W. D. Hamrick and W. F. Brown, for plaintiff in error. T. A. Atkinson, Sol. Gen., Edgar Watkins, and Aikinson & Hall, for the State.

PER CURIAM. Judgment affirmed.

BEARD'S ADM'R v. CHESAPEAKE & O. RY. CO.¹

(Supreme Court of Appeals of Virginia. Dec. 7, 1893.)

INJURY TO RAILROAD BRAKEMAN—LOW BRIDGE—SUFFICIENCY OF DECLARATION.

A declaration alleged that plaintiff's intestate was employed by defendant railroad company as freight brakeman; that it was his duty to obey signals given by the engineer, and that in so doing he was compelled to pass over the tops of the cars; that, on a dark and stormy night, the signal was given to apply the brakes in order to stop the train; that deceased responded to the call; that the brakes were defective, and would not stop the train as quickly as if in good condition, and that consequently the train ran under a low bridge, which deceased did not see on account of the darkness, and of his being busily engaged in his duties; and he was knocked down thereby, and killed; and that the accident was caused by the defective condition of said brakes, which it was defendant's duty to keep in good repair. *Held*, that the declaration stated a good cause of action. Lacy, J., dissenting. Clark's Adm'r v. Railroad Co., 78 Va. 709, distinguished.

Error to circuit court, Alleghany county.

Beard's administrator sued the Chesapeake & Ohio Railway Company in an action of trespass on the case for negligently causing the death of his intestate. Defendant demurred to the declaration, and the court sustained the same, from which judgment the plaintiff brings this appeal. Reversed.

John L. Lee and B. T. Gordon, for plaintiff in error. R. L. Parrish and Wm. J. Robertson, for defendant in error.

FAUNTLEROY, J. The petition of John P. Beard, sheriff of Amherst county, and, as such, administrator of E. T. Beard, deceased, complains of a judgment of the circuit court of Alleghany county, entered at its August, 1891, term, in an action of trespass on the case therein pending, in which

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

said petitioner is plaintiff and the Chesapeake & Ohio Railway Company is defendant. It appears from the record exhibited that the defendant company demurred to the declaration and to each of the four counts thereof, and that the court, by its judgment aforesaid, sustained the said demurrer, and dismissed the suit. The facts of the case, as they are alleged in the declaration and admitted by the demurrer, are substantially and materially as follows: E. T. Beard, the plaintiff's intestate, some time in the year 1889 was employed by the Chesapeake & Ohio Railway Company, and assigned to duty as a front brakeman on its freight trains passing through the county of Alleghany. One of the duties of the said Beard was to respond to and obey the signals given by the engineer of the locomotive propelling any freight train to which he might be assigned, and in so doing to pass over the tops of cars when in motion, in order to apply the brakes thereto attached whenever necessary to stop or check the speed of said train. At an early hour—3:35 A. M.—of the 26th day of February, 1890, it being then dark and cloudy and stormy, one of the defendant company's freight trains, upon which the said E. T. Beard, deceased, was employed as a brakeman, was approaching from the west a station upon the said company's railroad called Backbone, in Alleghany county, when the engineer in charge gave, in quick and rapid succession, certain alarm whistles, signals which implied and were a command to the deceased to apply the brakes to that part of the train to which he had been assigned, in order that the said train might be stopped and brought to a standstill as quickly as possible, when the deceased, responding to the signals so given him, proceeded to apply the brakes to his section of the train, and in doing so was obliged to pass, and did pass, over the tops of the cars from the front towards the rear end of the train. The brakes attached to sundry cars in his section of the train were in a worn, broken, and defective condition, and incapable, when applied, of stopping the train as surely and quickly as they would have done had they been in good and effective working order. Owing to the defective and inefficient condition of the said brakes, the train, instead of being stopped, was carried, despite the brakes, with great speed and force, under a low bridge spanning the railroad track, by collision with which the deceased, who was in the active and diligent discharge of his duty, obeying the signal and command to apply the brakes, was knocked from the top of the car on which he was so engaged, thrown to the track beneath, run over by the train, crushed, and killed. But for the worn, broken, and defective condition of the brakes aforesaid, the train, or that part of it on which the deceased was stationed, would have been stopped and brought to a standstill before reaching the

bridge, and the plaintiff's intestate would not have been killed. His death was occasioned by the negligence of the defendant company in permitting the brakes on its cars aforesaid to become worn, broken, and inefficient, and in consequence of the said death the plaintiff was injured and damaged to the extent of \$10,000.

The question presented for the determination of this court is whether the facts distinctly and pointedly set forth in the declaration (which is admittedly faultless in form) entitled the plaintiff to maintain his action. The gravamen of the action is the negligence of the defendant company, specifically charged in the declaration to consist in the nonperformance of a legal duty owing by the defendant company to the plaintiff's intestate, by commission or omission, and the injury resulting to the plaintiff's intestate by the defendant company's nonperformance of that duty. *Patt. Ry. Acc. Law*, 6, 7. It is averred in the declaration that there was a legal obligation resting upon the defendant company to provide and maintain safe, sound, and suitable brakes on the cars upon which Beard might be assigned to duty, and that it was in consideration of this obligation that the deceased went into the service of the defendant company; that the defendant company was guilty of negligence, and of the nonperformance of its legal and contract duty, in suffering the brakes attached to the cars of the train on which the deceased was employed on the night of his death to become and be in such a worn and broken condition as to be incapable of stopping the train as quickly as otherwise they would have done, and that the death of the said Beard, plaintiff's intestate, directly resulted from this negligence and nonperformance of duty on the defendant company's part. Every essential fact requisite to constitute actionable negligence is distinctly charged in the declaration, and admitted by the demurrer. Notwithstanding these positive and sufficient averments in the declaration, the circuit court sustained the demurrer, and dismissed the plaintiff's suit. The facts in the case of *Clark's Adm'r v. Railroad Co.*, 78 Va. 709, were wholly dissimilar from the facts of the case under review, the only point of resemblance being that in both cases the death of a brakeman was occasioned by collision with an overhead bridge. It was held in *Clark's Case* that his negligence in failing to observe the bridge under which the train had to pass, upon a moonlight night, and his failure to stoop down and avoid the collision when there was no occasion or necessity for standing in an upright posture while coming to and passing under the bridge, were the proximate cause of his death, and that the bridge was a peril incident to the employment, contemplated by the contract, the open, obvious, and danger-

ous character of which the deceased had an opportunity to ascertain, and the risk of which he assumed, and it did not appear that he was, at the time he was struck and killed by the bridge, engaged or engrossed in the active discharge of any duty or requirement which prevented or hindered the exercise of his mental and bodily caution. In this case, Beard is alleged in the declaration to have been struck and thrown from his train and killed by an overhead bridge which he could not see, on a dark night, and because his back was turned towards the bridge, and his mind and body actively engaged in the effort to apply the brakes, and stop the train before it reached the bridge, in obedience to the rapidly repeated alarm whistle signals given by the engineer. He had the right to assume that the brakes, when applied, would stop the train before it reached the bridge, and it is expressly averred in the declaration that they were out of order, worn, and inefficient, and that they would have stopped the train, and would have saved the life of the deceased, if they had been in due order; that he was ignorant of the inefficiency of the brakes; and that the negligence of the defendant company in failing to keep the brakes upon its cars in safe condition was the proximate cause of the death of the deceased. "The duty of inspection is affirmative, and must be continuously and positively performed." *Goodman v. Railroad Co.*, 81 Va. 586. In the case at bar the brakeman, Beard, did not, by his contract of service, assume the risk of injury caused by defective machinery, which it was the duty of the defendant company to keep in good repair, of the broken condition of which it is averred he was ignorant, and which he had a right to assume had been duly inspected. The circuit court of Alleghany erred in sustaining the demurrer and dismissing the plaintiff's suit, and our decree is to reverse the judgment complained of, and to remand the case, with instructions to the circuit court to overrule the demurrer, and try the case upon its merits. Reversed.

LACY, J., dissenting.

TURK v. SKILES.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1893.)

VENDOR'S LIEN—ENFORCEMENT—PARTIES—JUDICIAL SALE—RIGHTS OF PURCHASER—PERSONAL DECREE AGAINST MARRIED WOMAN.

1. In a suit to enforce a vendor's lien reserved in a conveyance of land, a trustee in a deed of trust, though subsequent to the conveyance reserving the lien, is an indispensable party, as he holds the legal title.

2. Though, generally, the beneficiary in such deed of trust, as it is subsequent, need not be a party, yet if there be a question whether the holder of the vendor's lien has by

his act waived his lien as to the debt secured by the trust, the beneficiary is a necessary party.

3. A purchaser at a judicial sale is not protected upon reversal of the decree by section 8, c. 132, of the Code, when the record shows that necessary parties interested in the land sold, having liens thereon, were not parties when the sale was ordered and confirmed. So when a trustee holding the legal title to the land is not a party.

4. A personal decree against a married woman for a debt contracted during coverture is erroneous and void, and a clause in the decree that it is to be levied of her separate estate and goods and chattels, not limiting it to the property before the court in the suit, does not cure error. This, before chapter 3, § 15, Acts 1893.

(Syllabus by the Court.)

Appeal from circuit court, Pocahontas county.

Action by R. S. Turk, trustee, against Jannie B. Skiles and others, to enforce a lien on land. Plaintiff had decree, and defendant Jannie B. Skiles appeals. Reversed.

H. S. Rucker, (Frank Woods, of counsel,) for appellant. R. S. Turk, for appellee.

BRANNON, J. J. R. Apperson conveyed to Jannie B. Skiles an acre of land in Pocahontas county, and in the deed reserved a lien for unpaid purchase money. This unpaid purchase money was \$1,500, for which Jannie B. Skiles executed to Apperson three bonds of \$500 each, but there was no mention of them in the deed. On August 25, 1880, Mrs. Skiles and her husband and Apperson executed to R. W. Baldwin, trustee, a deed of trust conveying the said one acre to secure to Richard Baldwin a bond of \$1,200, executed to him by Mrs. Skiles and her husband, which deed of trust was recorded September 8, 1880. On September 7, 1886, Apperson assigned to R. S. Turk, trustee, said three bonds so executed by Mrs. Skiles and husband, to be collected and applied to various debts against Apperson in the written assignment to Turk specified. Afterwards Turk, as trustee, brought a chancery suit in the circuit court of Pocahontas county against Mrs. Skiles and others, setting up the assignment of said bonds to him, and the lien under the conveyance from Apperson to Mrs. Skiles, and praying that it be enforced by the sale of said one acre for the payment of said bonds. Neither Baldwin, trustee, nor Baldwin, creditor, under said deed of trust was made a party to Turk's suit. Mrs. Skiles and her husband filed an answer, in which they alleged the execution of said deed of trust from them and Apperson to Baldwin, trustee, and exhibited the same, denying the existence of Turk's lien, and suggesting that both said Baldwins be made parties, and praying that the bill be dismissed. A personal decree in the case was made against Mrs. Skiles for \$1,796.27 in favor of Turk, trustee, on account of said bonds, and, in default of payment, that said land be sold; and the land was sold under

the decree to W. R. Tyree, and the sale confirmed. Jannie B. Skiles appeals.

In the investigation of the questions arising in this case the first matter which naturally calls for consideration is the absence of Baldwin, trustee, and Baldwin, the creditor, under the trust from Skiles and wife to Baldwin, trustee. That instrument vested in the trustee legal title to the land. The decree and sale would not vest in the purchaser legal title, because it was outstanding in the trustee. It will not do to say, as is said in argument, that if the purchaser do not object to the sale on this score no one else can. He is not the only one interested in the procedure. Mrs. Skiles, the debtor, has right to demand regularity of proceeding, so that the property be not sold under such serious defect as the absence of the party holding the legal title, which would tend to produce sacrifice. Who would pay full price for a title so vitally imperfect? Without this trustee a party, the court acquires no control over the land to sell it. Under several decisions this must reverse the decree. *Norris v. Bean*, 17 W. Va. 655; *Baker v. Oil Tract Co.*, 7 W. Va. 454; *Bilmyer v. Sherman*, 23 W. Va. 657; *Smith v. Parsons*, 33 W. Va. 653, 11 S. E. 68; *Bensimer v. Fell*, 35 W. Va. 17, 12 S. E. 1078. The creditor under said deed of trust is not a party. But it is said that Turk's suit being one to enforce a purchase-money lien, it is not necessary to make any subsequent lienor, whether by judgment or deed of trust, a party, and we are cited to *Neeley v. Ruleys*, 26 W. Va. 686, and *Arnold v. Coburn*, 32 W. Va. 272, 9 S. E. 21. Generally, it is true that in such a suit it is not necessary to make them parties; but where special reasons exist it is otherwise, and such is the case here. While the vendor's lien is older than the Baldwin deed of trust, yet the then owner of that lien, Apperson, united in the deed of trust, and thereby, it is claimed, subordinated his lien to the lien created by the deed of trust, and thus made Baldwin's debt under the trust prior to Apperson's vendor's lien. Clearly, to go on and sell would expose the purchaser under the decree to assault from Baldwin, claiming priority by reason of his deed of trust. Would not this serious cloud inevitably produce sacrifice of the appellant's property? And then again, this deed of trust provides that the proceeds of sale under it shall go first to the Baldwin debt, and the balance to Mrs. Skiles. Does this release the vendor's lien? The money that would otherwise go to Apperson is by Apperson's deed directed to be paid to the debtor. Is the lien any longer existing against that debtor? If there is no longer a lien, the corpus could not be sold; if there is, it could be sold. Again, does the deed of trust discharge the debt against Mrs. Skiles, or only the lien? If it discharge the lien only, and not the debt, her separate estate would be liable to the extent of rentals; otherwise not. Has not

the appellant the right to have the creditor, Baldwin, present, that these matters may be conclusively settled and given rest? If we look at it only from the point of Baldwin's interest, we may say he is not injured, because he is not affected; but the very fact that the decree is void as to him (*McCoy v. Allen*, 16 W. Va. 725) renders it all the more important that he be a party, looking to the interest of Mrs. Skiles and the purchaser, because Baldwin may any moment assert a prior demand. Baldwin has an interest in the land as creditor. It is hardly necessary to cite many authorities to show it error to proceed without him. *Pappenheimer v. Roberts*, 24 W. Va. 702, and authorities cited by Judge Wood. Even where it is uncertain whether a party has an interest in land to be sold, he ought to be made a party before sale. *Donahue v. Fackler*, 21 W. Va. 124. In the absence of the trustee and beneficiary under said deed of trust, we do not deem it proper to decide the merits as between said Baldwins and Turk and Mrs. Skiles.

Next, as to the purchaser's title. I think it clear that the title of William R. Tyree, as purchaser under the sale under the decree, must fall with the reversal of the decree, and that notwithstanding section 8, c. 132, of the Code,¹ because of the want of the said trustee and creditor, the two Baldwins, as parties. We are referred to the case of *Gray v. Brignardello*, 1 Wall. 627, asserting the doctrine that a right acquired under a judicial sale while the judgment or decree is in force will be protected, notwithstanding its reversal afterwards; that it is sufficient for the buyer to know that the court had jurisdiction; and that he has nothing to do with the court's errors. This doctrine has been long and uniformly asserted by the United States supreme court, and generally elsewhere; but in Virginia it has not been recognized, and while the decisions are not settled, the leaning has been against the doctrine. See *Voorhees v. Bank*, 10 Pet. 449; opinions in *Zirkle v. McCue*, 26 Grat. 528, and *Hull v. Hull*, 26 W. Va. 30. It has always seemed to me that the doctrine of the United States supreme court, sheltering the bona fide purchaser, is just, and according to the behests of sound public policy and principle; and, as I understand it, our Code section cited above has carried that doctrine into statute law. But that doctrine and the line of decisions applying it do not hold that, where essential parties holding or having vital interests in the cause and the subject sold are absent from the case, the purchaser is protected. There is want of jurisdiction as to parties and subject acted on. The decisions of this court leave no

¹The section provides: "If a sale of property be made under a decree or order of a court, and such sale be confirmed, though such decree or order be afterwards reversed or set aside, the title of the purchaser at such sale shall not be affected thereby, but there may be restitution of the proceeds of sale to those entitled."

room for question as to this point, and plainly show that the sale must be set aside in this case. The decision in *Underwood v. Pack*, 23 W. Va. 704, is that "a purchaser at a judicial sale is not protected by section 8 of chapter 132 of the Code when the record shows that necessary parties interested in the property sold, having liens thereon, were not before the court when the sale was ordered and confirmed." In *Newcomb v. Brooks*, 16 W. Va. 77, it is said that this provision of the Code cannot possibly transfer to the purchaser title vested in one not before the court. See *Capehart v. Dowery*, 10 W. Va. 142; opinion by Judge Woods in *Pappenheimer v. Roberts*, 24 W. Va. 712, and by Judge Green in *Hull v. Hull*, 26 W. Va. 30; *McNeel v. Aldridge*, 25 W. Va. 118.

There is a personal decree for the debt against Mrs. Skiles. There cannot be a personal decree against a married woman. *White v. Manufacturing Co.*, 29 W. Va. 385, 1 S. E. 572. The decree provides that it shall "be levied of her separate estate, goods, and chattels." This does not cure the error. Shall an execution issue on it? Against what goods? The separate estate of a married woman can only be made liable for a debt by equity, and that only on the estate before the court,—the particular property which is proceeded against.

A chancery suit of *Peter Beverage et al. v. J. R. Apperson et al.* was pending in said court, and the case in which this appeal was taken was heard on several occasions with it; but it has no such connection with this suit as to require more than mention. Therefore the decrees of the 18th of October, 1888, and 23d of October, 1889, and so much of the decree of 17th of June, 1890, as directs said property to be resold, and the decree of 21st of October, 1890, are reversed, and the sale to William Tyree is set aside and annulled, and the cause remanded to the circuit court, in order that proper new parties be made, and for further proceedings.

NEILL et al. v. ROGERS BROS. PRODUCE CO., (FIRST NAT. BANK OF SANTA BARBARA, Intervener.)

(Supreme Court of Appeals of West Virginia. Nov. 15, 1893.)

TRIAL—INSTRUCTIONS—REVIEW.

Where the trial judge, during the progress thereof, in overruling objections to the admission of testimony, expresses an opinion as to the material facts in issue, in the presence and hearing of the jury, so prejudicial that the error cannot be cured otherwise than by granting the party injured thereby a new trial, in case the verdict is against him, notwithstanding such opinion was not objected to at the time it was so expressed, it may be taken advantage of on the hearing of a motion for a new trial, and if the motion is overruled, and proper exceptions taken, the judgment will be reversed, and a new trial awarded, for such error alone.

(Syllabus by the Court.)

Error to circuit court, Ohio county.

Action in attachment by Neill & Ellingham against the Rogers Bros. Produce Company. To the property seized on the attachment, the First National Bank of Santa Barbara interposed a claim. From a judgment on the claim for plaintiffs, the intervening bank brings error. Reversed.

White & Allen, for plaintiff in error.
Henry M. Russell, for defendant in error.

DENT, J. On the 20th day of November, 1890, the First National Bank of Santa Barbara, in the circuit court of Ohio county, filed its petition claiming a certain car load of prunes, attached in the suit of Neill & Ellingham against the Rogers Bros. Produce Company, by virtue of an assignment to it, made by the latter company, of the draft drawn for the price of the prunes and the bill of lading. The firm of Neill & Ellingham contested this claim, insisting that the claimant did not purchase the draft, but only took it for collection, and, after notice of dishonor, had sufficient funds of the Rogers Bros. Produce Company to satisfy the draft, and that this claim was only made to aid the said produce company to defeat the attachment proceedings. To try this claim a jury was sworn, the evidence was heard, and a verdict was found for the defendant in error. The plaintiff in error then moved the court to set aside the verdict, and award a new trial, for three alleged errors: (1) Because of a certain improper remark made by the court during the progress of the trial, to the counsel, in the presence of the jury, which remark so made was not objected to until after the verdict of the jury; (2) because of the admission of improper testimony; and (3) because the verdict was contrary to law and evidence. The court overruled the motion, and gave judgment against claimant, who filed its bill of exceptions, and obtained a writ of error to this court, and here relies on the same assignment of errors as in the circuit court.

Concerning the first assignment, the bill of exceptions uses the following language, to wit: "After the depositions aforesaid of A. L. Lincoln and others, and the said answers of the petitioner to the said bill of discovery and interrogatories, which answers were sworn to by the same A. L. Lincoln, had both been read to the jury as aforesaid, the plaintiffs propounded to said G. W. Eckhart, their said witness, at the point where that question appears in the testimony, the following question: 'Mr. Eckhart, not confining yourself to your own bank, but speaking about banks generally, what would be the custom in a case where the draft was taken as a cash item, sent on for collection, and presented to the drawee, and was returned unpaid, and was taken back to the drawer, and he refused to give a check for it, but had then deposited to his credit in the bank a sufficient amount to pay the

debt?"—to which question the petitioner objected. During the argument of said objection, counsel for plaintiffs insisted that the said deposition of A. L. Lincoln, and said answer to the bill of discovery, which was sworn to by the same A. L. Lincoln, were contradictory, and counsel for the petitioner insisted that they were not contradictory; and the court, in the presence and hearing of the jury, during the progress of the discussion, made to counsel the following remark: "They are clearly contradictory;" and, when the argument of the objection was concluded, overruled said objection. To the making of said remark by the court the petitioner, neither at the time, nor afterwards, before the verdict was rendered, objected nor excepted; and no instructions having been asked or given for either party, and the jury having returned a verdict for the plaintiffs, as shown by the record, the petitioner, immediately upon the return of the said verdict, moved the court to set the same aside and grant it a new trial upon the following ground, to wit: That the court erred in expressing an opinion as to the weight of evidence, as hereinbefore set forth." This remark was "clearly" error on the part of the court. The witness' testimony was material in the case, and the only evidence in relation to the real point in issue, to wit, the purchase of the draft, and the whole contention of the defendant's counsel was directed to showing that his evidence was contradictory, and therefore unworthy of belief. If he could make the jury believe this, his case was won, and, if not, they could do nothing else than find a verdict for the claimant. And during, no doubt, an acrimonious discussion as to the admissibility of evidence, the counsel for the defendant insisting that it was admissible because the positive testimony of this witness was contradictory, and the claimant's counsel insisting to the contrary, the court cuts the Gordian knot by holding that the testimony of the witness is "clearly contradictory," and the evidence offered therefore admissible, overrules the objection, and allows the evidence to go to the jury, all of which the jury sees and hears. The claimant might as well have surrendered at this point, and allowed the jury to find a verdict in accordance with the ruling of the court; but its counsel held bravely on to the end, although the result of the trial could have been easily foreseen.

The fundamental law of this state guarantees the right of trial by jury where the amount in controversy exceeds \$20, exclusive of interest and costs. Const. art. 3, § 13. "The courts have always guarded with jealous care the province of the jury." *State v. Hurst*, 11 W. Va. 54; *State v. Thompson*, 21 W. Va. 756. "If the question depends upon the weight of testimony, the jury, and not the court, are exclusively and uncontrollably the judge." *Ross v. Gill*, 1 Wash. (Va.) 88; *Keel v. Herbert*, Id. 203; *Gregory v. Baugh*,

2 Leigh, 665. The doctrine is firmly established "that, where the evidence is parol, any opinion as to the weight, effect, or sufficiency of the evidence submitted to the jury, any assumption of a fact as proved, or even an intimation that written evidence states matter which it does not state, will be an invasion of the province of the jury." 1 Rob. Pr. 338-344. "The opinion of the court as to the weight, effect or sufficiency of the evidence submitted to the jury is a good ground for reversal of a judgment, according to all the authorities. Such an opinion is certainly calculated to mislead them, whether it be communicated to them in the form of a construction, or be merely expressed by the court in their presence in the progress of the trial. In either case they are authentically informed of the opinion, and it must have an influence upon their judgment,—probably as much in the one case as in the other; but whether the same, or more, or less, the principle involved is not affected." *McDowell's Ex'r v. Crawford*, 11 Grat. 377. It is held in *People v. Bonds*, 1 Nev. 38: "There is nothing in the point made by respondent's counsel that this was not a formal instruction, but merely a remark made to counsel. Such a remark, made by the presiding judge in the hearing of the jury, would have precisely the same effect as if given in a formal instruction;" and in the case of *State v. Harkin*, 7 Nev. 381: "It is evident that the opinion of the court can be as effectually conveyed to the jury by expressing it in their hearing, while ruling upon an objection to evidence, as by embodying it in what purports to be a declaration of the law for their instruction. Accordingly, and we think correctly, it has been held that the judge has no more right to volunteer before the jury his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge the jury in respect to such fact. * * * The right to a decision on the facts by a jury, uninfluenced and unbiased by the opinion of the judge, has been deemed worthy of a constitutional guaranty. It cannot be lawfully denied by the simple evasion of looking at the jury, or foisting the opinion into a ruling upon the testimony;" and in *McMinn v. Whelan*, 27 Cal. 300, 319: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words and conduct he may, on the one hand, support the character or testimony of a witness, or, on the other, may destroy the same, in the estimation of the jury, and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other."—as was the result in the present case. The counsel for the de-

defendant in error, in his brief, insists that the objection was not made in time, and says: "It is enough to say that the remark was not objected to when it was made, nor at any time before the verdict. If the remark was objectionable, and the bank had intimated in any way that it objected to it, the court might have told the jury not to regard it, or might otherwise have done away with any improper influence which the remark may have exerted. But what harm can have come to the bank from the statement by the court of what was obviously true? The two statements of the witness were in writing, and were before the court and jury. No one could hear them both without perceiving at once that they were contradictory, and the court merely stated what was patent to every one who listened to the evidence." As to the last proposition, it is sufficient to say this court might differ with the learned and shrewd counsel for the defendant in error, yet it would not be proper to so state, because of the influence it might have on a jury on retrial of this case. Where, at different times, a witness makes statements apparently contradictory, the law requires that they be reconciled, if possible; and, if the jury had been left unbiassed by an expressed opinion of the court, under the light furnished them by counsel they might have been able to do this. But this was a question for the determination of the jury, and not for the court.

The general rule is that an objection must be made, and an exception reserved, at the time of an erroneous ruling or other error committed by the court, and cannot be taken advantage of after verdict, and on motion for a new trial. *Nadenbousch v. Sharer*, 2 W. Va. 285; *Robinson v. Pitzer*, 3 W. Va. 335; *Wickes v. Railroad Co.*, 14 W. Va. 157. The reason for this rule is given in the opinion of Judge Daniels in the case of *Telegraph Co. v. Hobson*, 15 Grat. 138, as follows: "It is incumbent on him to show that he saved the point, or took the exception in the manner already indicated, or in some more solemn form, either at the time when the opinion of which he complains was given, or at least before the verdict of the jury was rendered. In the absence of such showing, justice to his adversary would require that he should be held to have yielded to said opinion. It is not just or reasonable that he should be allowed to take his chances before the jury, and, in the event of defeat, then deprive his successful opponent of the benefits of the verdict by an exception which, if insisted on during trial, might have been met and counteracted by the latter." But these reasons do not apply where the exception is not to a ruling on a point of law, but as to the expression of the court on a question of fact at issue before the jury, so material to the case that the error cannot otherwise be cured than by discharging the jury, and awarding a new

venire. In this case the plaintiff in error's claim depended entirely on the evidence of the one witness. He was neither impeached nor contradicted by other evidence. If the jury believed him, it was bound to find for the claimant; if it disbelieved him, the usual custom of banks as to receiving and disposing of such drafts would be potent in determining their verdict. The question of this belief depended on whether he had made contradictory statements alone. But the court settles this question by virtually instructing the jury that the witness' statements are "clearly contradictory," and for that reason permits them to hear testimony as to the customs of banks that would not otherwise be admissible. Here, both by his statement and conduct, taken together, he prejudices the claimant's case. Suppose the counsel had at once objected; could the court have made any statement to the jury that would have cured the error? He could not change his ruling, and tell the jury the court was mistaken, and cure his conduct by ruling out the testimony, because then he would prejudice the opposite party to the same extent, besides placing himself in a false position. To tell the jury to disregard his remarks would amount to nothing, especially if the testimony objected to was not withdrawn. Hence, the error was incurable, and could only be obviated by discharging the jury and ordering a new venire. By permitting the case to proceed without exception, the verdict of the jury might have proved the remarks of the court to be harmless error, and the party injured could avoid the necessity of placing the judge in the humiliating position of acknowledging that his inconsiderate remarks had made it necessary to discharge the jury and start the trial anew. Neither could the opposite party complain, because it could make no possible difference to him whether the jury was then discharged, and a new venire directed, or wait until a verdict was rendered in accordance with the finding of the judge, and then submit to a new trial. The effect would be the same, as in either case the battle had to be fought from beginning to end.

The authorities agree in holding that the court cannot cure inconsiderate remarks of this character by any statement he may make to the jury, because of "their proneness to ascertain the opinion of the judge, and to shift their responsibilities from themselves to the court." *State v. Ah Jong*, 7 Nev. 152. He should exercise great care not to intimate in any manner his opinion upon any fact at issue. "He cannot do so directly or indirectly, neither explicitly nor by innuendo; and the effect of such an opinion cannot be obviated by announcing in distinct terms the jury's independence of him in all matters of fact." *State v. Dick*, 2 Winst. 47; *State v. Ah Jong*, 7 Nev. 152. In the case of *State v. Tickel*, 13 Nev. 510, the court

says: "Whether or not appellant had succeeded in showing the witness to be unworthy of belief was a question to be decided by the jury upon legal proofs, admitted without comment or instruction by the court, upon questions of fact. It is true, the court did not address the jury personally; but it might as well have done so, for no one else had aught to do with the question of fact then before the court, and no one else could have been influenced against appellant, or in favor of the state, by the remark. It is entirely natural that jurors do, and proper that they should, listen attentively to, and be greatly influenced by, all remarks of the court. They have the right to confide in its expressed opinions, and it is their duty to obey its legal instructions. It may be said that jurors may be presumed to know the law that the court has not the right to instruct them or give its opinions upon questions of fact, and that therefore they ought not to be, and will not be, influenced thereby. In my opinion, experience does not justify such conclusion; but, at any rate, courts cannot presume against the natural result of remarks or instructions improperly made. If the court in this case had informed the jury it had no right to comment or instruct them upon questions of fact, and that they must not be influenced by what it might say, still its expressed opinion must have influenced them. They would have known the opinion of the court then, as now, and it would have left its impression upon their minds, however hard they might have tried to escape it." These remarks are as applicable to this case as to the one before that court. The judge had expressed his opinion; the jury heard it, and nothing could eliminate it from their minds. The remarks and ruling of the court were equivalent to instructing the jury that the witness was unworthy of belief, as under the law astute counsel could easily convince a jury that, when a witness' testimony is "clearly contradictory," it is unworthy of belief, and therefore should be disregarded in making up their verdict. Thus the claimant's constitutional right to a trial by a fair and impartial jury was destroyed, and the whole trial was rendered nugatory, and there appears to be no good reason why the prejudiced party should not take advantage of the wrong on a motion to set aside the verdict.

There is no intention to intimate in the slightest degree that the circuit judge purposely committed the error complained of, but that he inconsiderately did so. The effect, however, was the same in either case; probably stronger in the latter, as the jury would regard it as an unbiased opinion of the court. That it was a grievous mistake, he himself must admit on a dispassionate consideration thereof, and it is only to be regretted that he did not, by the exercise of

his plenary powers, obviate the unpleasant necessity of this court commenting on and correcting the error. The case having to be remanded for a new trial, it would not be right for the court at this time to pass upon the weight or admissibility of the evidence, as by so doing it might be led into the same error committed by the circuit court, to the prejudice of one or the other of the parties to this controversy. The judgment of the circuit court is therefore reversed, the verdict of the jury set aside, and the case is remanded to the circuit court, to be therein tried before a fair and impartial jury.

UNITED STATES COAL, IRON & MANUFACTURING CO. v. RANDOLPH COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

TAXATION — ASSESSMENT OF MINING PRIVILEGES.

1. Section 4, c. 36, Acts 1891, providing for the reassessment of lands where it mentions coal privileges or interests held by a party or parties or any company or association, exclusive of the surface, and providing for a separate assessment of the surface and coal privilege or interest, in using the word "held" meant and intended "owned" by such party or parties or any company or association.

2. Where either the surface or the coal or mineral underlying the same is leased to a party, it is the duty of the commissioner in reassessing the land under chapter 36 of the Acts of 1891, to assess such land and coal to the owner thereof.

3. Where a stratum of coal underlies a tract of land, and the owner thereof sells and conveys the coal underlying his land, it is the duty of the commissioner in reassessing said land under chapter 36 of the Acts of 1891, to assess the coal separately from the surface, charging the surface and coal to their respective owners.

(Syllabus by the Court.)

Error to circuit court, Randolph county; Joseph T. Hoke, Judge.

Action by the United States Coal, Iron & Manufacturing Company against the county court of Randolph county to correct certain assessments for taxation. There was judgment for defendant, and plaintiff brings error. Reversed.

L. D. Strader and Dayton & Dayton, for plaintiff in error.

ENGLISH, J. In the month of September, 1892, the United States Coal, Iron & Manufacturing Company applied to the county court of Randolph county to have certain coal rights held by it as assignee of certain leases or contracts stricken from the assessment books as improperly charged against it, and as improperly assessable. The petition was predicated upon the following facts: In the year 1872 one Isaac Carpenter by contract took from Crawford Scott and several others the right to mine the coal from

several different tracts of land aggregating 1,151 acres, all of which contracts were identical in the conditions and provisions contained therein, leasing to the party of the second part all of the coal and veins of coal in, under, and upon said respective tracts of land, with the right of entering upon said land and boring and exploring for said veins, and also the right to cut timber from the said lands for mining purposes, for such term of years as should be required to mine and remove all the merchantable and marketable coal under and upon said tracts of land which could be mined and taken out without extraordinary expenses and outlay; and for all coal mined and taken out under said leases the parties of the first part should be paid at the rate of 10 cents per ton for each and every 2,400 pounds semiannually on the 1st day of January and July in each year; and in case no coal should be mined under said lease for the term of 10 years from the date thereof the party of the second part might, at his or their option, declare the terms of said leases at an end, and surrender the same to the party of the first part, but after the expiration of the said 10 years the said party of the second part should pay for 500 tons of coal annually, whether any coal was mined or not, as long as said respective leases continued in force; and in case any coal should be paid for under that clause before any coal should have been mined and removed, said party of the second part, his assigns, etc., might mine and remove all coal so paid for and not mined during any subsequent year or years while said leases continued, without any charge therefor, etc.; all of which leases were assigned and conveyed by said Isaac Carpenter to said United States Coal, Iron & Manufacturing Company, and said company had no other interest than such as was conveyed to it by said Carpenter; and said county court held, upon construction of said agreements, that said coal privileges or rights were properly assessable to said petitioner, although not before assessed as separate interests, and refused to strike the same off of the assessment books, to which action of the court the petitioner excepted, and applied for and obtained an appeal to the circuit court of said county, and upon a hearing the said petition and appeal were dismissed, and the said company applied for and obtained this writ of error.

A copy of one of said agreements was exhibited with said petition, and, as before stated, it was agreed that said agreements were identical. An examination of this agreement, which was executory, and under which nothing appears to have been done, (although more than 20 years have elapsed since it was made), shows that it was not under seal, and our statute (Code, § 1. c. 71) provides that no estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by

deed or will, etc. In this case, however, an attempt seems to have been made to confer upon the grantee the right for an indefinite time to mine and remove the coal underlying these lands, and, although nearly 20 years had elapsed at the time this attempted assessment was made, without anything having been done by the party of the second part or his assignee in compliance with its terms, yet said company was assessed as being the holder of a coal privilege or interest in said lands. It is apparent from the face of said agreement that it was contemplated that it should continue for more than 10 years, for it is provided that, in case no coal should be mined under said lease for the term of 10 years from its date, the party of the second part might, at his or their option, declare the terms of said lease at an end, and surrender the same; but that after the expiration of said 10 years said lessee should pay for 500 tons of coal annually, whether the same should be mined or not. In view of the statute, then, can we say that when this assessment was attempted to be made, in the year 1892, the plaintiff in error was the holder of any coal interest in said lands, or that it was properly assessed as such? At best these contracts could only be regarded as leases of the mineral rights under the respective tracts of land, not under seal, for a term of more than five years, in direct contravention of the statute, which provides that "no estate of inheritance or freehold or for a term of more than five years in lands shall be conveyed unless by deed or will;" and, more than 10 years having elapsed since the date of said contracts, the plaintiff in error might, at his option, declare the terms of the lease at an end, and surrender the same to the party of the first part. If the plaintiff in error should seek to enforce the right to mine and remove the coal from said lands in pursuance of the terms of said contract, it might be met and defeated upon the ground that the contract was not under seal, and more than five years had elapsed since the execution of said contract; and should the party of the first part seek to enforce the terms of said contract against the plaintiff in error, it might be met and defeated by the fact that the party of the second part had the right, after the lapse of 10 years, to declare the terms of the lease at an end, and surrender the same to the party of the first. At the time, then, this assessment was sought to be made, it could not be said that the plaintiff in error held any coal or mineral right in said lands which could be enforced by it in a court of law; and, more than 10 years having elapsed since the date of said contract, the fair presumption would be that the plaintiff in error had availed itself of the provision contained in said contract, and declared the terms of said lease at an end, and surrendered the same to the party of the first part; but if such was not the case, and the

lease was a valid one in all respects, and in full force and effect, our construction of section 4, c. 36, of the Acts of 1891 is that in the language: "When mineral, mineral water, oil, gas or coal privileges or interests are held by a party or parties, or any company or association exclusive of the surface, the same shall be assessed separately to such party or parties, company or association, at its cash or market value at the time of such revaluation,"—the word "held" does not contemplate the holding of a lessee who pays a royalty for the coal mined and removed to the landowner, the title remaining in the lessor, but it does contemplate a case in which another party has become the owner of the mineral or coal, and holds it as such. It is frequently the case that the mineral and coal in a tract of land are held by one party while the surface is held and owned by another, and it is when this is the case that the mineral and coal shall be assessed separately. The owner of the land owns it from the center of the earth to the heavens, and the coal is but a part of the land, and if a man rents a part of his land the law does not require the lessee to be assessed with the taxes on the portion leased, but the assessment is made to the owner. That section, 4, c. 36, of the Acts of 1891, in providing for the reassessment of lands, in speaking of coal privileges or interests held by a party or company exclusive of the surface, meant and intended coal privileges or interests owned by such party or company, is apparent from the context, for the same section provides that the commissioner, in order to assist him in ascertaining and fixing the value of said lands and mineral, shall, when practicable, examine the owner of said lands, not the lessee, under oath, etc. Section 8, c. 29, of the Code provides that the clerk of the county court, in making out the land books, shall correct errors and mistakes which he may discover in any such land books as to the names of persons properly chargeable with taxes on any tract or lot of land entered therein, and enter and charge the same, with taxes thereon, to the person or persons properly chargeable therewith, whether such correction be rendered necessary by the conveyance of such tract or lot by the person last charged with taxes thereon or otherwise; and section 25 of the same chapter provides that "when a tract or lot of land becomes the property of different owners in several parcels, or one person becomes the owner of the surface and another of the minerals under the same, the assessor shall divide the value at which the whole had before been assessed among the different owners having regard to the value of each interest compared with that of the whole," etc. This section is a part of the chapter which provides for the assessment of taxes generally, and is not repealed by chapter 86 of the Acts of 1891, which provides for the reassessment of lands, and, being

read in connection with said chapter of the Acts of 1891, shows that the word "held," as used in section 4 of said last-named chapter, was to be construed as if the word "owned" had been used in its place. For these reasons my conclusion is that the circuit court erred in refusing the plaintiff in error the relief prayed for in its petition, and in dismissing its appeal. The judgment complained of is therefore reversed, and the cause is remanded to the circuit court of Randolph county for further proceedings to be had therein, with costs to the plaintiff in error.

HARRISON et al. v. BREWSTER.
(Supreme Court of Appeals of West Virginia.
Nov. 22, 1893.)

PARTITION—PLEADINGS.

Where the pleadings contain no proper prayer therefor, it is error to decree affirmative relief. *Middleton v. Selby*, 19 W. Va. 168.

(Syllabus by the Court.)

Appeal from circuit court, McDowell county.

Action for partition by William T. Harrison against Elizabeth Harrison, R. C. Brewster, and others. From the decree rendered, defendant Brewster appeals. Reversed.

W. E. Chilton and Okey Johnson, (A. F. Mathews, of counsel,) for appellants.

DENT, J. At the August rules, 1889, William Harrison, plaintiff, instituted his suit in chancery in the circuit court of McDowell county against the heirs of Henry Harrison, deceased, and others, asking for the partition of certain lands among those entitled thereto. The bill concedes that R. C. Brewster, one of the defendants, is entitled to one-eighth of the land sought to be partitioned. R. C. Brewster files his answer, admitting the allegations of the bill, and, setting out more fully his one-eighth interest, joins in the prayer for the partition. Publication is taken against certain nonresident defendants, and at the October term, 1890, the circuit court hears the cause, and appoint commissioners to make the partition. January 22, 1890, the commissioners make their report. To this report J. G. Watts, H. Newberry, William Bandy and wife, and William A. Whitley and wife except, for the reason that they deny that R. C. Brewster has interest therein. At the May term, 1890, Watts and Newberry file their petition, as nonresidents, under section 25, c. 106, of the Code, praying that the decree of October 9, 1889, be set aside and annulled, and that they be permitted to defend. A decree is entered setting aside and annulling the decree of October 9th, and the parties are permitted to file their answer, to which the plaintiff replied generally, and leave was granted

them to file a special replication to the answer of R. C. Brewster, to which he rejoined generally, and the cause was continued. On the next day, for some reason that does not specifically appear, this last decree is set aside, and a new decree is entered, allowing the same parties to make defense, filing their answer, and granting them leave to file their special reply, in writing, to the answer of R. C. Brewster, to which he rejoins generally. R. C. Brewster indorses an exception on the answer of Watts and others, which exception is not noticed in any of the orders or decrees. The record also contains a special rejoinder to the replication of Watts and others, with an exception indorsed thereon, not noticed in any of the orders or decrees. In this state of the pleading, both R. C. Brewster and the other defendants took depositions; and on the 12th day of October, 1891, the court heard the case on the pleadings, demurrers, and depositions, and decreed that R. C. Brewster had no interest in the lands, and therefore refused to allow him any part or parcel thereof, and further decreed "that the portion of land allotted to R. C. Brewster belongs to the heirs at law of Henry Harrison, deceased, and to the assignees of said heirs," and adjudged cost against said Brewster. From this decree, Brewster, the appellant, appeals, and assigns as error improper pleadings and erroneous decree entered thereon.

The decree of partition being interlocutory, and on bill taken for confessed, it was not necessary for the nonresidents to file their petition asking permission to make defense, as they had the right to appear and file their answers at any time before final decree. Code, c. 125, § 53. This was, however, harmless error, and appellant is not prejudiced thereby. The answer filed by the nonresidents sets up matters for affirmative relief, but does not pray for the same; hence it does not matter whether the affirmative allegations are sufficient or not; no relief can be granted, as the prayer is wanting. *Middleton v. Selby*, 19 W. Va. 168. The answer of R. C. Brewster, while it unites in the prayer of the bill, is not in the nature of a cross bill setting up new matter as the foundation for affirmative relief, and the court erroneously permitted the nonresident defendants to file a special replication thereto, as the answer contained no prayer for relief against them. Nor do the settled rules of practice, under the provisions of the Code, permit new matter for affirmative relief to be set out in a special replication, with or without prayer to that effect. This can only be secured by an amended bill, a cross bill, or an answer in the nature of a cross bill. With this state of pleadings, without prayer, proper or improper, the court, in its final decree, grants affirmative relief to the heirs of Henry Harrison, deceased, and virtually decrees to them the interest of R. C. Brewster in the lands of his father, William Brewster,

deceased. The pleadings are wholly insufficient to justify any such decree, according to the laws of this state and the decisions of this court. *McMullan v. Eagan*, 21 W. Va. 234; *Alleman v. Kight*, 19 W. Va. 201; *Middleton v. Selby*, Id. 168; Code, c. 125, § 35. The practice under the Code in relation to answers, cross bills, special and general replications has been so often passed upon by this court that it is nothing but a waste of time and labor to keep repeating what has heretofore been so well settled. Familiarity with repeated decisions and statutory law might be of assistance to counsel, and beneficial to their clients. This suggestion is without authority. So far as the record shows, the court has not yet passed upon the report of the commissioners appointed to make partition of the lands. The decree of October 12, 1891, is therefore reversed, and this cause is remanded for further proceedings in accordance with the principles of law and equity.

RILEY v. RILEY et al.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

PERSONS IN LOCO PARENTIS—LIABILITY FOR SERVICES.

1. Where a minor lives with his uncle as a member of his family, the uncle furnishing him with food, raiment, and shelter, and the minor rendering to his uncle his services, without any contract or mutual understanding as to compensation for support or wages to be paid, such minor cannot recover from the uncle, nor from his personal representative, the value of the services thus rendered, though the value of such services may have been greater than the value of such support.

2. But the uncle may give or release to such minor the right to his wages earned elsewhere, if it affirmatively appear, or may fairly be inferred from the nature and circumstances of the case, that such was the understanding of the parties,—a question of fact to be determined by the jury subject to the proper control of the court.

3. A case in which these two principles are applied.

(Syllabus by the Court.)

Error to circuit court, Hancock county.

Action in assumpsit by Isaac Riley against William H. Riley and another, executors. Plaintiff had judgment, and defendants bring error. Affirmed.

W. J. Huff and Ewing, Melvin & Riley, for plaintiffs in error. John J. Jacob, (J. R. Donehoo, of counsel,) for defendant in error.

HOLT, J. The common-law system of pleading, as modified by statute, still prevails in this state. This is an action of assumpsit, brought in the circuit court of Hancock county on the 10th day of January, 1891, by Isaac Riley, defendant in error, against William H. and Frederick J. Riley, as executors of the will of Enoch Riley, deceased; the declaration containing two of the common counts in assumpsit,—one for work and labor, and the

other for money had and received. Plaintiff also, according to the requirement of section 11, c. 125, Code, filed with his declaration an account or bill of particulars, stating distinctly the several items of his claim, amounting to the sum of \$1,200, as sued for and set out in the declaration. It was composed of two items, viz.: The price paid for plaintiff's labor in the East Liverpool potteries, and received by defendants' testator, from March, 1878, to February, 1887; (2) the value of the work done by plaintiff for testator during the same period, when he was not at work in the potteries. On November 12, 1891, defendants appeared by their attorneys, and entered the plea of non-assumpsit, issue was joined, and a jury impaneled and sworn to try the same. Twelve witnesses were examined on behalf of plaintiff; none was called by defendants. During the progress of the trial, defendants moved to exclude parts of the testimony of certain witnesses on the ground of incompetence, but the court overruled the motions, and defendants excepted, and, at the conclusion of plaintiff's testimony, defendants moved to exclude it, without saying upon what ground. This motion the court overruled, and defendants excepted. Defendants offered no testimony, and, the case being submitted to the jury, they brought in a verdict for plaintiff for \$1,100. The defendants then moved the court to set aside the verdict and grant a new trial, upon the ground that the verdict was contrary to the law and the evidence, and because of the rulings made during the trial; but the court overruled the motion, and rendered judgment for the damages found by the jury, viz. \$1,100, with interest from the 5th day of December, 1891, and costs, and signed and certified, as part of the record, defendant's bill of exceptions setting out all the evidence.

Passing by, for the present, the question raised during the examination of the witnesses, and considering the motion for a new trial, the question is, what are the facts proved, or what does the evidence fairly tend to prove? For unless the verdict is without evidence to support it on some essential point, or plainly insufficient to warrant the finding of the jury, the ruling of the court below must be sustained. For our purpose, and in the present attitude of the case, the record discloses the following facts: The plaintiff, Isaac Riley, was born in England. His parents came to Trenton, N. J., where his mother died December 2, 1875, and his father on the 2d day of February, 1878. He was 12 years old on the 19th day of February, 1878. He came to the house of his uncle, Enoch Riley, the testator of defendants, in March, 1878, where he made his home as a member of his uncle's family until he was 21 years of age. His uncle, in 1879, obtained work for him, where some of his sons were at work, in the East Liverpool potteries, across the Ohio river, where he

worked about 300 weeks at an average of \$4 per week, which was paid to him in money every two weeks, and which he took home and delivered to his uncle, amounting in the aggregate to about \$1,200. He began this work at 7 in the morning, quitting sometimes at 5, and sometimes at 6, o'clock in the evening. A full week was six days, but the potteries ran on an average, in his kind of work, only about ten days of the two weeks. He was honest, of good habits, and industrious. It was his business to help milk the cows of his uncle, take the milk, and sometimes vegetables, across the river to the customers, and, when not engaged at the pottery, he was employed in sawing wood and doing various kinds of work about the house and farm of his uncle. During the time, Enoch Riley said he intended to provide for (the plaintiff) Isaac just the same as for his own children. The money from the potteries was brought home in an envelope, and he would sometimes refer to it as Isaac's money. He induced his nephew to buy a lot from him, and to build a house on it, he furnishing the money and taking a mortgage, which is still subsisting; but he said to one of the witnesses that he intended to leave the house to Isaac,—to release the mortgage. This was when Isaac was not present, but he did sometimes in his presence speak of his nephew being a good boy, and of his turning over his wages to him. To another witness he frequently said that "he intended to recompense Isaac for his work." On the part of defendants it is claimed that Enoch Riley, the testator, stood in loco parentis to the plaintiff from the time he was taken into his family as a member thereof until he attained the age of 21, and was entitled to his services and his earnings. On the other hand, it is claimed for plaintiff that the relation of father and son did not exist in contemplation of law, as to the matter here involved, and that, if it did, there is enough in the testimony to warrant the jury in saying that plaintiff had been emancipated as to the right to the wages earned by him in the potteries, or that there was enough to warrant them in drawing the inference that Enoch Riley promised plaintiff that he would receive and hold such wages for plaintiff's use and benefit, to be paid over or accounted for when he attained his majority; and that such promise was in no view a merely gratuitous promise, but was supported by a sufficient consideration; that he took upon himself the character of a trustee of the fund, receiving it under such circumstances as made him legally responsible therefor. It appears from the testimony that Enoch Riley told one of the witnesses that he and Isaac had had a falling out; that Isaac had his clothes tied up, and said he was going to leave; that he told Isaac that he could not leave because he was adopted, and that he would follow him; that the trouble amounted to nothing; that he found Isaac truthful and honest in every respect;

and that he intended to provide for him as he did for his own children when he came of age.

By chapter 122 of the Code, as amended by act of March 20, 1882, and as the law now stands, he could have adopted his nephew, in which case he would have been invested with every legal right in respect to obedience and maintenance on the part of the child as if said child had been born to him in lawful wedlock; and the child would have been invested with every legal right, privilege, obligation, and relation, in respect to education, maintenance, and the right of inheritance in the estate of such adopting parent or parents, as if born to them in lawful wedlock, with certain exceptions not material here. See Code W. Va. p. 773, c. 122, § 4. So, under chapter 81, Code 1891, p. 671, plaintiff might have been bound as an apprentice to his uncle, to continue until he had attained the age of 21 years. But neither of these things was done. Plaintiff worked first in the pottery of Knowles, Taylor & Knowles, but at what wages, if any, and for what time, does not appear, except that it did not extend into the latter part of the year 1879, for at that time he went into the pottery of Laughlin, when he did work, "running molds" for about two years, up to Christmas, 1881, receiving during the first year \$3.50 per week, and the second year \$4 per week, working about ten days in the two weeks, and receiving his pay in money every two weeks, which he carried home and delivered in the package or envelope to his uncle. From that time he worked in the pottery of West, Hardwick & Co. for eleven months at \$4 per week, averaging about ten days' work in every two weeks. He worked in Barnes' pottery about seven months, between July, 1882, and August, 1883, receiving \$4.50 per week. He worked in the pottery of C. C. Thompson & Co. from the 4th of August, 1883, until February 26, 1887, when he had attained his majority, (February 22, 1887,) and he was paid therefor in all, by this firm, the sum of \$620.00. So that during the nine years in controversy he worked three years, say 900 working days, wholly for his uncle, and six years, say 1,800 working days, in the potteries, during the same time cutting wood, etc., and milking and carrying milk across the Ohio river for his uncle, and receiving during that time, as his wages in the potteries, not less than \$1,100, which, as received from time to time, he turned over to his uncle. The evidence tends to show that he was permitted to earn this money for himself. He evidently contracted himself with all the pottery firms and companies except the first. The pay rolls and accounts, as far as they appear, were made and kept with him, and the wages were paid directly to him. For instance, the witness B. C. Simms, a member of the firm of C. C. Thompson & Co., where plaintiff worked for about four

years and six months, produces a copy of his pay roll, with the itemized payments, amounting to \$620.00, saying: "Everything on that paper was paid to Isaac Riley himself, and I do not know whether the moneys, or any of them, paid to Isaac Riley, were by him paid to Enoch Riley;" showing that he evidently regarded himself as dealing with Isaac Riley, but with the knowledge and consent of the uncle where Isaac lived. The evidence also tends to show that Enoch Riley regarded himself as a kind of savings bank or safe-deposit of these earnings for the use and benefit of Isaac Riley. More than once, with the package or envelope containing plaintiff's two weeks' earnings, he said, "This money or this envelope is Isaac's," which, under the circumstances, is at least fairly capable of the meaning that he regarded himself as holding it, not as his own, but as trustee for his nephew who had earned it. He labored constantly for his uncle when not at work at the pottery, and did a very considerable amount of work for his uncle, day by day, after his work at the pottery was over in the evening, and before it commenced in the morning. The evidence does not show that he attended school at all. There was nothing to compel him to remain with his uncle, and nothing to induce him, so far as his own interests were concerned, except upon the theory that he was paying his board among his kinsfolk by extra labor, and laying up, for a start in life, his earnings at the pottery. It is only on some such theory that the facts and circumstances of the case can be explained, and the conduct and declarations of the parties given an intelligible meaning. It is not probable from the evidence that any such understanding or agreement was come to between them in the beginning, but that the young orphan boy was taken into the home of his uncle among his kindred as a member of the family, and that his uncle, during the first year at least, stood to him in the place of a parent; and there is nothing in the record that has the effect to exclude the inference of the continuance of such quasi parental relation down to plaintiff's attainment of his majority. But, whether it continued or not, there evidently came a time when there was a more definite understanding as to what each was to do and receive. Some time, perhaps in 1882, he and Isaac had some trouble. Isaac had his clothes tied up, and said he was going to leave. In a conversation with a neighbor about it, testator said that he had told Isaac that he could not leave, because he was adopted, and that he would follow him. This was not true, but Isaac for some reason became reconciled, and remained until he was 21 years of age.

There are but few Virginia and West Virginia cases bearing upon the points of law directly involved. The doctrine is well settled that the father is entitled to the labor

and services of his minor child, and may maintain an action to recover for the services of such rendered to any third person. *Halliday v. Miller*, 29 W. Va. 424, 1 S. E. 821, and 6 Amer. St. Rep. 653; 2 Kent, Comm. 193, (13th Ed.) notes. But the father may emancipate the child whenever he chooses to do so. This right is not within the control of his creditors, and they cannot prevent an insolvent father from relinquishing all right to the future earnings of his child. *Penn v. Whitehead*, 17 Grat. 508; *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570. The emancipation may be inferred from circumstances, and whether the circumstances establish an emancipation is a question of fact for the determination of the jury. *Beaver v. Bare*, 104 Pa. St. 58; *Ream v. Watkins*, 27 Mo. 516. The emancipation may be complete, though the child continue to reside with its parents. *Rush v. Vought*, 55 Pa. St. 437. See note to *Halliday v. Miller*, [1 S. E. 821,] 6 Amer. St. Rep. 653-664. He may give the child his earnings. *Monaghan v. School Dist.*, 38 Wis. 100; *Bish. Cont.* § 230. The father's consent for the son to receive his own earnings is put on the same footing with a gift delivered, (*Benson v. Remington*, 2 Mass. 113-115; *Jenney v. Alden*, 12 Mass. 375-378; *Whiting v. Earle*, 3 Pick. 201;) and the consent may be implied, (*Burlingame v. Burlingame*, 7 Cow. 92; *Johnson v. Silsbee*, 49 N. H. 544.) See *Hammond's Bl. Comm.* notes, p. 797; *Cloud v. Hamilton*, 11 Humph. 104, 53 Amer. Dec. 778, and notes; *Schouler*, Dom. Rel. §§ 273, 274; 2 Kent, Comm. (13th Ed.) 193, note b; 1 Minor, Inst. 437, 438. Ordinarily, where one person renders services for another which are known to and accepted by him, the law creates an obligation, called an "implied promise," on his part, to pay for such service a reasonable compensation, unless there be something in the relation of the parties or the circumstances of the case which precludes the idea of such compensation, in which case there would be an implied agreement or understanding that such compensation was not to be paid. See *Hurst v. Hite*, 20 W. Va. 183-204, 205; *Rea v. Trotter*, 26 Grat. 585; *Harshberger v. Alger*, 31 Grat. 52. "But where it is shown that the person rendering the service is a member of the family of the person served, and receiving support therein, either as parent, child, or other near relative, a presumption of law arises that such services were gratuitous. The conditions are not such as show a mutual intention to contract, according to the ordinary course of dealing and the common understanding of men. Therefore, before the person rendering the service can recover, the express promise of the party served must be shown, or such facts and circumstances as will authorize the jury to find that the services were rendered in the expectation by one of receiving, and by the other of making, compensation." 17 Amer. & Eng. Enc. Law, p.

336, and cases cited. It applies to those who occupy the relation of parent and child, and to those who occupy the quasi parental relation, as a nephew living with his uncle, and a natural son living with his father. In *Broderick v. Broderick*, 28 W. Va. 378, it was held that, in the absence of direct proof of an express contract, the surrounding circumstances authorize a natural son to recover from his father pecuniary compensation for work and labor done for, boarding and nursing furnished to, and money advanced, paid out, and expended for, the father in his lifetime. Yet I take the law to be if the nephew, as in this case, come to live with his uncle, "and live in his family for years as a child lives with his parents, rendering services, and receiving in return shelter, clothing, and subsistence, without any distinct contract as to wages, the latter cannot thereafter recover wages of the former, or of his executor or administrator, although the value of the services rendered may have been greater than the value of the clothing and subsistence received; and the reason is that for the law to raise such a promise would be to raise a promise directly opposed to the obvious understanding of the parties." 1 *Thomp. Trials*, 894. Therefore, I am of the opinion that from the understanding to be inferred from the quasi parental relation, if not from the express understanding to be drawn from the facts and circumstances, the plaintiff, Isaac Riley, was not entitled to recover anything from the estate of his uncle, Enoch Riley, on his first account, for the work, care, and labor, etc., performed and bestowed in and about the business of Enoch Riley, because he has failed to overcome by affirmative evidence the presumption which prevails by reason of the existence of the family relation. See *McGarvy v. Roods*, 73 Iowa, 363, 35 N. W. 488.

For the same reason, among others, I think the finding of the jury for plaintiff on the second count, for money had and received by defendants' testator for the use of plaintiff, was not an unwarranted verdict, caused by their sympathy in a hard case, but was justified by the application of the principles and rules of law already mentioned to the facts and circumstances of the case: (1) Plaintiff was not the son, but only the nephew. (2) The work was away from home, across the Ohio river, in another state; the amount received was small, about 66½ cents per day, and, when it was delivered to the uncle, the evidence tends in some degree to show that he considered himself as holding it for his nephew's use and benefit. (3) When not engaged in the potteries, say one-third of his time, he was constantly and faithfully at work for his uncle, and when at work in the potteries he did every day a considerable amount of work for his uncle about his house, farm, and dairy. (4) He was induced by his uncle to buy a lot and build a house upon the supposition that he had money coming

to him that would enable him to pay, so that the mortgage thereon would be lifted or released. It is further said, on behalf of defendants that, if plaintiff had been entitled to a verdict, the one rendered was excessive. In the estimate of plaintiff's counsel of the amount of earnings, the first year is properly left out, for there is no evidence of the amount. They make the aggregate, as justified by the proof, \$1,216.47. Counsel for the defendants make it \$835. I make it, on the same basis, \$1,050.09. The evidence leaves no guess work about it, and \$1,100, the amount found by the jury, is a safe, as well as a close, approximation. No interest thereon was found or allowed.

Twelve witnesses were examined by plaintiff, and cross-examined by defendants, but no witnesses were called on their behalf. Both examinations are brief and to the point. No spirit is shown to make captious or hypercritical objections to questions, but, during the examination of the witnesses, defendants moved to strike out the testimony of the witnesses Rigby and Barnes as to the industrious habits of the plaintiff. The first count was on a quantum meruit, which involved the worth of plaintiff's services, and the character of plaintiff's habits, skill, etc., was pertinent and admissible. Abb. Tr. Ev. 368. Defendants moved to exclude that part of the testimony of the four witnesses, Stephenson, Robinson, and the two Jacksons, which gave the declarations of Enoch Riley to befriend and requite his nephew. This was relevant, and it was for the jury to give it its proper weight in determining the issues of fact involved. Defendants also moved to exclude the testimony of the witness Metz, giving the conversation of the testator during his last illness, after plaintiff had ceased to live with him. Testator told witness that he had raised Isaac, that he was a good boy, that he had made a man of him, and that he intended to do well by him. This was admissible, together with the other evidence, as tending to prove an agreement to compensate, or at least as tending to show the relation between the parties which was in issue. In conclusion, as to all these exceptions to evidence, all the evidence is set out and certified in the bill of exceptions, and it appears affirmatively that they were merely cumulative, and, even if defendants' motion to exclude were improperly overruled, the defendants could not have been prejudiced by such rulings. See Hall v. Lyons, 29 W. Va. 410-421, 1 S. E. 582.

With the growth of business and the increase in the number and prolixity of trials, the modern tendency is very decided to let well enough alone; if the court can, from the record, clearly see that substantial justice has been done, notwithstanding some trivial or technical error of the trial court in a ruling on such questions, necessarily decided on the spur of the moment, to treat such error as harmless,—as something which did

not, and could not, affect the general result. For the reasons given, we think the judgment complained of should be affirmed.

JOHNSON v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

INJURIES TO EMPLOYE — CONTRIBUTORY NEGLIGENCE—VIOLATING RULES OF MASTER.

1. A printed rule of a railroad company says, among other things: "Entering between cars, while in motion, to uncouple them, and all such imprudences, are dangerous, and in violation of the rules of this company."

2. A brakeman who willfully and unnecessarily violates a reasonable precautionary rule, known to him, or which he must be taken to have known, cannot recover for an injury, of which such violation of the rule is the direct, efficient cause.

3. An employe, having knowledge of the danger about him, must use prudence and care to protect himself from harm; and if he willfully and imprudently encounters such danger the employer is, generally, not responsible for the injury caused thereby.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Action for personal injuries by E. E. Johnson against the Chesapeake & Ohio Railway Company. Plaintiff had judgment, and defendant brings error. Reversed.

For report on former appeal, see 14 S. E. 432.

Simms & Enslow, for plaintiff in error.
Gibson & Michie, for defendant in error.

HOLT, J. This is an action in case brought in the circuit court of Cabell county on May 3, 1890, by E. E. Johnson against the railway company, for negligence in failing to keep the car coupling in proper order, whereby plaintiff, a brakeman, while engaged in uncoupling the cars, had his left hand caught and mashed so as to require amputation of all except the forefinger and thumb. It was, on the issue of "Not guilty," tried by the jury on December 10, 1890, who found for plaintiff \$3,500 damages; and, the defendant moving for a new trial, the court overruled the motion and gave judgment. From this, defendant appealed. The cause was heard in this court at the January term, 1890, when the judgment was reversed, the verdict set aside, a new trial awarded, and the cause remanded. See Johnson v. Railway Co., 36 W. Va. 73, 14 S. E. 432. On the 12th of September, 1892, it was again tried by a jury on the same pleadings, and the jury found for plaintiff, and assessed his damages at \$3,300, but subject to the opinion of the court on defendant's demurrer to the evidence; and the court, being of opinion that the law on the demurrer was for plaintiff, overruled the same, and gave judgment for the damages found by the jury, and defendant excepted, and has brought the case up again on writ of error.

Plaintiff was a brakeman with the shifter of freight trains in the yard of the company at Huntington. On the 16th day of January, 1890, while the freight cars drawn by the yard engine or shifter were moving forward slowly, about three miles an hour, he went in between them to pull the pin, in order to uncouple car No. 2,616. He caught the pin, but found it tight in the hole, and grabbed it around with his whole hand. Just then the drawhead went back under the car, and caught his hand between the pin and the dead block, and held him there, by the hand, until it was loosened by the slack that had been given by the engineer at plaintiff's signal going out. The train was still moving forward, and carried him along 40 or 50 feet. His hand was thereby so badly mashed that all but the forefinger and thumb had to be amputated, leaving a stiff wrist and a badly-crippled hand. He did not examine the spring,—had no opportunity to examine it,—but from what he saw, took it to be a spring about six inches long, which had been straightened to some extent,—weakened in the power of recovery of length by recoil,—as the result of having been at some former time severely jammed. He had seen the rules of the railway company more than once, as printed on the back of the schedules, and among them was rule No. 142, an extract from which reads as follows: "Every employe is required to exercise the utmost care to avoid injury to himself or to his fellow employes, especially in switching, or other movements of cars or trains. * * * Entering between cars, while in motion, to uncouple them, and all such imprudences, are dangerous, and in violation of the rules of the company." This is from plaintiff's testimony on his own behalf, and one of his witnesses says: "The men have always been notified not to go between the cars, to couple or uncouple, while in motion, but a man frequently goes in between them when in motion. That it was not necessary to do so, in order to uncouple, but it can be caught at the slack better by going in. Yet it is dangerous, every time a man goes between them while they are moving."

There is nothing to show that the company knew, or ought to have known, that the coupling apparatus of the car in question was out of order. In fact, as plaintiff's own testimony on this point may be said to be only conjectural, and as one of his witnesses said the spring was all right, it may be said, without contradiction of it, that it was inspected in about an hour after the accident, and found to be in good order. But conceding, for the purposes of this case, that the defendant did not take due care to keep safe this coupling apparatus, yet it appears from his own testimony that, if he did not in fact read this rule of the company, he frequently had it in his hands, with opportunity to read it, and, from the testimony

of one of his witnesses, that "the men are always notified not to go in between the cars to uncouple, while they are in motion, and that it is unnecessary, and obviously dangerous at all times;" and it is equally clear from plaintiff's own testimony, and that of his witnesses, that his violation of this rule was the direct, proximate cause of his injury, without which it would not have happened. To hold otherwise would be giving the party advantage of his own wrong. The rule was reasonable, and made for his own safety and protection. He knew the rule, or ought to have known it. There was no urgent necessity, no higher rule calling for the violation of this one. Furthermore, his own and other testimony introduced on his behalf shows that he was wanting in reasonable care and prudence, in the manner and time in which he caught hold of the coupling pin. And when the plaintiff undertakes to point out, as he must do, how the duty arose which is supposed to have been neglected, he shows a violation on his own part of this precautionary rule prescribed for his own protection from danger. That such is the doctrine on the subject, see *Karrer v. Railroad Co.*, 76 Mich. 400, 43 N. W. 370; *Cullen v. Roofing Co.*, 114 N. Y. 45, 20 N. E. 831; *Railroad Co. v. Kerr*, 25 Md. 521; *Sedgwick v. Railway Co.*, 76 Iowa, 340, 41 N. W. 35; *Id.*, 73 Iowa, 158, 34 N. W. 790; *Railway Co. v. Barber*, 71 Ga. 644; *Goulin v. Bridge Co.*, 64 Mich. 190, 31 N. W. 44; *Railway Co. v. Rice*, 51 Ark. 467, 11 S. W. 699; *Lockwood v. Railway Co.*, 55 Wis. 51, 12 N. W. 401; *Beach, Contrib. Neg.* § 364. A servant cannot recover if his injury is the direct result of his own disobedience of orders, (*Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999,) or of a reasonable rule, (*Overby v. Railway Co.*, 37 W. Va. 524, 16 S. E. 813.) And as to the manner and the time of taking hold of the coupling pin, under such dangerous circumstances, he must use circumspection and care in protecting himself from harm, and be himself blameless about the business which caused the injury; otherwise, he cannot recover.

We are cited by counsel for plaintiff to a number of cases which lay down the doctrine that it is the nonassignable duty of the railway company to provide the employe with a suitable and safe place and appliances, not as an insurer, but as a prudent and careful employer, and use due care to keep them so. *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590; *Hough v. Railway Co.*, 100 U. S. 213. See, also, *Kane v. Railway Co.*, 128 U. S. 91, 9 Sup. Ct. 16; *Jones v. Railroad Co.*, 128 U. S. 443, 9 Sup. Ct. 118. And, on the subject generally, see *Railway Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044; 2 *Thomp. Neg.* 969, 972; *Cooley, Torts*, 657; *Bish. Non-Cont. Law*, § 642 et seq. Upon grounds of public policy, as well as of private right, no duty of the railroad company should be more unrelentingly exacted

than the duty of constant watchfulness to make and keep the track safe and clear; to have suitable appliances, and have them kept in good order and repair. No cases lay down this doctrine more fully and broadly than the cases of *Cooper v. Railroad Co.*, 24 W. Va. 37; *Riley v. Railway Co.*, 27 W. Va. 145; *Madden v. Railway Co.*, 28 W. Va. 610; and *Criswell v. Railway Co.*, 30 W. Va. 798, 6 S. E. 31,—a duty due to their employes as well as to passengers, and, though not requiring the same degree of care, yet often not separable from it. These cases show that it was the personal, nonassignable duty of the railroad company to furnish, and keep in repair, a reasonably suitable and safe coupling apparatus; but, whether it did so or not, it does not relieve plaintiff from the observance of a reasonable precautionary rule, prescribed in the main for his own safety, nor from the discharge of his duty to take care to protect himself from harm, and not willfully encounter such a danger. His own evidence shows that his own negligence was the direct, efficient cause, without which the injury would not have happened; and the demurrer to the evidence should not have been overruled, but judgment should have been rendered thereon, according to the conditional verdict of the jury, for the defendant. Therefore, the judgment complained of is reversed, and the judgment which should have been given is now entered.

JACKSON v. HOUGH.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1893.)

ASSUMPSIT—PLEADINGS—CONSIDERATION FOR CONTRACT—LIMITATION OF ACTIONS—RULINGS ON EVIDENCE—BROKERS—WHO ARE.

1. On the facts the action was properly indebitatus assumpsit for money had and received, not for services rendered. The common count for money had and received was proper.

2. The action of assumpsit is an equitable action, and applicable to almost every case where money has been received by one, which in equity and conscience ought to be refunded or paid to another.

3. Where a plaintiff has done everything which has to be executed on his part, and nothing remains to be done but the performance of a duty on defendant's part to pay money due the plaintiff under contract, the plaintiff may recover on the common counts in assumpsit, and need not declare specially.

4. On the facts the consideration was sufficient to render the defendant's promise enforceable.

5. Against a demand for money had and received by one for the use of another, the period under the statute of limitations is five years, and it begins on the receipt of the money.

6. Where a question is not allowed to be answered by a witness, and the question does not itself import that its answer will prove a fact material, and it does not otherwise so appear, the refusal to allow it to be answered will not be ground of reversal.

7. One single sale of land for reward by one for another, taken alone, without any-

thing to show that the former professed to follow or practice the business of a broker, buying or selling for others stocks, securities, or other property for commission or reward, will not make him such broker, under section 2, c. 32, Code.

(Syllabus by the Court.)

Error to circuit court, Marion county.

Action in assumpsit by Oliver Jackson against Thomas Hough. Plaintiff had judgment, and defendant brings error. Affirmed.

John W. Mason and U. N. Arnett, Jr., for plaintiff in error. A. B. Fleming, for defendant in error.

BRANNON, J. Jackson brought assumpsit against Hough, recovered judgment, and Hough brought the case up by writ of error. Hough wanted to sell his farm. Jackson thought he could make something by selling it. He knew Adams wanted to buy a farm, and, without knowledge or request of Hough, Jackson went to Adams, and negotiated with Adams a sale of the Hough farm for \$6,000, payable in six bonds on Sharpneck of \$1,000 each, given to Adams. After this agreement between Jackson and Adams, Adams sent for Hough. Hough's price for his farm was \$5,000. When Hough came, Jackson asked him whether he would take five \$1,000 bonds on Sharpneck, indorsed by Adams, for his farm, and Hough answered that he would. Then for the first time Jackson told Hough that he had, without his knowledge, sold his farm over 30 days since for six notes of \$1,000 each, and that he would do better by Hough than his first proposition; he would divide the proceeds of the last due Sharpneck bond, and Hough agreed to it. Jackson then caused a deed to be drawn from Hough to Adams, which was executed, and committed it to Jackson's hands, to be delivered to Adams when the transaction should be consummated, and Adams met Jackson, delivered to him the six Sharpneck notes, and received the deed. Adams assigned the notes not to any one by name, but simply indorsed his name on them. Hough was not present, and had no participation in the delivery of the notes and deed. It was between Jackson and Adams only. Hough needed the money, and hesitated to take notes for his farm, but he and Jackson concluding in their interview above mentioned that the notes could be discounted, Hough agreed to take them as above stated. After Jackson received the Sharpneck notes he handed them over to Hough, in order that Hough might have them discounted by a certain person named by Hough, who, as he thought, would buy them. Both Jackson and Hough tried to sell the Sharpneck notes. They made together a fruitless trip to Wheeling for the purpose. Finally Hough sold the last note. Learning this, Jackson demanded half its proceeds. Hough refused to pay. Jackson sued, and recovered a verdict and judgment for half its proceeds.

For the appellant it is contended that, as the declaration, which contains only the common counts, contained no count for work, labor, and service, there could not properly be a recovery, as Jackson's claim, legally viewed most favorably to him, is for services in selling Hough's farm, and the agreement to pay half its proceeds to Jackson only a measure of compensation. If such were the character of Jackson's claim, this would be true. But I think his demand can properly be regarded as for half the proceeds of the sale of the last due Sharpneck note,—that is, for money received by Hough which he should *ex aequo et bono* pay Jackson,—and therefore recoverable under the count for money had and received by defendant for the use of the plaintiff. I regard the services as settled by the agreement to take half the proceeds of the note. Suppose, before sale of it, Jackson had sued on the quantum meruit for services only, could he recover, having agreed to take pay out of the note, and just half of its proceeds? After sale of it, could he sue only for services? If, on Hough's refusal to pay, Jackson might fall back on his services, it would be because Hough would be deemed to have repudiated that contract; and even then it would give Jackson election as to the form of his demand. He might sue for half the money for which the note sold. It is immaterial whether Jackson and Hough were joint owners holding equitable title to this note itself, or Jackson became owner of half the money from its sale; for in either case Jackson could go for half the amount arising from its sale. Here is money in one man's pocket received under circumstances which call upon him *ex aequo et bono* to pay, and we need not refine as to the title to the note, whether in one or both parties; and, the action of *indebitatus assumpsit* being an equitable action, relief can be had by it for money had and received. If for my services to you we agree that I shall be paid by half the proceeds of the sale of your horse, which we agree shall be sold, and you sell it, why may I not sue for half the money? Such was our contract. Did we not both contemplate or realize that the effect would be to give me right to half this money? Plaintiff is not suing for the note, but, as his account filed with the declaration and giving specification plainly of the nature of his demand clearly shows, he is suing for money had and received,—for half the proceeds of the Sharpneck note; and, *assumpsit* being an equitable action, he can recover under the count for money had and received, it being applicable to almost every case where money has been received which in equity and good conscience ought to be paid or refunded to another. *Thompson v. Thompson*, 5 W. Va. 190. As Jackson had done all on his part, and nothing remained but for Hough to pay over the money, no special count was needed, but

only the general count. *Moore v. Supervisors*, 18 W. Va. 630; point 10 of syllabus in *Davissan v. Ford*, 23 W. Va. 619; 4 Rob. Pr. 497. I, however, do not understand counsel to contend for a special count, but for one for service performed. I hold, therefore, that Hough held the note in trust for Jackson as to half its proceeds when sold, and that Jackson can sue for money as coming from this trust property. It grows out of a trust, and is one enforceable at law by *assumpsit*.

But it is said that no consideration supports the promise of Hough to sell the Sharpneck note and pay half its proceeds to Jackson; that it is simply an unexecuted promise to make a gift, and not enforceable. I think the consideration is quite apparent. Jackson's knowledge, influence, and business capacity found a purchaser and effected an oral agreement for the sale of the farm. True, this was not at Hough's request, but he ratifies and adopts it, and that probably would validate the act of agency *ab initio*. Hough avails himself of it, and derives a positive benefit ultimately in the consummation of the sale. That is enough, but it is not all. Jackson reports his action under this self-assumed agency to Hough, who, approving it, authorizes Jackson to complete the sale of his farm, and after this Jackson went on applying his capacity, influence, and care to the preparation of a deed and the full consummation of the sale. Here is service and talent applied by Jackson in making a sale; here is benefit to Hough; here is plainly valuable consideration on both sides, and constituting valid consideration as defined in all the books. 3 Minor, Inst. 17; 2 Kent. Comm. 465; 2 Bl. Comm. 297. Trouble of the party to whom the promise is made and benefit to the party making it will make binding consideration. We find no injustice in the claim. By the sale effected by Jackson, Hough realized \$500 more than he asked for the farm. What does he lose by paying Jackson? Nothing that is not justly Jackson's. Perhaps, without Jackson's aid, he could not have sold at all, or not so well.

As to the point that the demand is barred by limitation. Suit was begun within five years from the sale of the note by Hough, the time when Jackson's right to sue for his money first accrued. *Scott v. Osborne*, 2 Munf. 413; 1 Rob. Pr. 485.

Is there error in refusing to allow Jackson to be asked as a witness the question whether he had license to engage in the business of real-estate agent or broker? No evidence had been given or was proposed to show that he carried on the business of real-estate broker, save this single sale. Is it possible that one sale of real estate by a party not professing to practice the business will make of him such broker? The statute says no one shall without a license "practice the business of a stock or other

broker by buying or selling for others stocks, securities or other property for commission or reward." Code, c. 32, § 2. If a person sell one drink of liquor without a license, he violates the statute on that subject, as it says he shall not sell; but here the word "practice" is used, meaning to exercise or follow a profession or calling as one's usual business to gain a livelihood; and the word "business" is used as the object of the verb "practice," and there is hardly to be found a word more strongly conveying the idea of a permanent calling for a support. If one should undertake or profess to follow that business, no doubt one sale would be sufficient to bring him within the letter and spirit of the statute; but one is not within its letter or spirit who, without any manifestation of carrying on such vocation, merely makes one sale. I suppose that the purpose of the question was to elicit the fact that Jackson had no such license, and then contend that he could not recover because to allow him to do so would be against the policy of the law, as it would enforce a demand in favor of a party violating the license law arising from a transaction which he was prohibited from doing. The question proposed to call out the answer that he had no license, I assume, and thus prove that isolated fact, which, in connection only with this one sale, would not make Jackson a broker, and would therefore be immaterial. This question does not itself, like that in *Gunn v. Railroad Co.*, 36 W. Va. 165, 14 S. E. 465, import proof of anything but that single fact, which itself would be immaterial. There was no intimation that it was to be followed up by other questions or evidence that Jackson practiced the business of broker. If we should think that an unlicensed broker could not recover his commission, yet the single fact that Jackson had no license would not bring him within the rule. Suppose we should for this reverse. For what good, when we see no probability that further evidence is in the possession of appellant? We affirm the judgment.

WILSON v. WEST VIRGINIA, C. & P.
RY. CO.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

CERTIORARI TO JUSTICE'S COURT—WHEN LIES.

Where a justice in a suit involving a matter merely pecuniary has jurisdiction of the subject-matter and of the person, and renders a bona fide judgment on the merits clearly wrong, but within the scope of his legitimate powers, the circuit court will not, upon a writ of certiorari issued in the exercise of its original supervisory jurisdiction conferred by the constitution, review and reverse such judgment, but will dismiss the writ as improvidently awarded.

(Syllabus by the Court.)

Error to circuit court, Tucker county;
Joseph T. Hoke, Judge.

v.188.E.no.14—37

Action by Martha I. Wilson against the West Virginia, Central & Pittsburgh Railway Company to recover the value of an animal killed by defendant. Plaintiff had judgment, and defendant brings error. Affirmed.

C. W. Dailey, for plaintiff in error. J. P. Scott and Dayton & Dayton, for defendant in error.

HOLT, J. On the 28th day of April, 1891, M. Parsons, a justice of the peace of Tucker county, rendered a judgment in favor of Martha I. Wilson, plaintiff below, against the railway company, defendant below, and plaintiff in error, for \$14, with interest from date, the amount of her claim for damages for the wrongful killing of a steer worth \$14. The only evidence of value was that she had paid \$6 for the steer, and had kept it nine months before the killing by the railway train. The defendant presented its petition to the circuit court for a writ of certiorari,—when, the record does not show, but the writ was awarded on May 6, 1891. The petition claimed that section 2, c. 110, of the Code, prohibiting the awarding of the writ of certiorari unless the amount in controversy exceeds \$15, is unconstitutional and void; that section 12, art. 8, of the constitution makes it the duty of the circuit court, and gives it jurisdiction, to supervise and control all proceedings before justices and other inferior tribunals by mandamus, prohibition, and certiorari. On the 2d day of December, 1891, plaintiff, by her attorney, moved the court to dismiss the writ as improvidently awarded, and the court, having taken time to consider, on March 12, 1892, sustained the motion, and dismissed the writ, to which ruling this writ of error was obtained.

The only ground of error assigned in the petition is that the court erred in dismissing the writ of certiorari as improvidently awarded. In the brief of counsel for plaintiff in error, it is argued that section 2, c. 110, of the Code, as far as it says that "no certiorari shall be issued in civil cases before justices where the amount in controversy, exclusive of interest, does not exceed fifteen dollars," is unconstitutional, so far as it attempts to impose such limit on the supervisory jurisdiction of the circuit court conferred by section 12, art. 8, of the constitution. Section 12, art. 8, of the constitution reads as follows: "The circuit court shall have the supervision and control of all proceedings before justices and other inferior tribunals by mandamus, prohibition, and certiorari. They shall, except in cases confined exclusively by this constitution to some other tribunal, have original and general jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds fifty dollars; of all causes of habeas corpus, mandamus, quo warranto, and prohibition; and of all cases in equity

and of all crimes and misdemeanors. They shall have appellate jurisdiction in all cases civil and criminal where an appeal, writ of error or supersedeas may be allowed to the judgment or proceedings of any inferior tribunal. They shall also have such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law." Section 2, c. 110, of the Code reads as follows: "Of the writ of certiorari. In every case, matter or proceeding in which a certiorari might be issued as the law heretofore has been, and in every case, matter or proceeding before a county court, council of a city, town or village, justice or other inferior tribunal, the record or proceedings may, after a judgment or final order therein, or after any judgment or order therein abridging the freedom of a person, be removed by writ of certiorari to the circuit court of the county in which such judgment was rendered, or order made; except in cases where authority is or may be given by law to the circuit court, or the judge thereof in vacation, to review such judgment or order on motion or on appeal, writ of error, or supersedeas, or in some manner other than upon certiorari, but no certiorari shall be issued in cases of judgment rendered by justices in civil actions for not exceeding fifteen dollars, exclusive of interest and costs." Section 12, art. 8, of the constitution (1) gives the circuit court a general supervisory jurisdiction of all proceedings before justices and other inferior tribunals by mandamus, prohibition, and certiorari. (2) It gives such court (except in cases confined exclusively by this constitution to some other tribunal) original and general jurisdiction—First, of all matters at law where the amount in controversy, exclusive of interest, exceeds \$50; second, of all cases of habeas corpus, mandamus, quo warranto, and prohibition; third, of all cases in equity; fourth, of all crimes and misdemeanors. (3) Appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error, or supersedeas may be allowed to the judgment or proceedings of any inferior tribunal. (4) Such other jurisdiction, whether supervisory, original, appellate, or concurrent, as is or may be prescribed by law. The latter part of section 28, art. 8, Const., (Code, Ed. 1891, p. 43), reads as follows: "Appeals shall be allowed from judgments of justices of the peace in such manner as may be prescribed by law." Chapter 50 of the Code (sections 163-175) regulates appeals in certain civil cases from the judgment of a justice, and section 163 reads as follows: "In all cases an appeal shall lie under the regulations herein prescribed from the judgment of a justice to the circuit court of the county when the amount in controversy on the trial before the justice exceeds fifteen dollars exclusive of interest and costs." The constitution (section 12, art. 8) leaves the appellate jurisdic-

tion in all cases where an appeal, etc., may be allowed by law to the judgment of the justice, and no appeal is allowed by law in such cases except where the amount in controversy exceeds \$15. Now, the constitution plainly does not mean that the supervisory jurisdiction shall be an appellate jurisdiction, and the jurisdiction given in such case by writ of certiorari, in section 2, c. 110, is plainly an appellate jurisdiction, after a trial by jury, before the justice, and hence is also limited to cases where the amount in controversy exceeds \$15; and so it has been held where the point was directly presented, and also the constitutionality of the limitation to \$15, as prescribed by section 2 of chapter 110 of the Code. See *Fouse v. Vandervort*, 30 W. Va. 327, 331, 4 S. E. 298; *Farnsworth v. Railroad Co.*, 28 W. Va. 815. Therefore the meaning of section 2 of chapter 110 is that the writ of certiorari shall not issue where the suit involves matters merely pecuniary, and the amount in controversy, exclusive of interest and costs, does not exceed \$15. See *Love v. Pickens*, 26 W. Va. 341; *Farnsworth v. Railroad Co.*, 28 W. Va. 815, 816. With this reading of the statute,—evidently the correct one, giving the meaning intended,—it does not trench upon the original supervisory jurisdiction by certiorari conferred upon the circuit court by the constitution. Upon the remedy by the common-law writ of certiorari, and as modified by the various early English statutes, see 2 Fitzh. Nat. Brev. 242; 2 Com. Dig. 310; 2 Bac. Abr. 162; 1 Tidd. Pr. 399; 4 Hammond's Bl. Comm. 321, note 31. Upon the remedy as modified by recent English statute, see *Crepps v. Durdin*, 2 Smith, Lead. Cas. (9th Amer. from 9th Eng. Ed.) 979, 986. Upon the subject generally, but especially upon the writ as used in the various states,—first, as the mode of supervising and controlling the judicial and quasi judicial proceedings of inferior tribunals; second, as a writ of review on quasi appeal,—see 3 Amer. & Eng. Enc. Law, 60; *Harris, Certiorari*, § 4 et seq.; 2 Spel. Extr. Relief, p. 1560 et seq.; *Duggen v. McGruder*, Walk. (Miss.) 112; *State ex rel. Matranga v. Judge*, 42 La. Ann. 1089, 8 South. 277; 4 Minor, Inst. pt. 1, top page 329. Upon the law and practice in this state, see the cases generally, especially the case of *Poe v. Machine Works*, infra, our leading case on the subject; also, 2 Bart. Law Pr. (2d Ed.) § 296. In *Farnsworth v. Railroad Co.*, 28 W. Va. 615, and *Fouse v. Vandervort*, 30 W. Va. 327, 4 S. E. 298, the distinction between the common-law writ used as a remedy by original supervisory jurisdiction and the writ of review, as a quasi appeal, provided by chapter 110 of the Code, (Ed. 1891,) is clearly pointed out. I am not sure but that the writ of appeal and review by certiorari is given as matter of right by the present statute, or is required to be so given by the constitution, which

would put it more closely in harmony with chapter 50 of the Code of the justice, but this is only thrown out as a suggestion.

I take it for granted, therefore, for the purpose of this case, that this supervisory jurisdiction of the circuit court in cases involving matters not merely pecuniary does not depend on the amount, except, perhaps, where the maxim de minimus might apply, or some other appropriate remedy come in. If the justice refused to act at all where his duty as justice required him to act, the circuit court would compel action by mandamus; if he were usurping power, or abusing or exceeding his legitimate powers, the circuit court would forbid and prohibit the justice by prohibition; or, if such action had passed into judgment or final order, the circuit court would supervise and control it by certiorari, and undo and set right what had thus been done amiss, but in the latter case, not if the judgment of the justice could be reviewed by appeal, writ of error, or in some other law-appointed manner. So that the only question in this case is, did the justice usurp and abuse power when he had no jurisdiction of the subject-matter in controversy or of the person, or, having such jurisdiction, did he exceed his legitimate powers? If that, or some action on his part falling properly into the same category, such as fraud, did not exist, then it was not a case for the circuit court to exercise its supervisory jurisdiction in, but a case of damage or loss, without injury to any legal right. The suit before the justice was brought by plaintiff on the following account: "The West Va., C. & P. R. R. Co. 1890. To the killing of one steer, of the value of \$14.00." The defendant was summoned, appeared before the justice, and, on the trial, put in its evidence. The evidence is all certified by the justice and made part of his record, removed and sent up. Plaintiff's evidence was: She had bought the steer nine months before the killing, had paid six dollars for it with her own money, and she did not get it off her husband; that she had a separate estate, which at that time embraced all the cattle on the place. The steer was killed. Defendant's train killed it. The engineer could have seen the steer 100 yards either way. There was no controversy about the value of the steer or the killing of it; but was the company guilty of negligence? On behalf of the defendant, the engineer testified: At the time and place mentioned, 9 or 10 o'clock at night, he was running engine No. 1, (without any train,) which had been at the shops, going at speed of 18 or 20 miles an hour. It was dark. Had headlight. Saw lot of cattle. Applied air brakes. After he had passed the cattle, he saw this steer lying in the ditch on the right, 40 or 50 yards ahead of the engine. He was looking his best. Could not have seen the steer sooner. Already had the air brakes on. Could not have stopped under 75 yards running as he

was. Had been in the business 3 years. Thus, the company seems to have made a strong case in defense, but the justice had jurisdiction of the subject-matter in general and in this instance of defendant. There was no usurpation or abuse of power or excess of his legitimate powers; only an error or mistake of judgment as to the weight of evidence, at the most. There was no want of jurisdiction,—no defect of jurisdiction. The most that can be said is that he exercised such jurisdiction wrongly, and, if that would be sufficient, it would be, in effect, substituting the circuit court for the justice, to whom the law has committed the right and duty of trying the case. One of the modes of proving negligence in killing stock is to show that it would not have occurred if reasonable and proper watchfulness had been observed; so that, however slight, it cannot be said to be wholly without evidence on that essential point; so that it is only a case of the exercise of a conceded jurisdiction wrongly, and comes within the rule laid down in *Meeks v. Windon*, 10 W. Va. 180, and cited with approval in *Poe v. Machine Works*, 24 W. Va. 517, 521: "Although it may be possible that the merits of the case have been erroneously decided, the writ of certiorari cannot be made a substitute for the inhibited appeal, writ of error, or supersedeas, to review the case upon its merits." We are referred to the case of *Dryden v. Swinburne*, 20 W. Va. 89. That was a contest for the office of clerk. It was the only remedy by which the proceedings of the county court in such cases could be supervised and controlled, as no writ of error or supersedeas would lie in such cases, and, having unquestioned supervisory jurisdiction, the court may review and correct the errors of law in their proceedings, as well as errors on question of jurisdiction. So in this case, if the justice had usurped jurisdiction when he had none of the subject-matter in controversy, or, having such jurisdiction, had exceeded his legitimate powers, so as to call for and justify the supervision and control of the circuit court, then the argument of counsel, based on the ruling in *Dryden v. Swinburne*, might apply; but, as we have already seen, the facts of this case do not bring it within the supervision and control of the circuit court, within the meaning of section 12 of article 8 of the constitution, and for that reason the writ was properly dismissed. Judgment affirmed.

VAN DORN et al. v. LEWIS COUNTY COURT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

ACCOUNTING—REMEDY AT LAW.

Where the specific facts stated in a bill in equity, notwithstanding vague and general allegations as to equitable jurisdiction, show that there is a plain, adequate, legal remedy

as to the matters in dispute, the demurrer to such bill should be sustained, and the plaintiff remitted to his legal remedy.

(Syllabus by the Court.)

Appeal from circuit court, Lewis county.

Action in equity by J. H. Van Dorn and others against the county court of Lewis county, P. M. Hale, and A. A. Arnold for an accounting and other relief. The bill was dismissed, and plaintiffs appeal. Reversed in part.

Wm. E. Lively, for appellants. Linn & Withers, for appellees.

DENT, J. This is a chancery suit founded on the following assignment and acceptance filed with the bill as—

"Exhibit R.

"Order No. 6461. Name, Lewis County. Weston, W. Va. Order of P. M. Hale. State of West Virginia, Lewis county, to wit: At a county court continued and held for the county of Lewis, at the courthouse thereof, on the 4th day of January, 1887. P. M. Hale having this day presented to the court a certain order in writing, directing and authorizing the court to pay certain moneys to J. H. Van Dorn out of the money due and to become due him on his contract for building the courthouse and jail, which said writing is as follows: 'To the County Court of Lewis County, W. Va.—Sirs: I hereby assign to J. H. Van Dorn, of Cleveland, Ohio, the sum of three thousand dollars of the money due me, or to become due me, upon my contract for the building of the courthouse and jail of Lewis county, W. Va., and I authorize and direct you to pay the same out of said moneys, as follows: At each monthly estimate of money to be paid me upon work completed, the supervising architect is to make a separate estimate of the value of the ironwork completed, and, this estimate for ironwork so completed, the said county court is authorized and directed to pay to said Van Dorn the sum of eighty per cent., (80%.) And if, in said estimate of ironwork, any sum of money is included as estimate for girders, said court is authorized and directed to pay out of any other moneys due and payable to me out of that monthly estimate, or any subsequent estimate, to said Van Dorn, a sum sufficient to pay him the full price of said girders. And said court is further authorized and directed to pay to said Van Dorn, at the completion of said courthouse and jail, and out of any money or moneys that may be due and payable to me over and beyond the 80 per cent. payable by monthly installments, a sum sufficient to pay all balances due said Van Dorn for said iron and girders, not to exceed to him the said sum of \$3,000.00 in full for all iron furnished. Witness my hand and seal this 4th day of January, 1887. P. M. Hale. [Seal.]' It is therefore considered that the court doth accept said order, and agree to pay

said Van Dorn, according to the terms thereof, said sums on said iron: provided, that said court shall in no event be liable to said Van Dorn or to said Hale in any sum beyond that contemplated in the original contract with said Hale for building the said courthouse and jail, which said original contract shall remain intact, and in no manner altered or changed by any acceptance of said order of said Hale to said Van Dorn; and this acceptance is to be considered only as a means of paying to said Van Dorn said sums of money that may be payable to said Hale without the intervention of said Hale.

"The state of West Virginia, county of Lewis, to wit: I, E. A. Bennett, clerk of the county court of said county, do certify that the above writing is a true copy from the records in the office of the clerk of said court appearing in Order Book No. 2, p. 474 & 475. Given under my hand and the seal of said court this 7th day of January, 1887. E. A. Bennett, Clerk."

"Exhibit Q. (Duplicate.) Weston, W. Va., Dec. 22, 1886. To the Honorable Board of Commissioners of Lewis County, West Va.—Gentlemen: I hereby authorize and direct you to pay J. H. Van Dorn the sum of (\$3,000.00) three thousand dollars, in full for ironwork for new jail and courthouse, the same to be paid as follows, to wit: 80 per cent. on all ironwork on monthly estimates of architect or superintendent, except beams, which is to be paid in full when delivered. The balance to be paid on completion of building, not later than Oct. 1st, 1887. You to deduct the same from my contract. Respectfully, P. M. Hale. E. A. Bennett, Clerk of County Court."

"Exhibits A, B, C, and D.

"A.

"Van Dorn Iron Works. J. H. Van Dorn, Proprietor. Cleveland, Ohio, March —, 1887. Sold to P. M. Hale, Esq. Order No. —, for Lewis county, Weston, W. Va.:

2 double jail doors, 1st and 2nd story, at.....	\$100 00	\$ 200 00
1 double jail door, woman's department.....		56 00
2 food wickets, at.....	20 00	40 00
4 window guards, 1st story, at..	30 00	120 00
4 window guards, 2nd story, at..	56 00	224 00
2 window guards, woman's department, at.....	20 00	60 00
1 beam for jail, jail tie rods. ..		815 00
1 " " " courthouse rods		485 00
12 set inside shutters, at.....	75 00	900 00
2 doors with transoms, at.....	100 00	200 00
4 doors without transoms at....	75 00	300 00
		<hr/> \$2,900 00
20 balcony railing and 2 pieces crestings, 1 vane, 8 high, 2 brackets, 5 long.....		100 00
		<hr/> \$3,000 00

"B.

"Van Dorn Iron Works. J. H. Van Dorn, Proprietor. Cleveland, Ohio, — March, — 1887. Sold to P. M. Hale, Esq. Order No. —, for Lewis Co., Weston, W. Va.

"C.

"Van Dorn Iron Works. J. H. Van Dorn,
Prop. Cleveland, Ohio, March —, 1889.
Sold to Lewis Co., W. Va. Order No. —.
Weston, W. Va.:

1888.		
May.	Extra work cutting off 2	
	shutters.	
	Fr't on shutters, paid by us.....	\$ 6 30
	Cartage both ways.....	1 50
	72 hours, at .40.....	28 80
		<hr/>
	2 transoms.. ..	50 00
		<hr/>
		\$36 60

"D.

"Cleveland, Ohio, March —, 1889. P.
M. Hale, Esq., Weston, W. Va., in account
with Van Dorn Iron Works. J. H. Van
Dorn, Proprietor.

1888.		
March.	Ironwork.....	\$3,000 00
1889.		
March.	Im.....	86 60
		<hr/>
		\$3,086 60
1887.	Cr.	
April 8.	By cash.....	\$554 40
May 4.	" ".....	124 80
June 4.	" ".....	120 00
Aug. 4.	" ".....	280 00
Dec.	" ".....	60 00
		<hr/>
		1,189 20
		<hr/>
		\$1,947 40"

The allegations of the original bill are to the effect that the county court has not faithfully complied with the obligation assumed by it towards plaintiff; that it did not have proper estimates made by the right party, but that it had improper ones made, and paid the money that should have been paid plaintiffs to others, not entitled to receive it. It also asks for certain discoveries as to the expenditures, and what defense the county court has to make to plaintiff's claim, and that an account be had between them. The amended bills convene other parties who have similar claims, and set out various other after-discovered facts as to the moneys expended by the county court in the construction of the new courthouse at Weston. The county court answered the original bill, and demurred to all the bills. The demurrers were overruled. A. A. Arnold files an answer setting up a claim he holds against the court. Depositions were taken, and on the 27th day of October, 1891, the circuit court rendered a decree dismissing the bills at the cost of the plaintiff. From this decree the plaintiff appeals.

The first question presented is, did the court err in overruling the demurrers for want of equity in the bills? The bills allege the want of discovery. But this is a mere pretense, as the defendant is a public corporation, required to keep records of all its doings open to the inspection of the public, so that, if plaintiff really wanted to know as to the expenditures of the court, he could find this out by an examination at the clerk's office. He also prays for an account between himself and the county

court. "It is well established that if the bill, on its face, shows that the specific account can be fairly determined in a court of law, and that no discovery is necessary to the relief sought, the simple fact that the bill contains vague and general statements of complications of the accounts between the parties, without giving specific facts to show that such complications exist in the particular accounts to be adjusted, or a statement that the remedy at law is inadequate, or that some discovery is required from the defendant, will not support the jurisdiction of a court of equity. In such cases such statements will be considered merely as colorable, and employed as pretexts for foisting a jurisdiction upon equity courts which does not pertain to them, and they will be disregarded, and jurisdiction declined." 1 Story, Eq. Jur. § 458a; Lafever v. Billmyer, 5 W. Va. 33-41; Gratton v. Reed, 26 W. Va. 437.

In this case the plaintiff claims a fixed balance due him, of \$1,947.40, on the price of iron furnished by him for the new courthouse; and the only question to be determined is whether the county court is liable to pay this sum, or any part thereof, by virtue of the agreement made with the plaintiff, with the consent of P. M. Hale, by its order entered of record on the 4th day of January, 1887, heretofore herein copied. There can be no dispute as to the amount due plaintiff, nor as to the obligation of the county court to assume and pay the same, provided it had the funds applicable thereto under its undertaking aforesaid; and it does not make any difference to the plaintiff how the county court disbursed these funds, or on what estimates, if not properly made. If proper estimates were not made according to the agreement, it is not the plaintiff's fault, as the person required to make them was the agent and in the employ of the county court for this purpose, and it cannot escape liability by neglectful or wrongful acts on his part. If it paid out the money to parties not entitled to receive it, this would be no defense to a rightful claim on the part of the plaintiff. The county court was directed by the contractor, Hale, in his order: "At each monthly estimate of money to be paid me upon work completed, the supervising architect is to make a separate estimate for ironwork so completed, and on this estimate for ironwork so completed the said county court is authorized and directed to pay eighty per cent., (80%.) And if, in said estimate of ironwork, any sum of money is included as an estimate for girders, said court is authorized and directed to pay out of any other moneys due and payable to me out of that monthly estimate, or any subsequent estimate, to said Van Dorn, a sum sufficient to pay him the full price of said girders." This order the county court accepted, and agreed to carry out, subject to Hale's contract;

and if it failed to do so the plaintiff has a plain, adequate, and complete remedy at law. It is certain that this plaintiff ought not to bear an undue proportion of the loss occasioned by Hale's failure to complete his contract, if he should bear any part thereof; which, however, are questions to be raised in a proper suit before a proper tribunal, and not for this court to determine at this time. The specific facts stated in the material allegations of these bills fail to show that the plaintiff has not a complete legal remedy, and therefore the demurrer to them should have been sustained, and the bills dismissed, for this cause alone. The bills being demurrable for want of equity, there could be no decree between codefendants. *Alleman v. Knight*, 19 W. Va. 201. The circuit court apparently heard the case on its merits as to this plaintiff, and, while it reserved the rights of the defendants, as to all parties, in its decree, only reserved the right of the plaintiff as to P. M. Hale, which would bar him as to any suit he might see proper to institute against the county court; and to this extent the decree will be reversed and amended, and in all other respects affirmed, with costs to the appellee, as the party substantially prevailing.

STATE v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1893.)

NUISANCE—OBSTRUCTION OF HIGHWAY BY RAILROAD COMPANY—CRIMINAL PROSECUTION.

Where a railway company takes and occupies a part of a county road without having condemned it, yet with the consent of the county court duly given, but on the condition that the company shall restore the county road to its former state, or to such state as will not unnecessarily impair its usefulness, and fails to comply with the condition, the railway company may be proceeded against by indictment for maintaining a nuisance, and fined for obstructing and injuring the county road.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Under indictment brought at the instance of the state of West Virginia, the Ohio River Railroad Company was found guilty of obstructing a public highway, and brings error. Affirmed.

Vinson, McDonald & Thompson, for plaintiff in error. T. S. Riley, Atty. Gen., for the State.

HOLT, J. This is an indictment found in the circuit court of Cabell county on August 7, 1889, against the railroad company, for obstructing a public road, to which defendant, by its attorneys, appeared and entered the plea of not guilty. By consent it was submitted to the court, who found defendant guilty, but at the same term set aside the finding and judgment, and ordered trial

by jury. The jury found defendant guilty. There was a motion to set aside the verdict, but the court, overruling the motion, fixed the fine at \$50, and gave judgment therefor. Defendant excepted, and filed a bill of exceptions setting out all the evidence; also, one setting out all the instructions given for defendant, those refused, and the one given as modified over defendant's objection,—both signed and made parts of the record. The law involved and the material facts are as follows: By the constitution all railroads are declared public highways. Section 9, art. 11, Const. Under clause 6, § 50, c. 54, of the Code, the county court of Cabell, by order of March 12, 1887, authorized and empowered the Ohio River Railroad Company to construct its railroad as now located in Cabell county, where it interferes with county property, roads, etc., across, along, and upon such county property and roads which the route of such railroad shall intersect or touch; but such company shall restore such county roads thus intersected or touched, at its own costs and expenses, to their former state, or to such state as not unnecessarily to have impaired their usefulness, and shall keep the crossings of such county roads in repair. Four commissioners were appointed on behalf of the county, any three of whom could act to accept and receive the road from the railroad company when completed by it as therein indicated, etc. Under this authority the Ohio River Railroad Company, in 1887, constructed its roadbed along the county road at certain points in the county above the town of Guyandotte, laid their track, and now occupy and use the same. The company built another, called the "Substituted Road," at various points generally back from the river, between the railroad and the hill. The evidence on behalf of the state is that such substituted road is not as good as the one taken, not built according to the agreement and as required by the order of the county court, and was never received by the commissioners. The evidence on the part of defendant tends to show that the substituted road is as good as the old road, in some respects better, by being moved back from the river bank, but, again, being necessarily on ground more likely to get muddy in the winter time; that the commissioners were satisfied with the substituted road. But the jury found against the defendant, and, unless misled by some erroneous instruction, we must, in that state of the testimony, take it that they found correctly. The grounds of error relied on by the defendant are (1) statute of limitations; (2) modifying the instructions of defendant; (3) the jury disregarding the court's instructions; (4) the court refusing to grant a new trial.

I agree fully, with counsel for defendant, that railroads should not be needlessly harassed, nor dealt with harshly. They are indispensable in these times as highways; such our constitution makes and calls them.

They indicate the character and reach of modern civilization. The proceeding by indictment is awkward and stiff at best, and it is at least doubtful whether, on conviction, the railroad track could be torn up and removed as a nuisance, for it was laid down in that very place with the sanction of the general statute and the consent of the county court. At any rate, the criminal proceeding has no capacity of adaptation or direct efficiency to bring about the restoration of the county road. One of the civil remedies suggested in *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, is better suited to bring about directly what we must infer to be the main purpose,—the restoration of the road. Nevertheless, we have to deal with this case as we find it, seeing only that the rules of law as settled in such cases have been given to the jury correctly, according to what the testimony tended to prove. In the case of *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, there is a full discussion of this subject by Judge Brannon, delivering the opinion of the court, in which the obstruction of ordinary public streets and roads by railroads, under authority of law and with the consent of the town and county authorities, is fully discussed in all its bearings, both as to the offense and the civil injury, and the mode of dealing with it by indictment, mandamus, and mandatory injunction in the nature of a bill for specific performance; and this is followed by the case of *State v. Monongahela River R. Co.*, 37 W. Va. 108, 16 S. E. 519, an indictment and state of facts similar to the indictment and facts in this case, in which it is held that if a railroad company, under authority from a county court giving it license to build its road upon, along, or across public highways, upon the express condition that it shall restore such highways to their former state, or to such state as not unnecessary to impair their usefulness, takes possession of a part of a highway, and constructs its road upon it, but fails to restore the highway to such state as is required by law, it is guilty of maintaining a nuisance, and may be indicted under section 45, c. 43, of the Code, notwithstanding it has such authority from the county court. This indictment is founded on section 45 of chapter 43 of the Code, (Ed. 1891, p. 330:) "Any person * * * who shall without lawful authority * * * obstruct or injure any road, shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than ten nor more than fifty dollars." See *State v. Chesapeake & O. R. R. Co.*, 24 W. Va. 809. This has been the law since July, 1850. See Code 1849, c. 97; Code 1860, p. 490. See *Dimmett v. Eskridge*, 6 Mumf. 308. Counsel for defendant quote from *State v. Chesapeake & O. R. R. Co.*, 24 W. Va. 809, 811, as follows: "Before the defendant could be convicted, it was incumbent on the state to establish by competent evidence that How-

ell's lane road, [the road in question] mentioned in the indictment, was, at the time the same was alleged to have been obstructed, a public road; that the same had been obstructed within a year next before the finding of the indictment; and that it had been obstructed by the defendant. Failing to prove either of these facts, the defendant was entitled to an acquittal." Defendant claims that this was not shown to be a public road. But this defendant recognized it to be a county road when on March 12, 1887, it moved the county court for leave to occupy it, and was by order of that date authorized and empowered to construct its railroad as then located, on, along, and across the said county road. Other evidence shows that it was the public road leading from the town of Guyandotte up the Ohio river, through Cabell county, to the Mason county line, and has been used and worked and recognized by the county as a road for many years.

2. As to the statute of limitations. The act complained of, in its inception, was in March, 1887, and this indictment was found at the August term, 1889, and defendant claims that it was barred. If it were not shown to have been a continuing offense, it would have been barred. But in *State v. Monongahela River R. Co.*, 37 W. Va. 108, 16 S. E. 519, a case very much like this, the defendant was held to be guilty of maintaining a nuisance; that the giving of leave to occupy and use the said road for the railroad track was upon the express condition that the company should restore it; that the company cannot enjoy the grant, and dispense with the condition; that such authority affords no protection for excess beyond departure from, or failure to comply with, the conditions. See *City of Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 16 S. E. 514, and cases there discussed. *People v. Dutches & C. R. Co.*, 58 N. Y. 152, 165; 2 Wood, Nuis. c. 23, § 753. It is a continuing offense, and the defendant is under a legal obligation to remove it, and indictable when he suffers it to continue. 1 Bish. Crim. Law, (8th Ed.) § 433; Elliott, Roads & S. 490, 493. The instruction No. 1, given on motion of defendant, is based on *Ratcliffe's Case*, 5 Grat. 657,—that if defendant entered upon the road set out in the indictment under a claim of right, believing it to be its own, and that it had a bona fide right thereto, then the jury should find for the defendant,—and has no application to the case as a defense in bar; for this offense consisted, not in the act of occupying the old county road, (the company had a license to do that,) but it was on the condition precedent that the new road substituted for that part of the old one taken should be such a restoration as the law and the order of the county court contemplated and required. The failure of defendant to make such restoration of the old road is the gist of the offense, and it requires no other criminal intent than the intentional occupation of the old

road, and the willful neglect or refusal to restore it.

This also disposes of the second ground assigned for error, viz. in improperly modifying instructions of defendant; for the court properly added that, to constitute a defense, the defendant must show that it had complied with the conditions under which it was permitted to enter and occupy, set out in the order of consent; and such modification made it consistent with instruction No. 4 given the jury on motion of defendant, which reads as follows: "No. 4. The court instructs the jury that if they believe from the evidence in this cause that the defendant made the alterations and changes in the county road where its track occupied the old road, and such alterations and changes restored the county road to its former state, or to such state as did not unnecessarily impair the usefulness of said road at the time such change was made, then you must find for the defendant." Leaving out of view the subject of crossings, etc., this instruction propounds the law correctly in this state, except where there may be some special reason for charging the company with a continuous duty, and in effect it called upon the jury to apply it to the facts as they should find them to be according to the evidence, and they returned a verdict of guilty. There is a good deal of testimony tending to show that the defendant had in substance made such restoration, and that the trouble with the new road was that it had to be built back from the river, next to the hill, where the wet weather and freezing through the winter made it muddy, narrowed it by slips, and put it out of proper width and shape. On the part of the state, three witnesses were examined who state that the defendant did not properly restore the old road by the new one, and one of them, a commissioner appointed to receive it, declined to receive on that account; so that no case is made out for a new trial on the ground of the verdict being unwarranted by the evidence, and the judgment must be affirmed.

GRAHAM v. NEWBURG ORREL COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

**INJURY TO SERVANT—PRESENCE OF GAS IN MINE
—DUTIES OF MASTER—ASSUMPTION OF RISK.**

1. It is the duty of the operator of every coal mine to provide ample means of ventilation, and to cause air to be circulated through the headings and working places, so as to dilute, render harmless, and carry off dangerous and noxious gases. It is also his duty to employ a competent fire boss to examine with safety lamp, immediately before each shift, working places and other places where dangerous and noxious gas is known to exist, or is liable to exist. It is also his duty to employ a competent mining boss to keep careful watch over the ventilating apparatus and the air ways, traveling ways, pumps, and drainage, and to see that proper break-throughs are

made, as required by law, and that all loose coal, slate, or rock overhead in the working places and along the haulways be removed or carefully secured, so as to prevent danger to persons employed in the mine, and to provide props and timbers for the mine, and perform other duties required of him by law.

2. Omission of these duties is negligence in the operator, and renders him liable to his employe for injury resulting from such omission of duty.

3. While the general rule of law is that an employe, knowing of defects in machinery, appliances, or in his working place, and still continuing in service, assumes risks, and cannot recover from his employer damages for injury arising from such defects, yet the rule is not without exception. Mere continuance in service with such knowledge is not per se negligence in the employe. He need not stop work in every instance of knowledge of a defect, but may run some risk by continuing service, provided the defects be not plainly dangerous, or be not such as ought to induce a prudent, careful man to believe that accident would likely ensue, and that, looking to his safety, he ought not to continue the work.

4. Where an employe knows of defects in machinery, appliances, or his working place, and is by words, acts, or conduct of his employer lulled into a sense of security, and continues in service, and is injured by reason of such defects, he is not precluded thereby from recovery of damages from his employer, if the danger be not so plain and obvious that a prudent, careful man, anxious for his safety, ought not to risk it.

(Syllabus by the Court.)

Error to circuit court, Preston county.

Action for personal injuries by Edward Graham against the Newburg Orrel Coal & Coke Company. Plaintiff obtained a verdict, and from an order granting a new trial he brings error. Reversed.

P. J. Crogan, for plaintiff in error. W. G. Brown, for defendant in error.

BRANNON, J. Edward Graham brought trespass on the case against the Newburg Orrel Coal & Coke Company, and, a verdict having been found for the plaintiff, the court set it aside, and Graham sued out this writ of error.

The action sought damages for injury from burning received by Graham while employed in mining coal in said company's mine, resulting from an explosion caused by fire damp following a blast in the work of mining. That the explosion came from the fire damp or inflammable gas is incontrovertible. That it is the duty of persons or corporations operating coal mines to use every reasonable precaution to keep the mines free from this dangerous gas, or neutralize and carry away what may inevitably be generated in the mines, so as to be harmless, by proper ventilation, not only appears from the common law relating to the obligations of employers, but also from the definite letter and spirit of legislation recently enacted, found in Code 1891, p. 991, and Acts 1887, c. 50. It needs but a hasty look at the act to tell us of the solicitude of the legislature to save the lives of the many who toil in mines, and reduce to the smallest possible

compass the great dangers inseparably connected with the occupation of mining. This legislation deserves to be enforced, to subserve the spirit which dictated it, and the very important ends it seeks to accomplish. When we find gas in a mine in quantity or condition dangerous, we may say it is *prima facie* evidence of negligence in the operator, because in the teeth of the statute. That gas was in this mine, in violation of law, follows from the simple fact that an explosion of it entailing injury to the miner took place. That the mine was infested with this gas, and peculiarly dangerous from it, the evidence shows, and the fact was known to the mining boss. All the more particular, therefore, should have been the care to free the mine of it. The act, in section 10, demands that all mines generating fire damp shall be kept free of standing gas in the worked and abandoned parts as far as practicable. There is nothing to show that in this instance the gas which worked the accident could not have been dissipated. There had been gas there for two weeks before the accident. The main heading was falling, and men were sent to put up timbers, and could not do so because of the presence of gas. Did not the superintendent and mining boss know this? They could have, by the slightest diligence, known it; they were bound to know it. The statute, in section 10, requires the employment by the operator of a competent person, called "fire boss," in all mines subject to gas, and he is required to examine every working place and all other places where gas is known to exist, or is liable to exist, with safety lamps, immediately before each shift; and the workman must not enter, and the operator must not permit him to enter, any working place, until it has been examined by a fire boss and reported safe. All this shows plainly that it is the imperative duty of the owner of the mine to search for this dangerous gas, cost what it will. There was no fire boss employed in this case. No search was made just before the men went to work.

Next, in what more particular respect does the plaintiff impute blame to the defendant? He says that the crosscuts or break-throughs were left open. If so, then the fresh air from the fan, intended for the nostrils of the miners, and to drive out and dilute the noxious gas, would escape through these openings, and not reach the miners, leaving them without fresh air, and exposed to the imminent danger of the gas. This would be a gross dereliction of duty on the part of the mine operator. The statute says he must furnish ample means of ventilation, and circulate air through the main and cross headings and working places, to dilute, render harmless, and carry off noxious gases. He must adopt all appliances and means to accomplish this; and indeed the statute, in saying that, when doors for directing ventilation are used, they shall be so hung

as to close themselves, implies this all important precaution. A rule of this company expressly requires them to be tight. There was before the jury evidence of at least two witnesses, very fully and squarely stating that the crosscuts were open. There was evidence to the contrary, but not more than that to show that they were open. The jury found that they were open. Certain it is that there was an explosion from gas; certain, also, it is that if there had been, at the place of the explosion, an adequate quantity of ventilating air, that explosion would not have occurred. It must have occurred either because the supply of air was insufficient, or because it escaped through openings on the way before it reached the location of this gas; and, as the claim and evidence of the defendant are that the fan was quite able to furnish an ample supply of air, why is the finding that these openings were unclosed not reasonable? I shall not cite authority for the proposition that, where evidence is very conflicting on matters essentially material in the case, the jury are almost uncontrollably the judges of the weight of the evidence, the deductions therefrom, and the credibility of the witnesses, and neither the trial court nor this court can overturn its verdict.

But it is said that, though defendant be guilty of negligence, yet the plaintiff cannot recover, because he was himself guilty of contributory negligence, inasmuch as he knew—First, that the brattices were open; and, second, that the gas was in the mine. The plaintiff did know of the open brattices. It is true that if an employee know that the machinery or appliances is defective, or the place where he works is not in proper state of condition, and he continues in service, he cannot recover for injury flowing therefrom. But this rule is not without exception. Such mere continuance in service is not *per se* or infallibly negligence. The danger must be such as may reasonably be expected to entail accident and injury; not a remote probability or chance of accident. It must be such as a fairly prudent, cautious man ought to think likely to result in accident, and which he ought not to risk. Does the rule require the employee in all cases to stop work simply because he knows of defective machinery or condition? In this case, could the plaintiff fairly expect that these openings would leave an insufficient supply of air? And did he know that there was gas present, in which case the openings would be a real danger, otherwise not? Was it rash, or even imprudent, to work? Was he so im thinking he might go on safely? Under the circumstances of this case, you cannot say that the situation was such as to impress him with a feeling of insecurity. To do so you must fix the rule unalterably that knowledge of any defect whatever, finally resulting in disaster, should have caused the employee to stop, and will forbid recovery.

Would the interests of either employer or employe be subserved by such a rule? To know simply of a defect of machinery, or that the condition or surroundings of a working place are not just what they should be to guaranty safety, is not to be certainly or necessarily forewarned of danger. Does the employe, from that knowledge, in all instances assume all risk? I think not. The question is, did he know, or ought he to have known, by the use of ordinary common sense and prudence, as applied in the particular instance, that dangers were before him likely to flow from the defect or condition? not simply that he knew the defect or condition existed. He need not in all cases quit work. He may run some risks, provided they be such as a prudent, careful man would, under the circumstances, run. I am aware that this subject is one which is, and will continue to be, in practice, of great importance; but I do not know that by following it further here I could make it any clearer. The following authorities discuss it, and I think will sustain the views above presented: Cases cited on pages 513, 514, 35 W. Va., and pages 265, 266, 14 S. E., *McKelvey v. Railway Co.*; *Beach, Contrib. Neg.* § 372; *Wuotilla v. Lumber Co.*, 37 Minn. 153, 33 N. W. 551; *Russell v. Railway Co.*, 32 Minn. 230, 20 N. W. 147; *Soeder v. Railway Co.*, 100 Mo. 673, 13 S. W. 714; *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. 801; *Eddy v. Mining Co.*, 81 Mich. 548, 46 N. W. 17; *Colbert v. Rankin Union*, 72 Cal. 197, 13 Pac. 491; *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. 937; *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. 710; *Ford v. Railroad Co.*, 110 Mass. 240; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Conroy v. Iron Works*, 62 Mo. 35; *Railroad Co. v. Ogden*, 3 Colo. 499. It later occurs to me that the principle of point 7, in *Washington v. Railroad Co.*, 17 W. Va. 190, and reiterated in *Fowler v. Railroad Co.*, 18 W. Va. 579, applies strongly in support of this doctrine. That is that, "to bar the plaintiff from recovery, his alleged act of negligence must be such as he could reasonably anticipate would result in his injury." In point 4 of syllabus in *Wooddell v. Improvement Co.*, 17 S. E. 386, 38 W. Va. —, we find strong support of the position above taken, as it lays down that if a brakeman know of a tree limb over the track, "and he appreciates the danger," he is chargeable with contributory negligence. Judge Holt, in that case, makes a very valuable collection of West Virginia cases on contributory negligence, and gives the salient points decided by them.

And, moreover, the question whether Graham, by continuing work after knowledge that these openings had not been closed, was guilty of contributory negligence under all the circumstances, was a question for the jury. The fact that he had such knowledge is unquestioned; but whether knowledge of that isolated fact would fix on him contrib-

utory negligence was dependent on many other facts and circumstances, and rendered it a question for the jury, and we do not see our way to reverse the jury on this point. For myself, I am clear in opinion that the mere knowledge that these crosscuts were open would not stamp the plaintiff with negligence, but was only probative or evidentiary before the jury on the inquiry whether Graham was chargeable with contributory negligence. The rule is correctly laid down in *Snoddy v. City of Huntington*, 37 W. Va. 111, 16 S. E. 442, that "contributory negligence, when it depends upon questions of fact and testimony, is for the jury; but when the facts are undisputed, or indisputably established by the evidence, the question becomes one of law for the court." Where the evidence as to contributory negligence is conflicting and uncertain, the question is for the jury, and their verdict will not be interfered with. *Hanley v. City of Huntington*, 37 W. Va. 578, 16 S. E. 807. Though there may be a prominent fact which, taken alone, would sustain the defense of contributory negligence, yet if it depends upon surrounding circumstances, and is to be viewed with and receive quality and effect from them, the question of contributory negligence is for the jury. *Washington v. Railroad Co.*, 17 W. Va. 190; *Johnson v. Railroad Co.*, 25 W. Va. 570; *Riley v. Railway Co.*, 27 W. Va. 163. In this case the fact that Graham knew that the crosscuts were open had to be taken in connection with the question whether he knew there was, or likely was, gas in the mine, which was disputed, and whether he was ordered to go to work, and was lulled into a feeling of security by the assurance of an agent of the company that the place was safe. The question is none the less a jury question when the case is one where the employe continues work with knowledge of defects. Citations on pages 513, 514, 35 W. Va., and pages 265, 266, 14 S. E., *McKelvey v. Railway Co.*; *Shear. & R. Neg.* § 215, note 4; *Hawley v. Railway Co.*, 17 Hun, 115, 82 N. Y. 370; *Sanborn v. Trading Co.*, 70 Cal. 261, 11 Pac. 710; *Johnson v. Railway Co.*, 43 Minn. 53, 44 N. W. 884; *Huhn v. Railway Co.*, 92 Mo. 440, 4 S. W. 937; *Eddy v. Mining Co.*, 81 Mich. 548, 46 N. W. 17.

Next, as to charge against Graham that he knew that gas was in the mine, and yet worked on. This is the only point in the case giving me any difficulty. It depends upon evidence in some respects conflicting, and upon deductions therefrom, and the jury has found no contributory negligence imputable to the plaintiff; and with this remark I might dismiss the point. Graham was told that night that there was gas, not in the room he was working in, but in another place seven or eight yards distant. As I understand the evidence, which is not very intelligible, this gas was brushed out with his vest by McNaught, perhaps imperfectly, thus leading Graham to think there was no dan-

ger. The plaintiff says he did not rely on the statement that there was gas in the mine, as he thought the person telling him had interested motives in telling him to induce him to go home, and the man was not an expert. He says the person did not tell him it was unsafe to fire shots. He stated, and there was no evidence to the contrary, that he had no experience with gassy mines, and was unacquainted with the qualities and danger of gas. It is laid down in *Whart. Neg.* § 216, that when the employe, from inexperience, infancy, or inability, is incapable of estimating the danger, he is not held to accountability for contributory negligence. It might be with some force said that the employe, if not an infant or imbecile, is bound to know and appreciate the danger if he enters into an employment. He is so bound as to dangers incident to that employment, but not those extraordinary or not properly incident. Where the defendant is shown to be chargeable with negligence producing injury to his employe, he is not excused unless he show that the plaintiff himself, by his own negligence, brought misfortune upon himself, which could not well be the case if, from inexperience or want of knowledge, the plaintiff knew not his danger. The guilty defendant has no right to exemption for injury done to an innocent employe. But there is an undisputed fact of decisive import under this head, which alone does away with the contention that, if Graham knew there was gas present, he cannot recover, and it is this: That on Sunday, needing coal for the engine, the mine boss went to Graham's house, and asked and urged him to work that night, and assured him that the mine was all right and safe, and he would have a nice night's work; and that he (Graham) supposed it was clear of gas when the mine boss said it was all right, as he did not know anything about the danger of gas, and he had confidence in the statement of the mine boss. The mine boss made this statement when he could not know it to be true, as he had not been in the mine for hours, and had not examined the mine before the men went to work, as the statute required. Now, whether we consider this an order or a request, Graham was lulled into a feeling of security by it, and unless we could find, as we cannot, that the danger was known to Graham, and was patent and manifest, so as to deter any reasonably prudent man, it frees Graham from contributory negligence. *Wood, Mast. & Serv.* §§ 352, 353; *Shortel v. City of St. Joseph*, 104 Mo. 114, 16 S. W. 397, 24 Amer. St. Rep. 317, and note. I regard it tantamount to an order to work. Had he refused, would he have been retained? But, if not a command, it was an assurance by a superior having every means and with capacity to know, and bound to know, given to one not having equal means or capacity, not knowing the danger or having no definite knowledge of any ground of danger, inspiring

confidence and a feeling of security. In *Tarrant v. Webb*, 18 C. B. 797, commented on by Judge Green in *Criswell v. Railway Co.*, 30 W. Va. 826, 6 S. E. 31, the employe had, as in this case, been told by a fellow servant of the defect, and informed his employer, and he remarked that he must not listen to what they said; and the employe recovered because, as Judge Green said, he had lulled the employe into a sense of security. We must take into consideration the employe's limited means of knowledge, and that, when laborers look to superintendents, they are not given to thought and foresight of danger. *Id.* This court held in *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53, that "if a master, having knowledge of a danger of which the servant is ignorant, by his conduct, actions, or words lulls the servant into a sense of security, in consequence of which the servant is injured, the master is answerable in damages." Defendant cannot complain of plaintiff's want of vigilance as contributory negligence, when that very want of vigilance was attributable to his own act, direction, or assurance of safety. *Railroad Co. v. Ogler*, 35 Pa. St. 60; *Totten v. Phipps*, 52 N. Y. 354; 1 Shear. & R. Neg. § 91. "It is not contributory negligence for an employe, who is in doubt about the safety of the place where he has to work, to defer to the opinion and assurance of those who are supposed to know, and from their position are bound to have special knowledge, as to whether it is safe or not." *Iron Co. v. Erickson*, 39 Mich. 492. And since writing the above I notice the case of *Fowler v. Railroad Co.*, 18 W. Va. 579, holding that "if the defendant has, by its own act, thrown the plaintiff off his guard, and given him good reason to believe that vigilance was not needed, the lack of such vigilance on his part is no bar to his claim for damages." If we can say that the plaintiff knew that gas was in the mine, yet we cannot say that he knew it was there in such quantity as to make it dangerous, or that his danger was manifest or imminent or even probable.

Another consideration is that there was no fire boss, as required by statute, to examine and test this mine, particularly dangerous because it was a deep shaft of 380 feet. It seems it would be his duty to fire the blasts used in mining. This explosion resulted from a blast shot by Graham. Had there been a fire boss, we may say with safety the accident would not have taken place. Evidence was before the jury that Graham requested a fire boss, but the reply was that one would cost too much. It is said that Graham and others, for extra pay, agreed to act for themselves as fire boss; but this contention is not supported by evidence, and was overruled by the jury. It appears from the case that this dangerous mine was not operated with such care and precaution for the safety of life and limb as required by law, and by reason of this the plaintiff received serious

injury; and, seeing no legal reason to excuse the defendant or set aside the verdict of the jury, we must reverse the order of the circuit court setting aside the verdict and granting a new trial, and enter judgment for the plaintiff upon the verdict. Reversed.

DAVIS et al. v. BOARD OF EDUCATION OF FT. SPRING DIST. et al., (two cases.)
(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

SCHOOL DISTRICTS—TAXATION—BUILDING CONTRACT—CONSTRUCTION.

1. Under section 45, c. 45, of the Code, the value of a schoolhouse and site yet unsold, though the board of education intends to sell it, cannot be taken into consideration, in estimating, for contracts and expenditures, the amount of money available in the fiscal year for contracts and expenditures.

2. Where a contract between a board of education and contractors, for building a schoolhouse, fixes a sum as the contract price which may exceed the amount of money available under section 45, c. 45, of the Code for a fiscal school year, but contains a provision that no liability shall be imposed by such contract on the board for anything beyond the sum lawfully available under that section, so as to prevent the contractors from recovering of the board anything beyond such sum, the contract is not unlawful, under said section, so as to prevent the board from paying upon it such money as is applicable under said section.

(Syllabus by the Court.)

Appeal from circuit court, Greenbrier county; A. N. Campbell, Judge.

Two actions by George N. Davis and others against the board of education of Ft. Spring district and others for an injunction. From the decrees entered, a part of defendants appeal. Reversed.

John W. Harris, for appellants. Gilmer & Gilmer, for appellees.

BRANNON, J. The board of education of Ft. Spring district, Greenbrier county, made a contract on May 14, 1892, with Driscoll & Peters, to erect a schoolhouse in the town of Ronceverte, and Davis and others filed a bill to obtain an injunction restraining the board from levying to pay Driscoll & Peters anything under said contract; and such injunction was awarded, and a motion to dissolve was overruled, and the injunction perpetuated. After said injunction was awarded, and while pending, the board and Driscoll & Peters made a new contract on July 16, 1892, canceling the former one, and providing for the building of said schoolhouse, and the board made a levy for the building fund; and then Davis and others filed another bill, and obtained on it an injunction restraining the board from issuing, and the sheriff from paying, any drafts issued to Driscoll & Peters for work done under said new contract. The defendants moved the court to dissolve the injunction, but the judge refused to do so. The board of education and Driscoll & Peters

obtained an appeal to review proceedings in both cases.

As to the first case, I may safely say that the show of funds available to pay the contract price for the schoolhouse under the agreement between the board of education and the building contractors of May 16, 1892, is inadequate, and that the contract created a debt reaching beyond the current year, and binding the district in future, unless we can include in the count or estimate of available funds the old school building. I do not think we can do this. True, section 39, c. 45, of the Code does say that the proceeds of taxes levied under section 38 for the use of the building fund, and "of school houses and sites sold," and donations, devises, and bequests, shall constitute a special fund, called the "Building Fund," to be used in building and furnishing schoolhouses; but that section only tells us how that fund shall be constituted, and has no relation to this question, save that it makes money in the treasury from actual sales of schoolhouses and sites a part of the fund which may be used for building, but it uses the words proceeds of "school houses and sites sold," not that they may be sold. How can we include a mere estimate of the value of a disused schoolhouse in the estimate of funds actually available, when it may not be sold, and, if sold, at very much less than the estimate? And when we look at section 45, c. 45, Code, it makes unlawful any contract in any year for the expenditure of more than the aggregate amount of the district's quota of the general school fund, and the tax levies that year, and any balance in the sheriff's hands from the preceding year, and such arrearages of taxes as may be due the district; and here we do not find any allowance for unsold school houses or sites, though the items that are to be treated as ready or available means are carefully enumerated. But the answer of Driscoll & Peters states that there was no intent by the first contract to bind the board to do anything contrary to chapter 45 of the Code, and if it bound the board to any extent beyond what it could lawfully do under said chapter, or any statute relative to boards of education, they did, by their answer, release, acquit, and discharge the board and its members from any and all liability created or attempted by said contract contrary to law, and agreed to hold the board liable under it only to the extent that it might lawfully bind itself under the laws aforesaid, and that they construed and held the contract to bind the board to pay for such work as they (the contractors) might do to the extent of available funds during the year ending June 30, 1892, and for any work afterwards done they construed the contract so that they would have to take chances of a levy therefor.

Chapter 45, § 45, Code, provides that no board of education shall incur any debt to be paid out of the school money of any subsequent year, and shall not contract for or ex-

pend in any year more than the aggregate amount of the quota of the general school fund, and the amount collected from the district levies of that year, together with the balance in the sheriff's hands from the preceding year, and such arrearages of taxes as may be due the district. The injunctions rest on the claim that the contracts both violated this statute. The plain and commendable purpose of the provision is to make the available funds of each year pay the demands of that year, and to protect the taxpayers from indebtedness beyond what each year's means will pay. That means an enforceable debt. Let us say that this contract did create such debt, and that the injunction, in its inception, was maintainable. Yet when these contractors, by their solemn agreement of record, through an answer filed in the case, signed by them, operating as an agreement of record, and operating also as an agreement based on sufficient consideration,—that is, a release from litigation, and permission to go on with the work,—when, I say, they thus acquit the board from all demand further than the lawfully applicable means, and repudiate all pretension to hold the board liable further, and thus bring the contract within the pale of the lawful authority of the board, and purge it of objections, it would seem that the whole object of the law is carried out. They have estopped themselves from doing what the law forbids. The board does no unlawful act, further than that it makes a debt reaching over and mortgaging next year's fund by a present binding contract, and when that feature is removed there is no taint. The board is commanded to provide schoolhouses. Often, the public need requires a house costing more than the means of one year can pay. Can the board not begin it, and lay the foundation one year, and put the building on it the next year, and finish it the next, so it do not make a contract that will involve at once future years? I hardly think the statute means to tie the power of the board so closely as that. Such action would not involve the public, for next year the work may be abandoned or postponed. The providing schoolhouses is a part of the work of the current year. The board is an agency in the government vested with important powers, and must be accorded credit for subserving public interest by prudent action, but it is limited by the injunction not to create a debt beyond the year's means to pay. The law has no further restricted it. This contract having been brought within the law, I see no reason to further restrain the lawful function of the board.

After the court had overruled a motion to dissolve and perpetuated the injunction, the defense, on same day, filed the new contract of July 16, 1892, and again moved a dissolution, which the court refused. The contract was not introduced by amended answer, as perhaps it should have been. No objection was made. As the answer it-

self called for a dissolution, it is unnecessary to discuss the manner of filing the paper; but I think, barring that, the paper also called for a dissolution for reasons stated below, as it more properly concerns the second suit.

As to the second suit: After the court had awarded the injunction in the first suit, the board of education and Driscoll & Peters made a new agreement for the construction of the schoolhouse, dated July, 16, 1892, with the intent, as it states, to proceed with the work, and avoid all litigation, and render the contract consistent with law, by which contract the former contract was wholly canceled, and provision made for the construction of the house at the price of \$9,540, payable in installments of \$600 when the foundation should be completed; \$2,000 more when the brickwork should be completed; \$2,720 on December 1, 1892; and the remaining \$2,720 on January 1, 1893. And a clause provided that nothing in the contract should be construed to require the builders to proceed with work during that or any subsequent fiscal school year, to any greater extent than the extent to which the expenditure for the building might be made under section 45 of chapter 45 of the Code of the state, but that they should push the work as rapidly as funds for their payment should become available under said Code section, or any school levies lawfully made, provided that unless there should be in the hands, or under the control of the board, on or before September 1, 1892, funds sufficient for payment of the contract price, the contractors should have option to annul the contract, and receive pay on the basis of said contract so far as work had been done; and another clause provided that nothing in the agreement should be construed to create any indebtedness on the part of the board beyond the means then at its disposal or under its control, according to the provisions of said Code section, and, if work done should amount to more than the means so at the disposal of the board, the contract should not be construed as imposing any liability on the board for any year subsequent to the fiscal year expiring June 30, 1893. The board of education laid the levy for the current year. Then Davis and others filed another bill to enjoin the issuing or paying to Driscoll & Peters of any drafts out of the building fund levy so made, and an injunction was awarded. The board and Driscoll & Peters filed answers setting up the new contract; maintaining that there were funds adequate in the current year to discharge the price fixed by the contract for the construction of the school building, and that the contract did not operate to create any debt beyond the money expendable in that year, and did not bind the money belonging to any future year, or in any event require the board to pay a cent beyond the money lawfully applicable,—money belonging to the then current year,—whether work was done beyond

it or not. The only theory on which we can hold this second contract as contravening the statute is that it creates a debt which may not be within the reach of moneys on hand in the fiscal year to discharge, and that it carries over and binds moneys belonging to a year or years in future. But can we say it does this? If it does not do this, it is not unlawful. There is the plain letter of the contract that the board shall not pay, and rest under no obligation to pay, beyond the money available that year, and the plain letter that the contractors need not go on beyond that money with their work, and, if they did, it imposed no obligation on the public to pay for it. If there should be a deficit, the board had next year a right to refuse pay. The contract was improvident, perhaps, on the part of the contractors, but they made it. Here are parties, competent, contracting on a lawful subject, on valuable consideration; and why could they not insert this clause limiting the liability? If a board of education contract for a schoolhouse at a given sum, it would have to pay it, if the money of the year be sufficient or insufficient, unless that Code section would forbid payment. Now, could it not, by agreement, limit its liability to the money of the particular year, if the other party, in order to get the work, chose to run the risk? Why not? It is said the case of Mayor, etc., v. Gill, 31 Md. 375, rules this case the other way. But I see a clear and strong line of difference between that and this case. The Maryland constitution provides that no debt, with certain exceptions, shall be created by the city of Baltimore, nor shall its credit be given or loaned in aid of any corporation, nor shall its council involve the city in works of internal improvement, nor in granting aid thereto, which would involve the faith and credit of the city, unless authorized by the legislature, etc. The council passed an ordinance to raise \$1,000,000 by the hypothecation of shares of stock in the Baltimore & Ohio Railroad Company, owned by the city, and for investing the money in bonds of the Western Maryland Railroad Company. Now, observe that money was to be borrowed by the city to be devoted, in the teeth of the constitution, to aid a corporation in a work of internal improvement,—an act wholly forbidden without legislative assent,—while here the board of education is doing an act it is commanded by law to do, unless done in improper manner. But the purpose for which the Maryland case is cited is that it will show that the clause in the contract here involved, limiting the liability to the funds of the one year, does not prevent the whole contract sum for building from being a debt against the board of education. Let us see. The ordinance of the council of Baltimore provided that the city should not be bound, but the lenders of the money must look to the stock hypothecated. The court properly said—First, that there

was a debt; and, second, one for which the property of the city was pledged. The constitution forbade aid by the city to a corporation, or to works of internal improvement, and the property of the city was pledged and endangered, its faith and credit extended, against the constitution, so far as the property was concerned. It was a debt, because enforceable out of its property, and, besides, a debt made for an unlawful purpose. Baltimore could neither create such a debt, nor pledge its securities for it; but the board of education made a lawful debt, and pledged only one year's money which it could lawfully do. Both that case and this hinge on the act done. Remember that Code, § 45, does not forbid a debt, but one to be paid out of the school money of a subsequent year. The naming a sum in a contract for building a schoolhouse, payable in future, may be, in a sense, called a "debt;" but if not payable out of the school money of subsequent years, in terms, or it will not exceed the money of the then fiscal year, it is not a debt forbidden by the section. In both the Maryland case and this case, let us say a debt was created; but in the Maryland case any debt was forbidden, while here such a debt as was made was not forbidden. In the Maryland case the property of the city was pledged, against the law, while here no more was pledged than the law authorized. If the law had not made it unlawful for Baltimore to make the debt, and pledge the property it did pledge, the ordinance would have been good. This is not an unfair presentation, as here the board made a lawful promise to pay, and pledged, lawfully, one year's assets, and no more. I do not see how a debt without obligation can be a debt, in a legal sense. If it be said that the clause in the Baltimore ordinance limiting the city's liability to the securities pledged did not prevent the engagement from assuming the nature of a debt, and so the limitation in this contract of the liability to one year's money does not prevent the board's engagement from being a debt, I answer that it does not, but it prevents the engagement from being a forbidden debt, whereas the limitation in the Baltimore ordinance did not prevent that debt's being one forbidden. Here the law authorizes a contract for a school house, and the pledge of one year's money for it. If we could say that when a board of education contracts for a school for a certain sum, which may or may not be in excess of the money applicable to it, and takes care to provide against any liability beyond what such money will pay, this is a debt which, in the language of section 45, "is to be paid out of the school money of any subsequent year," we should uphold this injunction; but we cannot say so. Can we say that the clause limiting the liability to one year's assets is not a bar against the contractor's recovering it? I think we cannot. Then there is no prohibited debt. I

do not think this decision at all in conflict with *Splman v. City of Parkersburg*, (W. Va.) 14 S. E. 279. We are of opinion to reverse all orders and decrees in both cases overruling motions to dissolve the injunction and perpetuating the first one, and to dissolve both injunctions and dismiss both bills.

D. M. OSBORNE & CO. v. FRANCIS.

(Supreme Court of Appeals of West Virginia.
Nov. 25, 1893.)

CONDITIONAL SALE—RIGHTS OF BUYER—INSTRUCTIONS.

1. Defendant bought a harvesting machine called a "binder," upon the condition that if it did not work to his satisfaction he might return it. *Held*, that his right to reject was absolute, and his reasons could not be investigated.

2. An erroneous instruction on a material point is presumed to be to the prejudice of the party appealing, against whom it is given, and will cause reversal, unless it clearly appears from the record that it was harmless.

(Syllabus by the Court.)

Error to circuit court, Marshall county.

Action by D. M. Osborne & Co. against Samuel Francis. Plaintiff had judgment, and defendant brings error. Reversed.

D. B. Evans, for plaintiff in error. J. L. Parkinson, for defendant in error.

HOLT, J. This action was for \$133.50, the price and value of one right-hand binder and 50 pounds Manilla binding twine, which plaintiffs claimed to have sold defendant. It was originally brought before a justice, where the defendant confessed judgment for \$8.50 for the twine, which, together with the costs, he paid. On the 9th of January, 1891, the justice gave judgment against Francis for \$125, the price of the binder. From this judgment the defendant appealed to the circuit court of Marshall county, where the case was tried before a jury, and a verdict found for plaintiff for \$133.50. During the progress of the trial the court, on motion of plaintiff, gave three instructions. To the giving of the one marked "No. 2" defendant objected, but the court overruled the objection, and defendant excepted. On motion of defendant the court then gave the jury three instructions, to which plaintiff objected, but the court overruled the objection, and gave the same, and plaintiff excepted. After the verdict the defendant moved the court to set the same aside, and grant him a new trial, because the verdict was not in accordance with the law and the evidence, and because the court erred in giving plaintiff's instruction No. 2 to the jury; but the court overruled the motion for new trial, and defendant excepted, and the court signed, sealed, and made part of the record the defendant's bills of exceptions, and also certified and made part of the record the instructions given and refused, and all the evidence in the

cause. There are two points assigned as error: (1) That plaintiff's instruction No. 2 is erroneous; (2) that it is inconsistent with defendant's instructions, especially defendant's instruction No. 2. Plaintiff's instruction No. 1 is as follows: "The jury are instructed that if they believe from the evidence that the machine was sold on a guaranty, and that after a fair trial it did do the work as guaranteed, then the verdict should be for the plaintiff." Plaintiff's instruction No. 2 is as follows: "If the jury believe from the evidence that the machine was to give satisfaction to the defendant, then it should be a fair and reasonable satisfaction, and not a whimsical or unreasonable satisfaction." This is the only one to which defendant objected. The instruction No. 2 given for defendant reads as follows: "The court instructs the jury that if they find from the evidence that the machine, the price of which is in question, was sold to the defendant with the understanding and agreement that if it did not give satisfaction to the defendant the seller would take it, then the defendant had a right to refuse to keep the machine if it did not in fact give him satisfaction, and the burden of proving that it did give him satisfaction is on the plaintiff." Now, the appellant must make it manifest from the record that the ruling complained of is wrong.

The first question is, what were the terms, the language, the words of the contract of sale? The parties, instead of committing it to writing, and thus giving us a stable and trustworthy memorial that could speak for itself, have seen fit to commit it to the uncertain, slippery memory of man as to the terms, the words used; for on some of the very words the meaning and scope of the contract in large part depends. For this we have to look to the evidence, what the parties said and did, the nature of the subject of sale, and the surrounding circumstances. There is no controversy that the cultivated land on defendant's farm was sidling, sloping, some of it steep. He had an old reaper that did not bind. Whether a binder could be used on it safely, usefully, was in his mind doubtful, and up to that time unknown. The two agents of plaintiff who were together and made the sale were examined as witnesses on behalf of plaintiffs. The first one said defendant was to give for the binder his old reaper and \$120; one-half payable in a year, and the balance in two years. "We guaranteed for the machine to do as good work as any other machine of the same nature, to be as light running as any other reaping machine, and to do as good work in every particular. Defendant was to take the machine out, and if it did not do the work we guaranteed it to do defendant was to bring it back, and we were to pay him for hauling it out (10 miles) and back. He got the machine June 26th. It was set up and started June 30, 1890." On July 3, 1890,

witness got a card from defendant, saying: "My binder does not work right. You can come and get it;" and on the 18th of July, 1890, another card, saying, "Your reaper is here at your order." He told defendant that their machine would not go on a certain sloping field with the platform on the upper side without upsetting, but could not be upset with the platform on the lower side. He said that the machine was not sold on the condition that it was to give satisfaction, but defendant was to take the machine and try it, and, if it did not do its work well, it (the plaintiff) was to pay for hauling it out and back. The second agent, who helped to make the sale, and was present, and seemed to be principal agent, in answer to the question, "What was the cause of the upsetting?" said: "Well, the weight is always on the left-hand side, and in a right-hand binder the binding attachment don't make weight. To put the platform up the hill, the sideling will turn it over. It will not turn clear over, but it will upset, and stop the binder, and stop the running of the shoes." On the question of giving defendant satisfaction he said: "In guarantying the machine to do its work properly we always guaranty it to give the man satisfaction, because a machine doing its work properly must always give satisfaction. If a man has a farm that wouldn't be fit for any binder, that is something else. Of course, we can't satisfy every farm, but we can the man." Defendant testified that it cut the grain off as nice as any machine and tied the grain, but told plaintiff's agents that it worried his horses too much. On the main item here involved—the terms of the contract—he testified that he was to haul out the machine, and if it gave him satisfaction he was to take it; if it did not, he was to haul it back, and plaintiff was to pay for hauling it out and back; and when plaintiff's agents came out to see him about it, after receiving the cards, he told them in substance that he did not intend to take the machine. They replied, "You will have to keep the machine, and pay for it." This was not denied. Another witness, and one not interested, as far as appears, who was present at the sale, examined for defendant, said, by the contract, defendant was not to take the machine if it did not give him satisfaction. The evidence, therefore, at least tended to show that kind of conditional sale called in the books a "sale on trial," or "a sale or return." See *Benj. Sales*, (Bennett's 6th Ed.) § 595 et seq. and notes; *Id.* p. 568, notes 10, 11, et seq.; 21 *Amer. & Eng. Enc. Law*, 647, 648, 714, cases cited; *Tied. Sales*, § 213 and cases; *Machine Co. v. Smith*, 50 *Mich.* 587, 15 *N. W.* 906; *Seeley v. Welles*, 120 *Pa. St.* 75, 13 *Atl.* 736; *Gray v. Bank*, (City Ct. N. Y.) 10 *N. Y. Supp.* 5. If it is a "sale on trial," it is said to be a sale on condition precedent to buy if satisfied; that is, the title does not pass until the condition

prescribed is fully performed, although the possession is delivered; being rather a bailment with an option to buy than a sale. If it is a "sale or return" it is said to be a sale on condition subsequent; that is, the title passes with the possession, but to be divested if the condition is not performed and the property returned. "If the condition of the sale be that the property may be returned if it do not prove 'satisfactory' to the buyer, or if the buyer is not satisfied with it after trial, the condition must be fully performed; that is, the buyer must in fact be satisfied. If the buyer expresses himself to be dissatisfied, it matters not how unreasonable or groundless his dissatisfaction may be, he cannot be required to keep the property. The buyer is not obliged to be satisfied although the property delivered conforms to his order. But some of the cases require that the dissatisfaction shall be real (not feigned) in order to relieve the buyer from liability, although they recognize that the dissatisfaction may be unreasonable without affecting the right of rejection." *Tied. Sales*, § 214; 1 *Whart. Cont.* § 590; *Benj. Sales*, (Bennett's 6th Ed.) § 595 et seq., *Amer. notes*, 569; 2 *Add. Cont.* top p. 53, (Abbott's Ed. notes 1883.) "Sales are not always absolute. The acceptance is sometimes made conditional, and delivery given accordingly, and then no complete execution of the contract can take place until the condition is fulfilled. Instances of this are found in sales 'on trial' and the bargain of 'sale or return.' It is obvious that one may take a chattel on the understanding that he is to try it before the purchase shall take full effect; or again, upon a complete present bargain, with the reservation of a right on the buyer's part to return it at his option within some period; and the main object of either provision is to give the buyer a chance to test the thing, and find it satisfactory, before he shall be finally bound to the bargain. But the concession thus made by the seller is not coextensive in the two cases, for the one puts the test as a condition precedent to divesting the seller fully of his property, while the other seems rather to carry property to the buyer defeasible on the condition subsequent of a test which proves unsatisfactory, though this application of a test must be, after all, a matter often within the buyer's own breast, and a sort of ill-defined ingredient in determining his satisfaction or dissatisfaction. The point towards which these decisions gravitate is doubtless that of mutual intention, but using the terms above stated in no technical sense, since common-sense men will every day make bargains of either character without designating them by any particular names, we find the distinction quite marked as regards the immediate passing of property, between sales 'on trial,' 'on approval,' and the like, and the bargain of sale or return. There is a buyer's option to be sure, but, as

It has been fitly said, an option to purchase if the buyer likes is essentially different from an option to return a purchase if he should not like it. In the one case the property will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return." 2 Schouler, Pers. Prop. (2d Ed.) § 310. In the one case the buyer is a bailee, rather than a buyer in fact, the title not having passed; in the other the title has passed by the delivery of possession, subject to defeasance by the exercise of the option reserved to rescind and return. But on the point here involved each may, as a general rule, return peremptorily within the time without giving any reason, if he acts honestly,—a question to be determined by the intent of the parties. It is a question of intention of the parties, and of the construction of the meaning of the conditional sale according to its terms, its subject-matter, and the surrounding circumstances. "In the one class of cases the right of decision is completely reserved to the promisor, without being liable to disclose reasons or account for his course; and a right to inquire into the grounds of his action and overhaul his determination is absolutely excluded from the promisee and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and, if the facts are sufficient to show that they did so, their stipulation is the law of the case." (*Machine Co. v. Smith*, 50 Mich. 567, 15 N. W. 906,) although the dissatisfaction may appear to be "whimsical or unreasonable," if expressed in good faith. *Seeley v. Welles*, 120 Pa. St. 69, 13 Atl. 736. In such cases it is generally for the buyer to decide for himself; to decide whether a refusal to accept is or is not reasonable; because he uses for that purpose a term which indicates the state of his own feelings, which it is hard for any one to know so well as himself; and he may have prescribed the term for the purpose of protecting the gratification of some whim or fancy of his own, at all events to protect himself from the necessity of rendering any reason for his conduct. Such sales on trial are almost universally so construed in the every day affairs of life. But there may be cases—have been cases—where, owing to some peculiarity of subject-matter or other peculiarity, such optional contract may be construed as binding the buyer to decide on fair and reasonable grounds, or to the extent of ascertaining whether the dissatisfaction be real; that is, whether it in fact exists. But generally his own feeling of dissatisfaction is enough, and his own announcement of it is to be taken as true. So that if the defendant took the binder on the condition that if it did not give him satisfaction,—which the evidence certainly tends to prove, and which is the basis of the

instruction given for defendant,—then instruction No. 2 given for plaintiff is erroneous; for there is nothing to show that defendant intended the question of his satisfaction or dissatisfaction to be canvassed, or his decision reviewed. Such a doctrine would upset the whole law of sales on trial, and breed infinite uncertainty and confusion.

Defendant testified, in substance, that after trial he was dissatisfied with the binder; that it did not suit his farm; his team could not handle it; it worried his horses; told plaintiff's agent that he did not propose to worry his horses any more with it, and the agent replied, "You will have to keep the machine, and pay for it." "His objections to the reaper may have been ill-founded; indeed, they may have been in some sense unreasonable in the opinion of others; yet if they were made in good faith he had a right, if his testimony is believed, to reject it. If he wanted a machine that was satisfactory to himself, not to other people, and contracted in this form, upon what principle shall he be bound to accept one that he expressly disapproved? What the learned court said to the jury on this point was equivalent to saying that, although the reaper may have been wholly unsatisfactory to the defendant, yet if the jury thought he ought to have been satisfied he was bound to take it; whereas, if the defendant's testimony is true, he was to judge of the merits of the machine himself, not the bystanders or the jury; and if he exercised his own judgment in good faith in the refusal to accept it he was certainly not bound for the price." *Clark, J.*, delivering the opinion in *Seeley v. Welles*, 120 Pa. St. 69-75, 13 Atl. 736. See *Railroad Co. v. Brydon*, 65 Md. 198, 8 Atl. 306, opinion of Alvey, C. J., on motion for rehearing, and cases cited; *Gibson v. Cranage*, 39 Mich. 49; *McCarren v. McNulty*, 7 Gray, 139; *Brown v. Foster*, 113 Mass. 136; *Zaleski v. Clark*, 44 Conn. 218; *Harvesting-Mach. Co. v. Chesrown*, 33 Minn. 32, 21 N. W. 846; *Slisby Manuf'g Co. v. Town of Chico*, 24 Fed. 893; *Pierce v. Cooley*, 56 Mich. 552, 23 N. W. 310; *Goodrich v. Van Northwick*, 43 Ill. 445; *Boiler Co. v. Garden*, 101 N. Y. 387, 4 N. E. 749, and 54 Amer. Rep. 709, notes. Neither is the bad instruction given for plaintiff cured by the good one given for defendant, nor can we regard the one given for plaintiff as thereby plainly withdrawn. *McKelvey v. Railway Co.*, 35 W. Va. 500, 517, 14 S. E. 261. The general rule is that the court may cure errors in its instructions by withdrawing, explaining, or correcting them. When a material instruction is given that is erroneous it should be effectively withdrawn. *Elliott, App. Proc.* § 705; *Kirland v. State*, 43 Ind. 146; and other cases cited in note to said section 705. "The court cannot, without fatal error, give contradictory instructions to the jury, since that would impose upon them the duty of

determining the law as well as the facts." Elliott, App. Proc. § 705; City of Logansport v. Dykeman, 116 Ind. 15, 17 N. E. 587. Nor could the court have intended instruction No. 2 given for plaintiff as a modification or qualification of No. 2 afterwards given for defendant, for that would not be readily comprehended, even if so intended; and, if intelligible to the jury, would make the last instruction erroneous as well as the first, (see Carrico v. Railway Co., 35 W. Va. 389-404, 14 S. E. 12,) as the error would be in the correction.

It is claimed on the part of plaintiff that the jury would be justified in finding that the contract was one of guaranty, as claimed by the plaintiff; and, if so, the court could not set the verdict aside. It is true that the inquiry is, what was the intention of the parties? And when that intention is ascertained the law will respect it. The question whether a sale of personal property is complete or only executory is to be determined from the intent of the parties as gathered from the contract, the nature and situation of the thing sold, and the circumstances surrounding the sale. Morgan v. King, 28 W. Va. 1, 14. That there was a guaranty or warranty, I think, is clearly shown, and that, so far as the cutting and binding were concerned, and the lightness of draft on ground well suited to the use of such binder, the machine was all that it was guarantied to be. But it is past contradiction that there was competent evidence tending to prove that the buyer, who cultivated sidling and steep land, was expressly reserving the right to reject and send back the machine if on trial it should not be satisfactory to him, positively and generally, without saying in what respect. His mind was fixed immovably that no chance should be left to force the article upon him unless he finally chose to take it; and this condition was added to meet this purpose, and, we may infer, was the one thing which induced the defendant to take it. See Machine Co. v. Smith, 50 Mich. 565, 15 N. W. 906, cited above. Promising to do a thing only in case it pleases himself may be no promise at all, yet is what the books call a "sale on trial," and may become by mere lapse of time a binding promise; and I can see nothing unreasonable or unfair in such everyday quasi contracts of sale. It is the custom and habit of the people, especially with regard to certain kinds of property. On the contrary, it would be harsh, if not unreasonable, to compel such a buyer without his fault to keep a binder that could not be safely or profitably used on such land as his, to which important item the guaranty did in no wise relate; and it shows the importance, as well as the motive, of such qualifying reservation. The agents who sold the machine say in their testimony on this head, "Of course, we can't satisfy every farm, but we can the man."

It is also contended that the meaning and scope of the term "satisfaction" as it was used in this contract has been already fixed by this court in interpreting and construing it in a like contract in the case of Kinsley v. County Court, 31 W. Va. 464, 7 S. E. 445. Here the contractor, Kinsley, entered into a written contract with the county court to make a road and build a bridge according to certain specifications set out, and "to the satisfaction of the county court of Monongalia county." On demurrer the court held that the declaration was not faulty in not alleging that the work was not done to the satisfaction of the court; that "it means in that contract that it must be done according to the specifications, and that would be to the satisfaction of the court; that is, that the county court was to accept it as completed, when it was satisfied that the work had been done and the bridge completed according to the specifications,"—a very reasonable construction, so far as necessary on general demurrer to notice it in the declaration, and very likely in any construction of the contract. But such a contract is very different from a "sale on trial," with the absolute and unqualified option to return if not satisfactory. A man might sell his horse on the latter terms, as is often done; but they seldom or never knowingly build bridges on such terms. In the bridge case, the subject-matter, the finality of the written contract at its inception, its reason and object, rebutted the idea of the reservation of the arbitrary power of refusal to accept and to pay; whereas the same things in part, and the want of some of them, show such reservation in an ordinary sale on trial of a horse or machine to have been intended by the parties, which is at last the decisive test.

Counsel for plaintiff also contends that the instructions given for defendant were erroneous. The plaintiff could waive such error if it saw fit, and let the verdict in its favor stand; or, if dissatisfied, it could move the court to set it aside, and grant it a new trial. It elected to let it stand, and a judgment for plaintiff ought not to be reversed on the ground that the court, at the instance of the defendant, gave an erroneous instruction to the jury. Murrell v. Johnson's Adm'r, 1 Hen. & M. 450.

But the point urged with greatest force on behalf of plaintiff is that the error, if any, in giving its instruction No. 2, was a harmless error; "that the facts and circumstances certainly warranted the verdict of the jury." It is held in many cases that, when the verdict is clearly right on the evidence, errors in instructions may be treated as harmless. This is made so by statute in the state of Indiana. Rev. St. Ind. 1881, § 658. See a full and able discussion of the subject in Elliott, App. Proc. c. 4, § 643; Oil Co. v. Bretz, 98 Ind. 231, and other cases cited; 3 Grah. & W. New Trials, 862. There

has been and is a tendency no doubt to advance and widen the doctrine of harmless error. It is due in part to the desire constantly pressing upon appellate tribunals to reach the substantial merits of the case in spite of errors that are for the occasion deemed immaterial or to have done no harm. Hence the rule has long been settled that when the court can clearly see affirmatively that the error has worked no harm to the party appealing it will be disregarded, (*Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471;) and the judgment ought not to be reversed on the ground that the court below admitted illegal evidence, or gave an erroneous instruction to the jury, unless it appears that some injury could possibly have resulted therefrom to the party appealing, (*Preston v. Harvey*, 2 Hen. & M. 55;) for the appellant must make it manifest from the record in some way that the ruling against him is wrong. But, that being done, it is taken to be to his prejudice until the contrary is made to appear, and it must appear so clearly as to be beyond all fair ground of questioning that the error did not and could not with any reasonable degree of likelihood have prejudiced the party's rights. See *Deery v. Cray*, 5 Wall. 795, 807. This qualification of the general rule, or this cautious and sparing application of it, rests upon the ground that the court cannot instruct upon the weight of evidence or the credibility of witnesses, and upon the settled rule that when there is any competent evidence fairly tending in some appreciable degree to prove his case the party has the right to have the law applicable to such evidence correctly declared to the jury by the court. "Their superintendence in explaining and deciding legal questions is essential to the proper administration of justice, and ought to be exercised when either party requires their interference." *Picket v. Morris*, (1796,) 2 Wash. (Va.) 325-346; *Hopkins v. Richardson*, 9 Grat. 486. Our own cases on the general subject are numerous, and indicate a tendency sometimes to extend the rule, at others to adhere strictly to the limitation of the rule. See the following cases on the subject: *Hall v. Lyons*, 29 W. Va. 410-420, 1 S. E. 582; *State v. Douglass*, 28 W. Va. 298; *Mason v. Bridge Co.*, 20 W. Va. 224-239; *Clay v. Robinson*, 7 W. Va. 350, 358; *Beatty v. Railway Co.*, 6 W. Va. 388-395; *Preston v. Harvey*, 2 Hen. & M. 55; *Pitman v. Breckenridge*, 3 Grat. 127; *Wiley v. Givens*, 6 Grat. 277; *Colvin v. Menefee*, 11 Grat. 87; *Kincheloe v. Tracewells*, Id. 587; *Rea v. Trotter*, 26 Grat. 585-600; *Binh v. Waddill*, 32 Grat. 588, 593. In *McKelvey v. Railway Co.*, 35 W. Va. 500-517, 14 S. E. 261, it is said: "This court has repeatedly held that an erroneous instruction is presumed to prejudice a party, and will cause reversal, unless it clearly appears that the instruction could not have been prejudicial" to the exceptant. The court will not re-

verse on account of an erroneous instruction on an immaterial point. *Pitman v. Breckenridge*, 3 Grat. 127. In *Davies v. Miller*, (1797,) 1 Call, 110, upon the trial of a writ of right, both parties claimed under John Miller, who died seised in 1742; the demandant claiming under Christopher, his grandson and heir at law; the tenants, under a devise from Christopher, the son. After certain evidence was given on behalf of the demandant, the tenants moved the court, without going into evidence on their part, to instruct the jury that for reasons apparent the said devise was void; and the court, being of that opinion, instructed accordingly. The jury found for the tenants, and demandant, on bill of exceptions, appealed. The court of appeals, though of opinion that the grounds of the ruling of the court below were wrong, and to that extent the language of the instruction given, yet, as it appeared by the demandant's own showing that Christopher, the grandson, had neither seisin, possession, nor title, so that demandant could derive none from him, the opinion and verdict were substantially right, and the court affirmed the judgment. "The instruction there bore upon the question which was decisive of the cause." *Wiley v. Givens*, (1849,) 6 Grat. 277-285, opinion of Judge Allen. The instruction involved a question of law upon a state of facts about which there was no dispute. It is said in the syllabus of *Wiley v. Givens*, (made by the reporter:) "When an appellate court is of opinion that an instruction given to the jury by the court below is erroneous, the appellate court cannot undertake to determine that the verdict, notwithstanding the erroneous instruction, is right upon the evidence, and therefore to affirm the judgment; but the judgment must be reversed, and the cause remanded for a new trial." This is correct, as applied to the facts of this particular case; but Judge Allen did not mean to announce any such general proposition. On the contrary, the implication is that it would be otherwise if the instruction were substantially right, and therefore could work no injury; but in a case where the jury may have been warranted in their verdict by the whole evidence, yet where they may have been misled by the erroneous instruction in regard to so much of the case as the instruction referred to, the verdict must be set aside, and the cause sent back for a new trial. This case is much stronger, for if the jury followed plaintiff's instruction No. 2, given by the court, they were misled in regard to what, in our view, was the vital point in the case; for there is at least evidence tending to show that the agents of plaintiff, by their conduct and declarations, had dispensed with and virtually waived the necessity, if any such existed, of defendant returning the machine to them at Cameron. But the case is reversed for the reason that instruction No. 2, given on motion

of plaintiff, was erroneous; and no opinion is intended to be given on the merits other than is necessarily involved, for on a new trial the evidence even as to that point may be different. Judgment reversed, verdict set aside, and a new trial awarded.

CORE v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

MASTER AND SERVANT — INJURY TO BRAKEMAN — PERMITTING FIREMAN TO ACT AS ENGINEER.

1. If the defendant, after the court has overruled its motion to exclude the plaintiff's evidence on the ground of insufficiency, proceeds with its defense, and introduces its evidence, this court will disregard such motion, and will not reverse the judgment, unless it appears that the whole evidence is insufficient to justify the verdict of the jury.

2. Two servants of a common master may occupy a threefold relation towards each other, entirely dependent on the duties imposed upon them by their employment, to wit, that of (1) superior or master, (2) co-ordinate or fellow servant, (3) inferior or servant.

3. Where an engineer, with authority so to do, places an inexperienced and incompetent fireman in charge of an engine, the company is liable for unavoidable injuries that result to other employes by such fireman's unskillful management of the engine, for the reason that it is a breach of the duty the company owes to its employes to exercise ordinary care in providing and retaining competent servants.

4. When an action is founded on the incompetency of a fireman temporarily in charge of an engine, the plaintiff must prove (1) that the fireman was so inexperienced in the management of an engine that it was not an exercise of ordinary care to place him in charge thereof, he not being reasonably safe and fit for the employment; (2) that he was guilty of mismanagement of the engine by reason of his inexperience and unskillfulness; (3) that such mismanagement was the proximate cause of the plaintiff's injury.

(Syllabus by the Court.)

Error to circuit court, Wood county.

Action for personal injuries by Ellis T. Core against the Ohio River Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

Leonard & Archer, for plaintiff in error.
George Loomis, for defendant in error.

DENT, J. Suit was instituted in the circuit court of Wood county by Ellis T. Core, plaintiff, against the Ohio River Railroad Company, claiming damages for an injury received while in the employ of the defendant as a brakeman. The defendant appeared, and demurred to the declaration. The demurrer was overruled, and the defendant pleaded not guilty. A trial was had, and a judgment was rendered in favor of plaintiff on the 9th day of January, 1892, for the sum of \$1,600. Defendant obtained a writ of error to this court, and now relies on the following assignment of errors, to wit: "First. The court erred in overruling defendant's demurrer to plaintiff's declaration.

Second. The court erred in permitting the several questions to be asked, and the answers thereto to be given in evidence to the jury, as set out in defendant's bill of exceptions No. 1. Third. The court erred in overruling defendant's motion to exclude the plaintiff's evidence, and to direct a verdict for the defendant, as set out in bill of exceptions No. 2. Fourth. The court erred in overruling defendant's motion to set aside the verdict for the reasons set out in bill of exceptions No. 3. Fifth. The court erred in overruling defendant's motion to set aside the verdict of the jury upon the grounds set out in bill of exceptions No. 4. Sixth. The court erred in refusing to instruct the jury as set forth in bill of exceptions No. 5. Seventh. The court erred in refusing to instruct the jury as set forth in bill of exceptions No. 6. Eighth. The court erred in refusing to instruct the jury as set forth in bill of exceptions No. 7."

1. The demurrer to the declaration is without foundation, and it requires a considerable stretch of imagination to give its language the construction claimed by the defendant's counsel, as it seems to me to plainly charge that an incompetent fireman was discharging the duties usually devolving on a skillful engineer, and that thereby he had control of the movements of the train at the time of the accident, and that his unskillfulness was the cause thereof. The context shows that there was no pretense nor attempt to charge that he was acting in lieu of the conductor. The demurrer was properly overruled.

2. The following questions and answers were objected to by defendant: "Question. Mr. Core, I wish you would state to the court and jury where Raven Rock is situated, and whether that is a station on this road. Where is it situated as between St. Mary's and Clarrington? Answer. There is a station there that is called Raven Rock, situated just a short distance above St. Mary's. I do not know the exact distance. Question. State whether you received any directions from the conductor at Raven Rock to stop the train as you were going towards St. Mary's; and, if so, what the directions were. * * * Question. State what instructions, if any, you received at that point from the conductor about stopping the train, or signaling to stop the train. Answer. Well, the conductor gave me orders to signal the train to stop at Raven Rock, so that the engineer could go to his post; and I went out on top of the train, and gave him the signal to stop, and got no answer, and I set some brakes,—three or four brakes,—and still got no answer. I gave him a second signal with my lantern, and got no answer; and I went back to the conductor, and told him I could get no answer from the engine. * * * The Court. I will allow you to prove the instructions of the conductor—the man who had charge of this train—to this man. Question. Well,

what were they? Answer. Well, he told me to have the train stopped, or to stop the train,—to give them the signal to stop,—which I did. Question. State whether you communicated that fact to the conductor, that you got no response back from the engineer. * * *

Question. Well, what did he say in that connection about stopping at St. Mary's? The Court. What instructions did he give you about stopping at St. Mary's? Answer. The instructions he gave me about stopping at St. Mary's was to have the train stopped there at the south end of the switch, and back into the switch,—was all the instructions that was given to me about St. Mary's,—to back in and allow the other train to pull up alongside of us, and to pull back on the main track, and let the train going north pass us. That was the only instruction given about St. Mary's." The defendant objects to this evidence, because it shows that the fireman was acting as engineer before the train reached the place of the accident. This evidence was not proper to show any negligence on the part of the conductor or engineer, but it was admissible on the question of competency or incompetency of the fireman to discharge the duties of the engineer. The brakeman certainly had the right to tell what instructions the conductor gave him as to what was to be done at St. Mary's, the place of the accident. And the following question, propounded to the witness T. B. Ayers, was answered by him: "Question. Well, state whether or not it is not usual, when cars come together, that they come along so gently as not to produce a jar. Answer. Yes, sir; there is cars come together that a man on the front end would not feel the jar from the hind end." Defendant objects to the foregoing, because it is an effort to prove a custom, and is expert testimony from one not an expert. I cannot see how this question could effect the issue either way, or how the defendant can be greatly prejudiced by it. Any member of the jury, if he had ever been about a railroad, could have testified the same way, and could have also testified that "there are cars come together that a man on the front end would feel the jar from the hind end." Matters in the knowledge of all men are outside the pale of proof, especially if of everyday occurrence. Where there is perfection in the track and machinery and the men handling it, cars might always be brought together without a jar, but such perfection as this is hardly practicable of attainment in all places and under all circumstances. The question was leading, and the witness was at first led into an answer he did not intend; but he afterwards modified it in such a way as to make his meaning clear. Awkwardly asked, awkwardly answered, and not much harm done.

In the sixth, seventh, and eighth assignments of error defendant complains of the court's refusal to give the following three instructions, to wit: (1) "The jury are further in-

structed that if they believe from the evidence that the engineer, Charles Miller, was on the locomotive, and that E. C. Hogan, the fireman, was handling the locomotive under the direction of the said Charles Miller, that in such case the locomotive was under the control of the engineer, and the plaintiff cannot recover in this suit, although the jury may believe from the evidence that the engineer was negligent in directing said fireman in the management of said locomotive, and that such negligence caused the plaintiff's injury." (2) "The jury are further instructed, as a matter of law, that, if other things are equal, affirmative testimony is in general entitled to more weight than negative testimony; and if you believe from the evidence that the witnesses Charles Miller and E. C. Hogan are credible witnesses, and you find that they have sworn that they were both on the defendant's locomotive at the time the plaintiff was injured, and that the engineer was in control of said locomotive, then this is what is known as 'affirmative testimony,' and is for that reason entitled to more weight than negative testimony; and if you further believe from the evidence that the witnesses Ellis T. Core, T. B. Ayers, and J. W. Taggart are credible witnesses, and you find that they have sworn that they were also present and giving signals and attempting to make the coupling at the time of the accident, and did not know whether or not the engineer, Charles Miller, was on the locomotive, and in control thereof, then their evidence on this point is what is known as 'negative evidence,' and for that reason is entitled to less weight than the testimony of the witnesses Charles Miller and E. C. Hogan upon the same point, provided you further believe from the evidence that the witnesses Ellis T. Core, T. B. Ayers, James Taggart, Charles Miller, and E. C. Hogan are otherwise entitled to equal credit, and that they have been corroborated to the same extent." (3) "The jury are further instructed that while, under our law, a party to a suit is a competent witness, and it allows him to testify in his own behalf, still the jury are the judges of the credibility and weight of such testimony; and in this case, in determining the weight and credibility of the evidence of the plaintiff, the fact that he is interested in the result of the suit, if it so appears from the evidence, may be taken into account by the jury, and they may give his testimony only such weight as they think it fairly entitled to under all the circumstances of the case, and in view of the interest of the plaintiff in the result of this suit." The first instruction is bad, because it assumes the fact that the locomotive was under the control of the engineer if they believe the other two facts stated; and, ignoring all the other evidence in the case, instructs the jury to find for the defendant. The fireman might have been, in the belief of the jury, so utterly incompetent that the locomotive was not under the control of any one; and if the negligence

of the engineer in permitting such a person, even under his direction, to attempt to handle a locomotive at a critical juncture, when skill and experience are required, could be traced back to the company in any way, it would be liable for the injury occasioned by such negligence. In the case of *Railway Co. v. Col-larn*, 5 Amer. & Eng. R. Cas. 555, it was held that a railroad company which permits an engineer to place an engine in the hands of a careless and incompetent fireman is guilty of negligence, and liable for damages to a conductor injured by reason of such negligence. See, also, *Riley v. Railway Co.*, 27 W. Va. 145; *Storrs v. Felck*, 24 W. Va. 606. The second instruction violates the rule that instructions should be clear, accurate, concise, and not argumentative, confusing, or unintelligible to the jury. *State v. Greer*, 22 W. Va. 800; *Dickeschied v. Bank*, 28 W. Va. 340. The third instruction was not justified by the plaintiff's evidence, which appears to have been straightforward, sincere, and truthful, without any attempt on his part to color it in his own behalf. Neither is he contradicted in any material point by any witness, but is fully corroborated by all of them and the circumstances. The instruction seems to have been offered for the purpose of disparaging and prejudicing him in the minds of the jury without just cause, and, if given, could have only had the effect to have produced an opposite impression from that intended, and would have prejudiced, instead of benefited, the defendant's cause, as intelligent jurors are generally very quick to perceive the unjust attempts of counsel to bias their opinions by instructions aimed at the reputation for truth and veracity of the party against whom they are contending, not justified by such party's conduct or testimony. Instructions must be pertinent, and based on the evidence. *Moore v. Douglass*, 14 W. Va. 708.

In its third assignment of error the defendant insists that the court erred in overruling its motion to exclude the plaintiff's evidence, and direct a verdict for the defendant. If error, this could not be taken advantage of in this court, if, when the motion was made and overruled, the defendant, instead of at once closing the case, proceeded to reopen it, and introduce his own evidence. This motion is not founded on a variance between the allegations and the proofs, nor because of incompetent testimony, but upon the insufficiency of the plaintiff's evidence by reason of some omission or failure of proof on his part; and this omission may be supplied by the evidence of the defendant, and it would be a vain thing for this court to sustain the motion to exclude the plaintiff's evidence for insufficiency alone, if the whole evidence, taken together, should establish the right of plaintiff to recover, as it would only be sending him back to go through the farce of another trial; and, if the whole evidence shows the case is for the defendant, and the plaintiff is not entitled

to recover, then it would make no difference whether the court acted on the motion to exclude or the motion to set aside the verdict, the result would be the same. In either case the remedy would be to award a new trial. This practice seems to prevail in the federal courts, and in the case of *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, the supreme court of the United States held: "Although the refusal at the close of the testimony for the plaintiff to direct a verdict for the defendants would justify a reversal of a judgment against them, yet, if they proceed with their defense, and introduce testimony which is not in the record, the judgment on the verdict, which the jury, under proper instructions, find against them, will not be reversed on account of that refusal." Chief Justice Waite says in his opinion: "The present case comes within this rule. The evidence introduced on the part of the company is not in the bill of exceptions, and the court was not asked to instruct the jury to find for the defendant on the whole case. Under such circumstances it must be presumed, in the absence of anything to the contrary, that when the case was closed on both sides there was enough in the testimony to make it proper to leave the issue to be settled by the jury. In this we are not to be understood as saying that the instruction ought to have been given when it was asked." In that case the defendant omitted its testimony from the record, and endeavored in the supreme court to rely on its motion in the court below to direct a verdict for it, because of the insufficiency of the plaintiff's testimony; but the supreme court refused to reverse the lower court, although it erred, for the reason that the defendant's evidence might have supplied the insufficiency of the plaintiff's, and rendered the case a proper one for submission to the jury. In this case the defendant's evidence is in the record, and for the same reasons that actuated that court this court will disregard the motion to exclude as waived by the defendant's proceeding with the case, and consider the whole evidence, either on a motion to set aside the verdict or in arrest of judgment, and will not reverse the judgment unless the evidence as a whole is insufficient to justify the finding of the jury. Relating to motions to exclude, see the case of *Carrico v. Railway Co.*, 35 W. Va. 389, 14 S. E. 12; *Bon Aqua Imp. Co. v. Standard Fire Ins. Co.*, 34 W. Va. 766, 12 S. E. 771.

The fourth assignment of error is based on the special verdict in answer to certain questions of fact propounded by the defendant under chapter 131, § 5, Warth's Code, being the same as in the present Code. The questions were 23 in number, and the answers given by the jury may be summed up as follows, to wit: The plaintiff was engaged as a freight brakeman. His employment was somewhat hazardous. He was employed under Conductor Taggart, who had control of

and was operating the train. The employees were five in number, all under the control of the conductor. The conductor directed the plaintiff to make the coupling, and was two or three car lengths from him when he was injured, and Brakeman Ayers was on the second or third car from engine. The jury disagreed as to whether Charles Miller was on the engine, directing the fireman as to its management. That Fireman E. O. Hogan had very little experience in managing locomotives, and was not competent to handle a locomotive while making couplings. At the time of the accident both plaintiff and engineer were subject to the orders of the conductor, but the engineer was off duty. The cause of the accident was the negligence of the conductor. The defendant insists, "if the jury could not agree as to whether or not the engineer was on the locomotive, that under the law of master and servant the general verdict of guilty ought not to stand." The view, undoubtedly, the jury took of the case was that a wholly incompetent fireman was managing the engine, with the permission, express or implied, so to do from the conductor, and by reason of his ignorance and unskillfulness caused this accident. That the conductor had authority from the company to forbid the fireman managing the engine, and to require the regular engineer to manage it; and therefore it made no difference in this case whether the fireman was acting under the direction of the engineer or not. An accident having been occasioned by his unskillfulness while engaged about its business by its permission, through its conductor, the defendant was liable; it amounting to the same thing as if the company, knowing the unskillfulness of the fireman, had temporarily hired him, and placed him in charge of the engine. The provision of the statute is that, "where any such separate verdict or special finding shall be inconsistent with the general verdict the former shall control the latter and the court shall give judgment accordingly." The jury manifested decided intelligence in their findings. The large number of questions appear to have been carefully prepared for the purpose of entrapping them into inconsistent answers, and thus rendering their general verdict a nullity; but, if such was the intention they seem to have divined it, and neatly foiled the questioner, as their findings are in no wise inconsistent, even though they may be unsupported by the evidence and the law governing the same.

The fifth and remaining assignment of error, being for the refusal of the court to set aside the verdict as contrary to the law and evidence, raises the real merits of this controversy. On this question the court is limited to the inquiry as to whether the verdict of the jury is plainly unwarranted by the evidence under the law applicable thereto. If not, the judgment must be affirmed. The facts established by the plaintiff's evi-

dence were as follows, to-wit: A freight train belonging to the defendant was passing south over the defendant's road, manned by James W. Taggart, conductor, in charge of train; Charles Miller, engineer; Ed C. Hogan, fireman; Ellis T. Core (plaintiff) and T. B. Ayers, brakemen. At Clarington, the engineer, complaining of illness, left the engine in charge of the fireman, and lay down in the caboose. The train proceeded about 30 miles, to Raven Rock, a point near St. Mary's, where the conductor told the plaintiff to signal the fireman to stop the train, so that the engineer could get on the engine. The plaintiff did so, but, getting no response from the engine, informed the conductor, who instructed the plaintiff to let the train run on to St. Mary's, where they had orders to stop, and there to back the train in at the south end of the siding, so as to let the north-bound passenger train pass them. When the south end of the siding at St. Mary's was reached, and the train stopped, the engineer got off the caboose and started towards the engine, and the plaintiff got off and opened the switch, and gave the signal to back. There were some cars on the siding, which would make the train too long for it, and to let the passenger train by it was necessary to fasten these cars to the train already composed of about 20 cars, and back them as the rear end of the train backed out the north end of the siding until the engine was safe in the siding, and then, after the passenger train passed by the south switch, to run the rear end of the train back so the passenger train could pass it. The plaintiff, with the assistance of the other brakeman, who was stationed on top of the train about two car lengths from the engine, made the first coupling. The conductor then came out of the caboose, and took his station about three car lengths from plaintiff. Plaintiff gave the signals. They were repeated by the conductor to the front brakeman, who transmitted them to the engine. It was about 9 o'clock at night, quite dark, and the signals were made with lanterns. Plaintiff, standing close to the car to be coupled to the train, signaled for the train to back. The train moved back slowly until within six feet of the car, and plaintiff signaled to slow up, and reached forward and caught hold of the link in the end of the moving train, and raised it for the purpose of inserting it in the bumper of the other car, when the train or hind car came back with a sudden movement, and caught his hand between the bumpers, and mashed it off. He immediately cried out, the train was moved forward, and his hand was freed. The plaintiff had been working as a brakeman for about six weeks, before which he was in the shops. The conductor testified that the fireman, he thought, had not been known and recognized as a regular engineer capable of running engines at that time. For the present the defendant's evidence is omitted. Under his decla-

ration the plaintiff was bound to prove by competent testimony: (1) That the fireman was unskillful, unlearned, and incompetent to manage an engine. (2) That he did manage it in an ignorant and unskillful manner; not making it quite so strong as his declaration, "in a violent, negligent, careless, rash, unskillful, and ignorant manner;" and that this mismanagement was the cause of the accident. (3) That the defendant knew, or ought to have known by the exercise of reasonable care and diligence, that the fireman was wholly unskillful, unlearned, and incompetent to manage an engine. (4) That if the engineer was present and directing the management of the engine by the fireman, and there was such mistake in such management as to cause the accident, it was wholly due to the unskillfulness of the fireman alone, and not due to the misdirection of the engineer. (5) That the plaintiff did not know that the fireman was managing the engine, and could not have known it by the use of ordinary care, and avoided the accident. (6) That the defendant permitted, either expressly or impliedly, the fireman to manage the engine. As to the last proposition the jury found that the conductor was guilty of negligence in that he permitted the fireman to manage the engine. This appears to be the conclusion they arrived at, both from their special verdict and the argument of the plaintiff's counsel. To arrive at this conclusion the jury must have been erroneously instructed in the law, as the conductor does not appear to have neglected his duties in any way at the time of the accident. In the case of *Railway Co. v. Ross*, 112 U. S. 877, 5 Sup. Ct. 184, Justice Field, in delivering the opinion of the court, and commenting on the duties of a conductor, says: "We know from the manner in which railways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements; and all persons employed on it are subject to his orders." This language, being general, is liable to be misunderstood, and hence is misleading, especially the closing sentence, that "all persons employed on it are subject to his orders;" this should be limited to mean as to the movements of the train. He adds further: "In no proper sense of the term is he a fellow servant with the fireman, the brakeman, the porters, and the engineer." This is also misleading, because not limited by the nature of the duty or employment he is engaged in discharging. The employees of a railroad company oftentimes occupy not only a dual, but a threefold, relation towards each other, according to the duties they are called upon or delegated to perform, to wit,

that of superior or master, co-ordinate or fellow servant, inferior or servant. For instance, in running the train, the conductor is the superior of the engineer, and in that particular he represents the master; in the separate management of the engine and the train from the engine back they are co-ordinate or fellow servants, each being independent in his own sphere; and in permitting the fireman or other person to manage the engine in his stead the engineer is the superior of the conductor, discharging a nonassignable duty, delegated to him by the master or company. As an illustration of and to support the last proposition I refer to the case of *Harper v. Railroad Co.*, 47 Mo. 567, in which it was held that when an engineer placed a fireman in charge of the engine, acting under authority, either express or implied, his act in so doing was the act of the company, and that the company was liable to the conductor for injuries sustained by reason of the incompetency of such fireman.

For authorities sustaining the second, see 7 Amer. & Eng. Enc. Law, p. 821; and for authorities to sustain the third, the case of *Railway Co. v. Ross*, above referred to, and also the case of *Madden v. Railroad Co.*, 28 W. Va. 610, approved in the case of *Daniel's Adm'r v. Railway Co.*, 36 W. Va. 397, 15 S. E. 162. The principles established by these citations are that where the injury is caused by an employe acting in the discharge of a duty that renders him inferior to or co-ordinate with the injured employe the master or company is not liable, but where he acts in a superior position the master is liable. These superior duties that the law devolves upon the master, and for the proper discharge by his delegated agents, servants, and employes he has been held responsible, have been established by the citations above to be as follows: (1) To exercise reasonable care in providing and keeping in repair suitable machinery, and all necessary appliances, including a safe place to labor; (2) to exercise a like care to provide and retain suitable servants for each department of service; (3) to establish, conform to, and enforce compliance with proper rules and regulations. In this case the conductor had nothing to do with the employment of the engineer or fireman. They were employed as suitable persons for and placed in their respective positions by an entirely different agent of the company, and he was given no authority over them outside of the control of the movements of the train. In all other respects they were independent of him. It was imposed upon the engineer as a duty by his master to make a skilled engineer of the fireman, and the conductor had no right to interfere and say when and how that duty should be performed, even if he was competent to do so. At least there is no evidence in this case tending to show such authority, and in the presence of such

a painful vacuum we are compelled to fall back on judicial notice of the manner in which the great railways of the country are managed. *Slater v. Jewett*, 84 N. Y. 61. The conductor is not required to be a skilled engineer, or to know anything about the management of an engine. This is the engineer's co-ordinate duty, and the fireman is his assistant, and under his control. In training and making a skilled engineer out of the fireman he acts in his delegated capacity, and is the superior or master therein to all the other employes, conductor included. The conductor could order him out of the caboose, but on the engine he was entire master of the situation, and, within the sphere of his employment, as independent as the prince in his palace, or the poor man in his hovel. The jury, therefore, erred in its special finding that the conductor was guilty of negligence in permitting the fireman to manage the engine. This, however, is not a good reason for setting aside their general verdict, as there is no allegation in the declaration that charges the conductor with negligence, but the charge is a general one against the defendant, without pointing out the special servant in fault. The only trouble with them is they put the saddle on the wrong horse. If there was any negligence in placing the fireman in management of the engine, it was the engineer that was at fault, and in doing so he acted in discharge of a superior duty, and his act was the act of his master, the company, and his knowledge as to the competency or incompetency of the fireman was the knowledge of the company. We must therefore answer the sixth proposition stated above, as to proof required, in the affirmative, to wit, that the defendant permitted the fireman to manage the engine. Such permission, as shown by the references above, was a temporary employment for this purpose. In the case of *Thompson v. Railway Co.*, 84 Mich. 281, 47 N. W. 584, it was held "that it is not necessarily negligent to allow a fireman to run the engine. * * * It is customary, and sometimes necessary; and it is the way in which fireman are educated to be engineers." And the court says further: "Whether it was negligent to allow this particular fireman to run the engine or not must depend on whether he had such experience in the work as to make him reasonably safe and fit for it." And this brings us in proper order to inquire, first, whether the fireman was unskilled, unlearned, and incompetent. The evidence introduced by the plaintiff to prove this allegation was, first, the failure of the fireman to respond to the signals at Raven's Rock; the testimony of the conductor, above quoted, that "the fireman was not known and recognized to be a skilled engineer;" and the accident itself. This proof is wholly insufficient. The proper inquiry is contained in the *Thompson Case*, last quoted, "whether he had such experience in the work as to

make him reasonably safe and fit for it;" not whether he was known and recognized as a skilled engineer. The mere fact that he failed to notice and answer signals when he was under instruction to run to St. Mary's counts for very little, when no doubt the signals were unexpected, and he was watching the track in front of the engine, the place dangers are usually encountered. And it is to be presumed, although the evidence is silent on the subject, that the front brakeman was on the engine, acting as fireman, and it was his duty to watch the rear end of the train for signals from that direction, and his fault that they were not seen and communicated to the fireman. And the fact that the accident happened is not sufficient to show that the fireman had not had such experience in the work as to make him reasonably safe and fit for it, much less to show that he was "unskilled, unlearned, and incompetent." But the accident must be traced to some unskillful act of his, as the proximate cause of the injury; and that brings us to the second proposition, to wit, did he manage the engine in an ignorant and unskillful manner, and was this mismanagement the proximate cause of the accident? The plaintiff must prove this, and the only evidence to sustain it is the manner of the accident. If the accident was occasioned by the negligence, and not the incompetency, of the fireman, the defendant is not liable. The company cannot be required to answer for the negligent act of a competent fellow servant. That is one of the ordinary risks assumed by the plaintiff in his contract of service. "The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow servants in the course of the employment." *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Rodman v. Railroad Co.*, (Mich.) 20 N. W. 788; *Railroad Co. v. Myers*, 55 Tex. 110; *Greenwald v. Railway Co.*, 49 Mich. 197, 13 N. W. 513.

Admitting that the accident was caused by the act of the fireman, can we, from the evidence, say it was caused by his incompetency, or, being competent, his negligence? As heretofore shown, there is no proof of incompetency; hence we are bound to assume that it was an act of negligence, independent of the question of skill. But was this mismanagement the cause of the accident? The only answer to this is that the car came back with an accelerated speed for six feet. But the evidence does not enlighten us as to what caused the acceleration. The curvature, grade, and condition of the track, the length, heaviness, and friction of the cars and slack in the train, and loosening of the brakes, may all have been potent forces in the matter, independent of the pressure of the engine. The dark night and the plaintiff's inexperience and unskillfulness may have contributed to it. There

is no proof that the fireman did anything wrong, but we are left to infer this from the manner of the accident. In the case of *Kersey v. Railroad Co.*, 79 Mo. 362, it was held that "it is not enough that one servant is injured while an incompetent servant, known to the master to be such, is engaged in one common employment." "But the master cannot be held liable unless the incompetent servant was guilty of some negligence or misconduct directly contributing to produce the injury." The evidence on this subject—that is, the manner of the accident—tends as much to prove the proximate cause of the accident was the plaintiff's own inexperience and unskillfulness as to prove the incompetency of the fireman. The plaintiff had only been employed as a brakeman about six weeks. When he went to couple the car to the train he says the train "came back within three or four feet of the car I was going to couple to very steady. * * * I reached down and took hold of the link, and as I took hold of the link the cars came back with a crash, and caught me, and I hallooed. After some few minutes the train was pulled apart, and I got loose." Plaintiff does not testify that the impact of the train had any effect on the car, but the car appears to have stopped the train still. A train of 20 cars with an engine attached, moving with great speed, is not an irresistible force; neither is a single car an immovable object. But if a single car is able to stop immediately 20 such cars with a powerful and heavy locomotive pressing in the rear, reason must convince us at once that the engine was not exerting much impelling force, or that the train was not moving at any great speed, although the rear car, on account of slack in the train, might continue to move after the engine stopped. The circumstances and the evidence leave the question in doubt as to where the fault lay.

The third proposition, calling for proof on the part of the plaintiff, falls with the other two, for, if the plaintiff has failed to prove that the fireman was incompetent, much more has he failed to establish that the defendant had notice of incompetency which does not exist in the light of the evidence.

The fourth proposition is not in accordance with plaintiff's theory of the case, and therefore there is no evidence whatever on the subject.

The fifth presents a question of contributory negligence. If the plaintiff knew of the incompetency of the fireman, and that he was in charge of the engine, or ought to have known it by the exercise of ordinary care, and he went on with his work without ascertaining the fact, he is guilty of contributory negligence, and cannot recover. The plaintiff testifies that he knew that the fireman had been in charge of the engine immediately before the accident, but he did not know it just at the time

of the accident. When he came out of the caboose to carry into effect the instructions of the conductor he saw the engineer start towards the engine, and, without waiting to give him a chance to reach the engine, he signaled the fireman to back the train; and if the engineer had not reached his post at the time of the accident it was the plaintiff's fault in not giving him time to do so. The plaintiff was acting as vice conductor, and the engineer and fireman were bound to obey his signals; and thereby he assumed the risk of the incompetency of the fireman. The rule of contributory negligence is laid down in the case of *Railroad Co. v. Martin*, (Colo. Sup.) 4 Pac. 1118, to be "that the doctrine of all the cases is that if a plaintiff so circumstanced might have avoided the injury by the exercise of ordinary care, he cannot recover, although the defendant was negligent." It is very apparent from what has been said that plaintiff has wholly failed to show himself entitled to recover, and the circuit court erred in not sustaining the motion to exclude the evidence, and, on failure of plaintiff to take a nonsuit. In not instructing the jury to find a verdict for the defendant; but, as heretofore determined, the defendant having reopened the case, and proceeded to introduce its evidence, the duty devolves upon the court of ascertaining from the defendant's testimony and the plaintiff's additional evidence whether there is sufficient proof in the case to justify the verdict of the jury. The additional evidence was introduced by the plaintiff to contradict defendant's witnesses about matters not very material to the issue, and resting entirely upon the memory of those testifying, and adds nothing to the plaintiff's case. The testimony of the engineer is taken, and he testifies fully as to the competency of the fireman, and, further, that he was on the engine, overseeing the fireman, at the time of the accident, and that the fireman managed the engine fully as well as he could himself. The engineer is corroborated in this by the evidence of the plaintiff's witnesses, who testify that when the train stopped at the south switch the engineer got out of the caboose, and started towards the engine, which from that time was moving back towards him. He is also sustained by the fireman, who says that he was on the engine. How the jury could hesitate or disagree in finding that the engineer was on the engine from the positive statement of himself and the fireman, when they had no evidence to the contrary, is more than I can understand, unless they took the statements of plaintiff's witnesses that they did not know where he was as evidence sufficient to justify their determination; and yet they found by their verdict for the plaintiff, from these same statements, that the plaintiff in truth did not know whether the fireman was in control of the engine. This is a plain contradiction in their finding to hold that the same evidence establishes one

thing as to the plaintiff, and yet establishes an entirely opposite thing as to the defendant, in the face of the positive statement of two unimpeached witnesses. A jury has the right to reject the testimony of any witness if they have reason for so doing. But this is not a matter of mere capriciousness. In complying with their oaths as jurors they must lay aside their predilections, and weigh the evidence in a manner becoming intelligent human beings; and they are derelict in the discharge of their duties if they ignore the evidence without cause, and find a verdict according to their preconceived prejudices and feelings. In the case of *Corson v. Railroad Co.*, 76 Me. 244, the jury were said to have found their verdict on the personal appearance of a certain witness before them, and the court, in commenting on the matter, said: "If the jury undertook to decide that Arnold was an unfit person to be employed as a brakeman on account of what they saw or supposed they saw or could read in his face and manner while testifying before them as a witness, they did fall into a grave error. As well might a jury find a man guilty of murder because in their opinion they could see guilt in his face. The law does not recognize physiognomy as an art or science sufficiently reliable to found a verdict upon, not even against a railroad corporation. In a case like this the law imposes upon the plaintiff the burden of proving that the defendant corporation has been guilty of negligence in employing a man known to be unfit for the place which he is to fill, and we feel no hesitation in saying that this burden cannot be sustained by the man's looks and manner while testifying as a witness." For some reason the jury rejected the testimony of both the defendant's witnesses. The record presented here does not justify them in so doing, and there can be no question but that the evidence clearly establishes the fact that the engineer was on the engine. Such being the case, it devolved upon the plaintiff to prove that the fireman was so competent as to be unable to execute the directions given him by the engineer; and, if none were given, that his incompetency in managing the engine was the proximate cause of the injury. It matters not whether the engineer is present or absent, if he puts a wholly incompetent fireman in charge of an engine, and by reason of that incompetency any of the employees on the train, other than the engineer, is injured, the company is liable, because the law holds that the engineer's act in placing the fireman in charge of the engine is an employment by the company, and therefore it should be he held to answer for the results of such employment. On the question of competency both the engineer and fireman sustain the latter's experience and skill in the management of an engine,—that all the signals were properly answered, and the couplings, so far as the movements of the engine were concerned, were properly made."

Certainly there is nothing in this evidence to supply the plaintiff's deficiency. On the contrary, it fully establishes the defendant's entire innocence of the negligence charged. The plaintiff relies on the case of *Railroad Co. v. Thomas' Adm'r.* (Va.) 17 S. E. 884. This case is strictly in accordance with this opinion, but is not a parallel case with that made out by plaintiff's evidence. The engineer turned over his engine to an inexperienced fireman, who had only been in the service of the company for three or four weeks. The conductor, in charge of a yard crew consisting of the engineer, fireman, and three brakemen, including the plaintiff, who had only been in the service of the company for a short time, was engaged in shifting cars and making up trains. The conductor, who was aware of the fact that the fireman had never been in the employ of a railroad before, but was raw and inexperienced, and that the engineer had turned over the engine to him, undertook to make a dangerous running and flying switch. When the time came to slack the engine the fireman, without shutting off the steam, as he should have done, slackened by reversing the engine, and, as a consequence the cylinders got full of steam, and of all this the brakeman who was on the rear of the engine, with his back to the fireman, knew nothing. After the brakeman withdrew the coupling pin, and cut the engine loose from the car, the fireman, without again shutting off the steam, as he should have done, threw the lever forward as far as it would go, thus giving full effect to the steam accumulated in the cylinders. This accumulated steam, being thus brought suddenly into full play, "caused the engine to start or jump suddenly forward with such great force as to jerk the brakeman off, and break his hold, and throw him on the track. He was run over by the car and killed. This statement is condensed from the opinion of the judge in that case. The court held the company liable—First, because of the negligence of the engineer in turning the engine over to a raw and inexperienced fireman; and, second, because the conductor was negligent in exposing the men under his control to a danger that he could have avoided by the exercise of reasonable care. The incompetency of the fireman, and the unskillful and ignorant manner in which he managed the engine, and that this was the proximate cause of the injury and death of the brakeman, were established by incontrovertible proof. But in the case now under consideration the plaintiff has failed to prove the incompetency of the fireman, that he was guilty of any unskillful or ignorant management of the engine, or that the accident was the proximate result thereof. On the other hand, the defendant shows that the fireman was experienced and competent, that he did manage the engine in a skillful and careful manner, and that there was no negligence on its part. The facts and circumstances sur-

rounding this unfortunate accident under the settled rules of law applicable thereto compel us to hold, however kindly and charitably disposed we may feel towards the plaintiff in his crippled condition, that it was one of the assumed risks and ordinary results of the dangerous employment in which he was engaged, and for this reason the judgment is reversed, the verdict of the jury set aside, and a new trial awarded the defendant.

STEWART v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

RAILROAD COMPANIES—OCCUPATION OF STREET—
INJURIES TO ABUTTING OWNER—DAMAGES—
PLEADINGS.

1. A case in which the declaration shows that the landowner whose lot abuts on a public street, on and along which a railroad company has laid its track and runs its trains, has sued for the permanent injury to his property caused thereby.

2. Where a railroad is laid down in a public street, the abutting property is damaged, within the meaning of section 9, art. 3, of the constitution, to the extent of the depreciation caused by the construction and operation of the road.

3. The measure of the damages is such a sum as will make the owner whole,—that is, the depreciation of the market value of the abutting property, caused by the railroad company laying their track and running their trains in the street.

4. In such case, if the fair market value of the abutting property is as much immediately after the construction of the railroad as it was immediately before such improvement was made, no damages are sustained for which a recovery can be had.

(Syllabus by the Court.)

Error to circuit court, Mason county.

Action by C. V. Stewart against the Ohio River Railroad Company. Plaintiff had judgment, and defendant brings error. Reversed.

D. H. Leonard and V. B. Archer, for plaintiff in error. Chas. E. Hogg and John E. Beller, for defendant in error.

HOLT, J. This is an action of trespass on the case, brought by plaintiff Stewart, against the defendant company in the circuit court of Mason county, on the — day of April, 1889, for injury to a lot of land situate in the town of West Columbia. The defendant appeared and demurred, and plaintiff filed an amended declaration. To this, also, defendant demurred, but the court overruled the demurrer, and defendant entered the plea of not guilty. The jury found for plaintiff, and assessed his damages at \$285. On the trial of the cause, various objections were made by defendant to the introduction and rejection of certain evidence which appears in the certificate of evidence, which objections the court overruled, and the defendant's exceptions were noted in the certificate of evidence. The defendant also

took three bills of exception,—No. 1 for the refusal of the court to give defendant's instruction No. 1; No. 2 for refusing defendant's instruction No. 2; and No. 3 for overruling defendant's motion to set aside the verdict, and grant it a new trial, upon the ground that it was contrary to the law and the evidence, and was excessive. All the evidence is certified, and made, by reference thereto, part of this bill No. 3. The court overruled the motion and gave judgment, and defendant obtained a writ of error with supersedeas. The plaintiff in error (defendant below) assigns eight distinct grounds of error, which may be considered under four heads: (1) The sufficiency on demurrer of plaintiff's amended declaration; (2) in admitting for plaintiff, and refusing for defendant, certain testimony on the trial; (3) in refusing to give the two instructions asked by defendant; (4) in overruling defendant's motion for a new trial.

The declaration, as amended, contains but one count in case. Though somewhat long, I give it in full, not alone or in the main on account of the demurrer, but because in my view it shows the gravamen—the gist—of the action to be permanent injury to plaintiff's right as an abutting owner in his lot on Coal street, by causing great depreciation in value, and on that question, as it may appear from both the pleadings and the evidence, the vital point in the case must turn. "Amended declaration. State of West Virginia, Mason county, to wit: In the circuit court thereof. The amended declaration of C. V. Stewart against the Ohio River Railroad Company: C. V. Stewart, by way of amendment to his former declaration filed herein, complains of the Ohio River Railroad Company, a corporation under the laws of the state of West Virginia, which does business in said state, and has its principal office in the city of Parkersburg, in said state, and which has been duly summoned to answer a plea of trespass on the case, for this, to wit, that the said plaintiff now is, and long has been, the owner in fee simple and occupier of a certain lot or parcel of land situate in the town of West Columbia, in the county and state aforesaid, and bounded on the west by Coal street, and on the north by the public road or street leading from the Ohio river to, and intersecting with, the Ripley and West Columbia pike, so that said lot is a corner lot, and very valuable, and upon which lot or parcel of land belonging to this plaintiff is situated a frame dwelling house, storehouse, stable, and other buildings necessary and proper for the free use and enjoyment of the same, and which lot, with the buildings thereon, the said plaintiff now is, and long hath been, using, occupying, and enjoying as a home and residence and place of business; and the plaintiff says that he used, occupied, and enjoyed said premises as aforesaid, free from all obstructions, obstacles, incumbrances, interferences, or hin-

drances, as of right he ought and should have done, until the happenings of the matters and things, and the acts and doings, herein-after specified and complained of, namely, that during the time said premises were occupied, used, and enjoyed by this plaintiff in the manner hereinbefore set forth, the said defendant, through and by its agents and employes, took possession and appropriated to its own use and benefit, to wit, on the — day of —, 1886, in the county aforesaid, that part of said Coal street which forms the western boundary of plaintiff's said premises, and defendant made deep and dangerous excavations in said street, and along the same, and immediately in front of plaintiff's said property, and built thereon its railroad bed and laid its railroad track on the same, and ever since the day and year last aforesaid the said defendant has been, and still is, using the same as a railroad right of way and railroad track, and the said defendant, ever since the day and year last aforesaid, has run its cars, locomotives, trucks, hand cars, engines, and all other rolling stock over the said Coal street, in the operation and carrying on of its business as a common carrier of freight and passengers, to the great and irreparable injury and damage to the said plaintiff in the use and the enjoyment of his said premises, and without compensating him therefor. And the plaintiff further says that the deep and dangerous excavations and cuts made in and along said Coal street immediately in front of his premises by said defendant, as aforesaid, have entirely destroyed the use of said Coal street by this plaintiff, so that this plaintiff cannot now have access to and from his said premises on the western side thereof, as he had theretofore done; that his said premises front upon said Coal street, and that he can no longer approach his said premises by means of said Coal street with wagons or other vehicles; and that said street was in constant use, in going to and from plaintiff's said premises, until it was destroyed by the said defendant, as aforesaid. Plaintiff further avers that said excavations and cuts made in said street by said defendant are deep and dangerous, and that in some places the said excavations in front of plaintiff's said premises are as much as four feet in depth, and leave a narrow strip between said cut and plaintiff's said houses and buildings, not exceeding six or eight feet in width. Plaintiff further avers that his only means of access to and from his said stable situate on said premises was over and along said Coal street, and that he cannot now reach said stable with a wagon or other vehicle, and that his said stable is rendered almost practically useless to this plaintiff by reason of the destruction of said street by the said defendant as aforesaid; and the said railroad passes so near to the said stable that it is unsafe and dangerous to keep hay, oats, or other

feed therein, or to confine or shelter stock therein, because of the great danger from fire originating from sparks issuing from the locomotives constantly passing along said street immediately in front of said stable; and the ground upon which said stable is located can no longer be appropriated to any valuable or practicable use or purpose, by reason of the loss of the use of said Coal street and its near proximity to said railroad track; and so plaintiff says that he has had to abandon the use of said stable, and the use and enjoyment of the ground upon which it stands. Plaintiff further says that the other buildings on his said lot are so close to said railroad track, by reason of the location of the said road on said Coal street, that there is great danger of their being lost and wholly destroyed by fire issuing from the locomotives of the defendant aforesaid, and this dangerous exposure to fire of plaintiff's said buildings has greatly enhanced the cost of procuring insurance thereon, and thus rendered it almost impossible for plaintiff to procure insurance against loss by fire upon his buildings aforesaid; and plaintiff says that the trains of the defendant which pass along and over said road immediately in front of his said buildings and property are very heavy, and frequently run very rapidly, whereby plaintiff's said buildings are greatly jarred and shaken, and much injured and damaged. Plaintiff further avers that the locomotives and trains of said defendant pass over said road in front of plaintiff's premises, as aforesaid, both in the nighttime and in the daytime, and shake and jar plaintiff's buildings, part of which is occupied by the plaintiff as a residence; and plaintiff is a person of highly sensitive nervous organization, and the shaking and jarring of plaintiff's said residence has greatly annoyed and disturbed him, and caused him great loss of sleep, whereby plaintiff's health has been much impaired. Plaintiff further avers that by reason of the facts and allegations hereinbefore specified, touching the injury to his said buildings and premises, that they have been depreciated in value more than two-thirds, and their value prior to the injuries herein complained of was at least the sum of twelve hundred dollars. And by reason of which matters and things hereinbefore set forth and complained of, an action hath accrued to this plaintiff to demand and have of and from the said defendant the sum of one thousand dollars, the damages sustained by this plaintiff, as aforesaid; wherefore the plaintiff brings this suit. Hogg & Beller, P. Q."

With us the use of case, rather than trespass, throws but little light on the subject, for our statute, in order to obviate a distinction sometimes nice, and troublesome in practice, has provided that an action of trespass on the case may be maintained in any case in which an action of trespass will lie. The demurrer, however, was not intended

to raise this question, and could not have had that effect. It states that it was to the declaration as amended, and to each "demand" therein set out, naming specially that averment which charges plaintiff to be of a highly sensitive and nervous organization, and greatly annoyed, disturbed in sleep, and thereby injured in health by the constant noise and jar caused by defendant's trains. But as the declaration contains but one count, there can be strictly only one demand or cause of action. All else save the gist of the action, whatever that may be, shows but the nature of the injury and the special causes and extent of the damage. Hence, strictly speaking, under our common-law procedure, the thing aimed at could not be reached in that way, except by a liberal construction of section 13, c. 131, of the Code, asking the court to instruct the jury to disregard the objectionable "demand," or under section 46, c. 130, move the court to order the plaintiff to file a definite or particular statement of his claim, or, in accordance with our usual practice, cause to be excluded all evidence offered touching the immaterial or otherwise obnoxious averment; and, as the declaration shows plainly enough that it is sufficient for judgment to be given according to law and the very right of the cause, the demurrer was properly overruled. On this subject, see *Robrecht v. Marling's Adm'r*, 29 W. Va. 765, 2 S. E. 827; *Newlon v. Reitz*, 31 W. Va. 483, 7 S. E. 411.

No instructions were asked by the plaintiff, none were given by the court, but the two following were asked by defendant, and refused: No. 1. "The jury are instructed that if they believe from the evidence in this cause that the plaintiff's property was worth as much immediately after the construction of the defendant's railroad as immediately before said road was constructed, then in such case they shall find for the defendant." No. 2. "The jury are further instructed that when an action is brought to recover damages, where no part of the plaintiff's property has been taken, but simply damaged, by a public improvement, damages cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of an improvement as it was immediately before the improvement was made, no damages can be sustained and no recovery can be had. Therefore, in this case, if the jury believe from the evidence that the fair market value of the plaintiff's property was as much immediately after the construction of the defendant's railroad as it was immediately before, then he has sustained no damages which can be the subject of a recovery in this suit, and they should in such case find for the defendant." The two instructions

seem to be alike in substance, so far as plaintiff has a right to complain, and whether they were properly refused or not depends upon two questions: (1) Are they, or either of them, good law in a proper case? (2) And, if so, were they appropriate in this instance?

The facts of the case not controverted and bearing on the matter in hand are, in short, as follows: The locus in quo is a lot in the town of West Columbia, 48 feet front along Beacon street, by 100 feet deep along Coal street, with a one-story frame house on the corner, where plaintiff has lived continuously since the 29th day of August, 1878, when the lot was sold and conveyed to him in fee by John Treeger and wife, describing it as "known upon the plat of the town as lot No. 24, the same conveyed to John Treeger by John Hall and wife by deed dated 15th of August, 1865, to which deed as recorded." etc., reference is made. The presumption is that his ownership in fee extends to the center of the street, subject to the public right of way, as nothing to the contrary appears. The town was incorporated the 1st of May, 1852, by act of the general assembly of Virginia, but had fallen, perhaps, into disuse now and then, as I infer from the testimony of Dr. Knight, who says incidentally of Coal street, "The town would not improve it, even when it was incorporated." In 1886 defendant laid down its track along Coal street 19 feet, where it entered the street, crossing Beacon street, from plaintiff's house and lot, making a 4-foot cut and embankment in front of plaintiff's house, impairing somewhat his power of convenient ingress and egress with an ordinary wagon. The track gradually veers away from plaintiff's property until, at the lower end, it is out of the street on the opposite side, being 48 feet from the stable on the other end of plaintiff's lot, but it makes his stable, which extended 4 feet into the street, unfit for storing hay, etc., by reason of danger of fire from sparks, and subjects plaintiff to such annoyance as the noise and jar and smoke of locomotives, etc., generally create, impairing his comfort and lessening its value as a dwelling place. Coal street is 40 feet wide. How the track runs with reference to the median line does not appear. By what right or authority defendant built and used its road in and along this street does not appear directly from any evidence, and it can only be inferred, if at all, from the general right to build conferred by law, from the fact that plaintiff says they have used it since 1886, and nowhere intimates that it was built there unlawfully, or without the authority or consent of the town or county,—a prerequisite required by law. But such consent is not material, for plaintiff in his averments proceeds on the inference that such consent had been given, or has plainly and distinctly elected to treat the entry of the company as an entry and taking under the exercise of the state's power of

eminent domain, conferred upon it *pro hac vice*, and has waived the wrong of unlawful entry, and sued for the compensation the constitution of 1872 gives him for the permanent damages done to his property by reason of its depreciation thus created; and on this point the plaintiff's declaration is plainer by what is left out, and more explicit by what is put in, than was the declaration in the case of *Johnson v. City of Parkersburg*, 16 W. Va. 402, or the one in *Fox v. Railroad Co.*, 34 W. Va. 466, 12 S. E. 757. What other right of his was injured, or what other remedy he may have had, we need not inquire, for he elected to waive them, and, as an abutting owner, has sued for the just compensation for the damage to his property, causing, as he alleges, "a depreciation in value of more than two-thirds, and that it was worth, before the injury complained of, the sum of twelve hundred dollars." See, on this subject, *Porter v. Railway Co.*, 3 Amer. R. & Corp. R. 357, 363, (from 125 Ind. 476, 25 N. E. 556,) edited and annotated by John Lewis, Esq., author of a work on Eminent Domain, which see, (section 507.) In *U. S. v. Great Falls Manufg Co.*, 112 U. S. 645, 656, 5 Sup. Ct. 306, Justice Harlan, delivering the opinion, says: "There is no sound reason why the claimant may not waive that right, [the right of injunction,] and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation." In *Railroad Co. v. Baker*, 45 Ark. 252, 255, (a state with code procedure,) Cockrill, C. J. says: "The complainant alleged a permanent injury to the land * * * with all the particularity that could be required under any state of pleading. The complaint must be taken now as though amended to conform to the proof, and the appellant's objection to it, if tenable at all, comes too late." In our case no amendment was needed, and the tenor of the testimony showed that plaintiff contemplated and sought a recovery of damages as a just compensation for the depreciation of his abutting property. In the case of *Organ v. Railroad Co.*, (1888,) 51 Ark. 235, 266, 11 S. W. 96, Battle, J., says: "But the owner may waive formal condemnation proceedings and all formal modes of transfer, and elect to regard the action of the railroad company as a taking under the right of eminent domain, and demand and recover just compensation." Plaintiff's proof shows, what his declaration expressly avers, that defendant, ever since the — day of —, 1886, has run its cars and all other rolling stock over Coal street in carrying on its business as a common carrier of freight and passengers; and the whole scope of his evidence shows that the object of his suit was to recover damages for the injury caused to his abutting lot by permanent depreciation occasioned directly by the building and running of defendant's railroad, so that it is too late now, and in this court, for plaintiff to shift his ground, and

say that he is suing for a wrongful entry, or a continuing nuisance to his adjacent property; so that whether defendant entered on his fee subject to the easement, or on a street simply abutting on his freehold, without his consent and without condemnation, he has elected his remedy, both by pleading and proof, to go for the permanent depreciation, and must abide by it. All the special acts of injury and resulting damage pleaded or proved have weight and bearing only so far as they tend to show such permanent injury. The question of the railroad being a nuisance did not arise, except so far as that fact tended to show the character of the railroad as a permanent injury depreciating the property, and the amount of such depreciation, no matter how special such inconvenience and discomfort may be shown to be. If it was a constant injury of any kind, by which it destroyed the value of his property two-thirds or entirely, that only furnished one element for measuring and ascertaining the compensation. This keeps us in line with the pleading and practice of our cases as far as they have gone, and helps to avoid inconvenient confusion of rights and remedies.

No instruction was asked on behalf of plaintiff, none was given by the court, and this brings us to the two instructions asked by defendant and refused by the court. The question is, where a railroad is laid down and operated in a public street, what measures the damage to the abutting property which the owner may recover as compensation for the injury, under section 9, art. 3, of our state constitution? The question is not altogether a new one in this state. In *Johnson v. City of Parkersburg*, (1880,) 16 W. Va. 402, six years after our present constitution was adopted, the question is fully discussed by Judge Johnson in all its bearings, both as to the extent of the right and the nature of the remedy. The declaration in that case was properly framed to authorize a recovery for such compensation. In *Spencer v. Railroad Co.*, 23 W. Va. 406, the question was again discussed in all its bearings. In *Fox v. Railroad Co.*, 34 W. Va. 466, 473, 12 S. E. 757, Lucas, P., reviews these cases, and says, (page 473. 34 W. Va., and page 760, 12 S. E.): "In those cases, both in the syllabus and opinion, it is made perfectly clear that for permanent injuries to the value of the property entire damages can be recovered in one suit, and no second suit can be brought for the same cause of action. It is also manifest, from a study of these cases, that the owner recovers damages which necessarily result from the building and proper use by the railroad company of its track in the adjoining street, which has been taken and occupied. Evidence of the rental value, also that the plaintiff had been

¹ This section provides that private property shall not be taken or damaged for public use or for internal improvements without just compensation to the owner.

offered one thousand dollars for the property, would seem to be proper in assisting the jury in estimating the permanent damage." The gravamen of the charge in the second count is that the said "dwelling house and premises have, by means of the premises aforesaid, been greatly damaged, lessened in value, and permanently injured." This declaration is almost identically the same as the declaration in *Johnson v. City of Parkersburg*, 16 W. Va. 405, except that it is rendered still more appropriate as a count for permanent injury by charging in direct language that the property has been permanently injured. So that in this state it cannot be said that the true measure of damages in such case is an open question, but that, following the numerous decisions on the subject in other states, especially those of the state of Illinois, the abutting property is damaged, within the meaning of our constitution, to the extent of the depreciation caused by the construction and operation of the railroad (see *Lewis, Em. Dom.* § 225;) and it is immaterial whether the fee of the street is in the public or in the adjoining owner. From this it follows that no damage can be recovered on account of the construction and operation of the railroad, where no property is actually taken, if its fair market value is as much immediately after as before the completion of such railroad. See *Springer v. City of Chicago*, 135 Ill. 552, 26 N. E. 514. At page 552, 135 Ill., and page 514, 26 N. E., *Craig, J.*, says: "Where an action is brought to recover damages where no part of the plaintiff's property has been taken, but merely damaged by the public improvement, the law is well settled that a recovery cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement. In other words, if the fair market value of the property is as much immediately after the construction of the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had." See *McQuaid v. Railway Co.*, 1 Amer. R. & Corp. R., by *Lewis*, pp. 34, 51, 18 Or. 237, 22 Pac. 899. The editor in his note to this case says, (page 51,) under the head of "The Measure of Damage:" "When the fee of the street is in the abutting owner, and the purpose of the suit is to recover the just compensation guaranteed by the constitution, the measure of damages is the same as in any other case of partial taking,—the difference in the value of the property with and without the railroad; and that this is the better view, also, in cases where there is only a partial taking;" citing *Spencer v. Railroad Co.*, 23 W. Va. 406; *Taggart v. Railway Co.*, (R. L.) 19 Atl. 326; *Railway Co. v. Doyle*, 13 S. W. 936, 88 Tenn. 747; *Booth, St. Ry. Law*, § 94. This was the measure of damages impliedly taken and adhered to by the court, as the question arose

upon the giving in of the testimony of the witnesses, except the answer of one witness, who considered it damaged as a home one-half its value, that he permitted to go for what it was worth, but not as a proper estimate to found the amount of damages on. So that if there was any question of pretium affectionis as a home, or other matter special to the plaintiff, it was either not offered, or ruled out by the court without objection on the part of plaintiff. All the witnesses were asked their opinion as to the amount of damages, which has been held to be not error in *Railroad Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 788. As to witness' stating his opinion of damages, etc., see *Railroad Co. v. Brunson*, (Kan.) 22 Pac. 495, 2 Amer. R. & Corp. R. 180, 185.

I can see no objection to the use of the term "market value," used in the instruction asked, that would seem to have the sanction of the authorities which have passed upon the subject. Mr. Lewis, in his work on Eminent Domain, (section 478,) defines the market value in this connection to be the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell, and is bought by one who is under no necessity of having it. *Railway Co. v. Vance*, 115 Pa. St. 325, 8 Atl. 764; *Lawrence v. Boston*, 119 Mass. 126; *Railway Co. v. Woodruff*, 49 Ark. 381, 5 S. W. 792; and cases already cited. As to the term "immediately after, and immediately before, the improvement was made," it is also correct, though the damage given might comprehend interest on the amount of compensation agreed on, after the date at which it is estimated, down to the verdict. All the facts as to the condition of the property and its surroundings, its improvements, its capabilities, the enhancement in view of the contemplated railroad, immediately before the construction and location, and its value immediately after the construction, may be considered; also, has the market value been decreased by the taking, or has it prevented an enhancement, and, if so, to what extent? See *Bohm v. Railway Co.*, 129 N. Y. 576, 29 N. E. 802; *Boom Co. v. Patterson*, 98 U. S. 403. In *Fox v. Railroad Co.*, 34 W. Va. 466, 477, 12 S. E. 757, the circuit court refused to give the following instruction: "In this action the jury cannot take into consideration in ascertaining damages, if any, the market value of the property of the plaintiff before or after the laying of the track in question;" and this court, in view of what was said during the course of its opinion in regard to the nature of the action and the character of the evidence that might be properly introduced, says, (page 479, 34 W. Va., and page 762, 12 S. E.,) that such instruction was properly refused as erroneous. I have already stated that the road, crossing Beacon street, enters Coal street, extending about 1 foot across and from the median line towards plaintiff's

house; that is, at the point of entrance into Coal street in front of plaintiff's house it is 19 feet from the house, and at the lower end of plaintiff's lot on that street it is 48 feet from his stable or lot, being off the street entirely. A public highway only vests in the commonwealth a right of passage; but the freehold and the profits (such as trees upon it and mines under it) belong to the owner of the soil, who has a right to all the remedies for the freehold, subject, however, to the easement. *Bolling v. Mayor, etc.*, (1825,) 3 Rand. (Va.) 563, 573. The presumption is that the ownership of the abutting owner in fee extends to the center of the street unless the contrary appears. Whether the fee is in the abutting owner or in the public, he has private rights as such abutting owner, such as the rights of egress and ingress, and of light and air, but subordinate to the rights of the public in the street. See *Transylvania University v. City of Lexington*, 3 B. Mon. 25. If the road is laid wholly on the other half of the street, the abutters' right to compensation would be the same as in cases where the fee of the entire street is in the public. See *Railway Co. v. Brown*, 23 Fla. 104, 1 South. 512. As the abutting owner has a right of egress and ingress, and a right to light and air, notwithstanding the fee is in the public, it follows that any interference with these rights is a damage for which he is entitled to compensation under the constitution. When the fee of the street is in the abutting owner, and the purpose of the suit is to recover the just compensation guaranteed by the constitution, the measure of damages is the same as in any other case of partial taking,—the difference in the value of the property with and without the railroad. The above is taken from the valuable note of Mr. Lewis to the case of *McQuaid v. Railway Co.*, 1 Amer. R. & Corp. R. 34, 47, 22 Pac. 899, 18 Or. 237, where very many authorities are collected and briefly discussed. See, also, 6 Amer. & Eng. Enc. Law, p. 579; *Mayhew v. Norton*, 28 Amer. Dec. 800, 17 Pick. 857, notes of editor. If such company has built its road by proper authority, it is not committing a nuisance, but exercising its rights, and cannot be enjoined, unless the value of the property would be as effectually destroyed as if taken; but such lot owner, whether he owns the fee in the street or not, may under the constitution, by proper action at law, recover from the company for any permanent damages it may inflict on such adjoining lot, in the same manner as if it had built its road without such proper authority. See *Spencer v. Railroad Co.*, 23 W. Va. 408. In such action (trespass on the case in case) he may recover damages necessarily resulting from the ordinary and proper use by the railroad company of its track in such street, and may give evidence developing the character of this ordinary and proper use, and how it

affects the value of his property. *Fox v. Railroad Co.*, 34 W. Va. 466, 12 S. E. 757. For permanent injury to the property, entire damages can be recovered in one suit, and the jury may take into consideration in ascertaining damages, if any, the market value of the property of the plaintiff before or after the laying of the track in question. 34 W. Va. 479, 12 S. E. 762. And just compensation is that which makes him whole, and, in respect to general benefits or damages resulting from the road, leaves him in as good a situation as his neighbor, no part of whose property has been taken. *Lewis, Em. Dom.* § 471, p. 607. See *Cooley, Const. Lim.* 567. Both the instructions refused propounded the law correctly, as applicable to the facts of this case, and one or the other should have been given.

The evidence as to the amount of damages was conflicting, yet defendant examined two witnesses who knew the property long and well, who said in their testimony that the market value of the property was as great after the road was constructed as it was before; that it was worth as much immediately after the railroad was constructed as it was immediately before. Therefore, there was evidence tending to prove the hypothesis upon which these instructions were based. They were correct, and were not abstract, within the meaning of the rule, and both should not have been refused. They covered the whole ground of defense, and whatever qualification might properly have been made, as based on what any part of the evidence may have tended to prove, the defendant was not required to suggest or supply it. And under our view of the pleadings as already discussed, nominal damages, as such, were not recoverable; for plaintiff did not sue for an invasion or infringement of a legal right, as for a trespass or a nuisance, but for just compensation for the damages done to his property. The tortious entry or creation of a nuisance, if any, he elected to waive for this occasion. These instructions do not forbid the jury from taking into consideration any circumstance which there was evidence tending to prove, which tended to show the amount of the depreciation; such as the constant running of the trains by day and night, the noise, smoke, vibration, etc. The court was not asked to instruct as to any of these.

It is argued on behalf of plaintiff that he bought it for a home, and is compelled to use it for that purpose, but the road renders it wholly unfit. If the property in question had, before the laying of the track in Coal street, any special value or fitness as a residence or home, or from any other fact or circumstance, such fact was competent evidence for the jury, so far as it tended to help estimate the fair market value before the injury complained of; but if counsel mean that the mental suffering of plaintiff by reason of his home being rendered

uncomfortable, and his reluctance to leave it because it is his home, may be considered by the jury to swell the damages beyond the full depreciation, as shown by the difference between the full, fair market price before the laying of the track and after, then his contention cannot be made good upon either principle or authority. If upon authority, he produces none; on the contrary, the authorities already cited and referred to are against him, as is necessarily implied in the mode of measurement already given. Not on principle, for, although all can understand his attachment to his home, who can estimate its price in dollars and cents? And if you put yourself in his place you are carried away by fanciful estimates into imaginary values. But the law of redress in such cases must confine itself to the real and substantial; it can inflict no punishment for a lawful act, nor give any solatium for any of its inevitable consequences. The hardship in that respect, whatever it may be, is one that, in the nature of things, cannot be compensated in money. The law must deal with all alike, and under any other rule there would be no end to fanciful damages; and the inconvenience and discomfort of every abutting home and residence along the line, however great or small it may be, would have to be somehow weighed and accounted for.

There remains to be considered the error assigned in admitting and rejecting certain testimony against defendant's objection, to which it excepted, with the note of the reporter made at the place where it occurred, with no other formal bill of exceptions, except that there is a formal bill of exceptions to the overruling of the motion for a new trial, in which the grounds of the motion are stated to be that the verdict is contrary to the law and the evidence, and is excessive; and the certificate setting out all the evidence is made by reference a part of this bill, and a memorandum is entered on the order book saying that "these exceptions noted in the certificate of evidence are saved to the parties." What must the appellant do in the court below to save and make available the errors complained of here? No motion for new trial is necessary where the error relates to the judgment or pleading, such as sustaining or overruling demurrer; but in all other cases the complainant must move the trial court for a new trial, so that that court may review its rulings; otherwise, this court will deem them to have been waived. *State v. Phares*, 24 W. Va. 657; *Sammons v. Hawvers*, 25 W. Va. 678; *State v. Thompson*, 28 W. Va. 149; *Danks v. Rodeheaver*, Id. 274; *State v. Rollins*, 31 W. Va. 363, 6 S. E. 923. See *Searle v. Railway Co.*, 32 W. Va. 370, 378, 9 S. E. 248; also, *Shrews-*

bury v. Miller, 10 W. Va. 115, point 4. In *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606, 609, 16 S. E. 819, the certificate of evidence showed, as in this case, that defendant objected to the evidence, objection overruled, exception taken and noted; but no formal bill of exceptions was taken to such ruling, nor was it stated on the motion for new trial as one of the grounds therefor, but the grounds specified on such motion were that the verdict was contrary to the law and the evidence and to the instructions given. Held, the error noted in the certificate of evidence will be treated as waived; and the reason given is that the court below is called on to review his rulings, and for this purpose the party complaining must in some way bring them to his attention definitely and specifically, so that he may not have to grope his way through the whole certificate of evidence in search of them, attended, as it would be, with great labor, and the danger of overlooking important ones, nor should the appellate court be placed in somewhat the same predicament. The case before us is amenable to the same rule, and for the same reasons of convenience and policy in the due administration of justice. If there had, on the motion, been a direct reference to the page where each ruling is noted, and the assignment of error made the same reference to the page of the printed record, it would show what our appellant picked out as important on second thought; at any rate, if any were overlooked, it would not be the fault of either court. The constitution of the state makes it the duty of this court to consider and decide every point fairly arising upon the record. The trouble in cases like this grows out of the recent law requiring the trial court to certify and make part of the record the whole of the evidence involving the question, and makes it a part of the record to be considered by the court of appeals both upon the application for and hearing of the writ of error. Code, § 9, c. 131. What, under the constitutional provision, and under section 9, c. 131, of the Code, is to be regarded as points fairly arising upon the record, need not be further considered in this case, although it may give rise to some questions of practice not yet passed upon; but this case on the point involved as to the admission and rejection of testimony, and the mode in which the point must be saved to be available on appeal, is ruled by the case of *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606, 16 S. E. 819. Defendant's instruction No. 2, or its equivalent, should have been given, and it was error, for the reasons already stated, to refuse it, and for such error the judgment and verdict are set aside, and a new trial is awarded. Reversed and remanded.

ZELL GUANO CO. v. HEATHERLY et al.
(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

**CREDITOR'S BILL—DEED OF TRUST FOR CREDITORS
—FRAUD—PLEADINGS—PARTIES—DISTRIBUTION
OF PROCEEDS.**

1. The bill should state the plaintiff's case with reasonable certainty,—that is, the right he claims, the injury complained of, and the relief he seeks, with the facts to justify it,—with such accuracy and clearness, and with such detail of the essential circumstances of time, place, manner, etc., as will so make his case as to inform the defendant of what he is called upon to meet; stating, not conclusions of law, but the facts out of which arises his right to some specific relief.

2. The bill may be framed with a double aspect, and ask relief in the alternative, but the states of fact upon which such relief is prayed must not be inconsistent.

3. The bill must not be multifarious,—that is, two distinct grounds of equitable relief, even between the same parties, are not to be joined in one bill.

4. Persons are not improper defendants who are so connected with the case made as to be directly interested in obtaining or resisting the specific relief asked in the bill or given in the decree, such as claimants, by written executory contract, of part of the personal property mentioned in the deed of trust in controversy.

5. Fraud is the judgment of the law upon facts and intents, and the mere general charge of fraud is not sufficient; the bill must allege the specific acts or language which constitute the fraud, or connect them with some specific act for which the defendant is in law responsible.

6. Answers and other pleadings, except in cases of injunction, can only be filed at rules or in court.

7. When, for any proper cause, a court of equity is called upon to take control of the property conveyed by a deed of trust to secure creditors, it generally goes on and has the trustee, or some one in his place, to administer the trusts under its direction, and with its sanction; has the claims and priorities of all parties ascertained and fixed before directing a sale, except for some good reason to be specially shown; and does not disburse the proceeds of sale until it can do complete justice to all according to their respective rights.

8. It is not necessary to the validity of a deed of trust to secure creditors that it should be executed by them. The deed passes the legal title as soon as executed by the grantor and the trustee, and can only be avoided by the dissent or disclaimer, express or implied, of the trust creditors.

9. Such trustee is a purchaser for valuable consideration, and the statute against fraudulent conveyances applies to no such conveyance made bona fide; but an insolvent debtor, with certain exceptions named, can no longer give priority or preference of payment to one creditor over another. See Code, (Ed. 1891,) § 2, c. 74.

10. Where such deed is made for the security of various creditors whose claims are distinct, and where part is illegal or fraudulent, and another part is fair and untainted with fraud, and the deed is not fraudulent upon its face, it will not be held void as to the latter unless they have directly or indirectly had notice of such fraud at the time of the execution of the deed, or in some way participated in the concoction of such fraud.

11. A creditor of the trust debtor assails the deed of trust as made with the intent to hinder, delay, and defraud him in the collection of his debt, and succeeds in his impeachment

of one of the preferred claims, but the other trust creditors subsequent in order of preference successfully resist such charge as to their claims, which are held to be just and honest. *Held*, such assailing creditor will not, in order of payment, be promoted to the place thus made vacant, but must come next in order of payment to the successful bona fide creditors, who will hold the places given them in the deed of trust.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county.

Action by the Zell Guano Company against Samuel J. Heatherly and others to cancel a conveyance of property, and for other relief. Plaintiff had decree, and defendants appeal. Reversed.

W. T. Ice and Dayton & Dayton, for appellants. Sam'l V. Woods, for appellee.

HOLT, J. This was a suit in equity in the circuit court of Barbour county, brought by the Zell Guano Company against Samuel J. Heatherly and others, to set aside as fraudulent a deed of trust executed by Samuel J. Heatherly to secure, in a certain order of preference, his creditors, and to enforce payment of plaintiff's claim against the grantors' property thereby conveyed. Such proceedings were had that the court, on the 23d day of December, 1892, pronounced the decree appealed from, pronouncing the deed of trust fraudulent and void as to the several claims of plaintiff, and the various claims of certain defendants, naming them, who also assailed the trust deed on the same ground, and providing for their payment in the order named, out of a fund in court, the proceeds of the sale of certain personal property conveyed by the deed of trust. The trust debtor and trustee, and six of the trust creditors, obtained this appeal, and they assign eleven grounds of error, which are as follows: "First. It was error not to sustain the demurrer to said original bill, and hold the same to be inconsistent, incongruous, contradictory, and multifarious, and therefore not sustainable in a court of equity. Second. It was error to regard said answers of Timothy Male, the Webster Wagon Company, Thompson & Jackson, and Amos Whiteley to the original bill lodged with the papers in the month of February, 1889, and at no rule day, as filed, or being any part of the record. Third. It was error not to sustain the demurrer to said amended bill. Fourth. It was error to sustain the plaintiff's tenth exception to petitioner Crim's deposition. Fifth. It was error to hear said cause before it was matured at rules, and to dismiss the amended bill as to defendants C. J. and H. L. Roy. Sixth. It was gross error to decree the proceeds of the 197½ acres of land sold pendente lite, and to which 'valid liens' attached before such sale, without ascertaining such liens, and to the satisfaction of other debts admittedly junior in priority to them. Seventh. It was palpable error to disburse at all the proceeds of sale of this

197½ acres without ascertaining how such proceeds had arisen, in whose hands the same were, and the amount thereof. Eighth. It was error to decree to Timothy Male the debt which he, in his own evidence, admitted had been paid to him. Ninth. It was error to hear said cause by piecemeal, and, by declining to ascertain 'the facts necessary' to fix the liens and ascertain who were entitled to 'participate in the proceeds of sale of the real estate,' to satisfy the favored few, and leave the rights of the other creditors unsettled and in utter confusion. Tenth. But above all, and beyond all, it was gross and palpable error to set aside in toto, and declare null and void, as against just creditors whose debts were unassailed, this deed of trust securing their debts, in favor of seven creditors also secured by it; and it is submitted that this is the first time such a thing was ever attempted to be done by a court of equity, where such deed, on its face, did not present such conditions and provisions as to make it fraudulent per se. Eleventh. The court below plainly and palpably erred in not holding said deed of trust good in all its parts, and all of the debts secured thereby, including the one of petitioner Crim, honest, bona fide debts, free from fraud, and in not either dismissing said bill or directing said Melville Peck, trustee, to execute said trust, in all respects, as provided by its terms and stipulations."

1, 3. It was error not to sustain defendants' demurrer to plaintiff's bill and amended bill—First, because they are multifarious and inconsistent; second, because they contain only the general charge of fraud, and do not allege facts sufficient, if true, to make out, prima facie, the charge. This suit is based in part on section 2, c. 133, Code 1891, which is section 2, c. 179, Code Va. 1849, taking effect 1st July, 1850. This statute proceeds on the theory that the rules of equity, without such statute, forbid jurisdiction of a bill by a creditor assailing the fraudulent deed of his debtor until such creditor at large has reduced his claim to judgment or decree. But in Kentucky such a statute seems to have been enacted in 1838. See *Bank v. Huth*, (1844,) 4 B. Mon. 423, 442. For a discussion of the general subject, see *Fleming v. Grafton*, 54 Miss. 79; *Chamberlayne v. Temple*, (1824,) 2 Rand. (Va.) 384. In *Rhodes v. Cousins*, (1828,) 6 Rand. (Va.) 188, 190, Carr, J., says: "It is well-settled law that none but a judgment creditor can have the assistance of equity to control, prevent, or interfere with, in any way, the disposition which a debtor may choose to make of his property. He may destroy it, give it away, convey it fraudulently, or sell it and waste the money, and no creditor at large can stop him by injunction." There must be some specific right of the creditor against the property sought to be subjected, and, having no certain claim upon the property of the debtor, he has no

concern with his frauds. To same effect, see *Tate v. Liggat*, (1830,) 2 Leigh, 84; *Kelso v. Blackburn*, (1831,) 3 Leigh, 299; *McCullough v. Sommerville*, (1836,) 8 Leigh, 415. These cases lead in this state (Virginia) to the enactment of the statute in question. This act first came up for consideration in *Tichenor v. Allen*, (1855,) 13 Grat. 15, and from that day to this, as far as I know, it has been treated as giving a specific lien against the property fraudulently conveyed, somewhat after the manner of the law creating a lien by attachment, (see clause 6, § 1, c. 106, Code,) but more especially after the manner of foreign attachment in equity, as given by section 11, c. 151, Code 1849, which required no distinct proceeding, only the affidavit, as the foundation of the order of attachment, to be indorsed on the summons, (see Code Va. 1849, p. 603; Code 1860, p. 648.) In *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, this question, so far as the federal courts are concerned, was fully reviewed, and settled that a claim purely legal, involving a trial before a jury, until reduced to judgment at law, could not be made the basis of relief in equity, because in those courts the right to trial by jury is secured by the seventh amendment to the constitution of the United States. See *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691; *Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977. Our statute has been used for a period of more than 40 years, and has frequently been before the courts of last resort, and has never been supposed to be in conflict with the bill of rights, or with article 2 of the constitution of 1863, or with section 13, art. 3, of the constitution of 1872. See *Manufacturing Co. v. Bennett*, 28 W. Va. 16. The rules governing the general frame of bills in equity and other pleadings are based on general convenience, and are, in the main, the rules of all modern codes of civil procedure. The bill should state the plaintiff's case with reasonable certainty,—that is, the right he claims, the injury complained of, and the relief he seeks,—with such accuracy and clearness, and with such detail of the essential circumstances of time, place, manner, etc., as will inform the defendant of the nature of the case he is called upon to meet, stating, not conclusions of law, but the facts out of which arises his right to some specific relief. The case intended to be made must be certain, and the allegation of the necessary material facts to make it must also be certain. See *Story, Eq. Pl.* (10th Ed.) §§ 239, 242. Every fact necessary to make out the case must be certainly and positively alleged, for the court pronounces its decree as based upon the allegations, as well as on the evidence; but it is generally enough to state the main fact, and the circumstances which go to establish it need not be minutely charged. "A bill must not state two inconsistent states of facts.

and ask relief in the alternative. But it may state the facts, and ask relief in the alternative, according to the conclusion of law the court may draw from them; so that, if one kind of relief sought be denied, another may be granted. And it may state facts of a different nature, not inconsistent with each other, and equally supporting the prayer for relief. In both these cases the bill is said to have a double aspect." 1 *Fost. Fed. Pr.* (2d Ed.) § 70; *Story, Eq. Pl.* § 246. So, also, a bill must not be multifarious; there must not be a misjoinder of plaintiffs, nor a misjoinder of defendants, nor a misjoinder of grounds for equitable relief, held by the same parties, and against the same parties. The cases on the subject of multifariousness are extremely various, and the court, in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule. 1 *Fost. Fed. Pr.* (2d Ed.) § 71 et seq.; *Story, Eq. Pl.* (10th Ed.) 271 et seq. I do not regard either bill or amended bill in this case as multifarious. There is but one plaintiff, and all the defendants are parties to the trust deed assailed as fraudulent, or lien creditors of the trust debtor. The claim asserted by plaintiff consists of two judgments against defendants Samuel J. Heatherly and James E. Heatherly, and two other claims against them not reduced to judgment, as to which plaintiff was but a creditor at large. The object of plaintiff's suit was to avoid as fraudulent the assignment of, and charge upon, the estate of the debtor Samuel J. Heatherly, created by his deed of trust on all his property, dated January 31, 1889, under and by virtue of section 2, c. 133, of the Code, which reads as follows: "A creditor before obtaining a judgment or decree for his claim may institute any suit to avoid a gift, conveyance, assignment, or transfer of or charge upon the estate of his debtor, which he might institute after obtaining such judgment or decree, and he may in such suit have all the relief in respect to said estate which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover." So that there is no misjoinder of plaintiff's grounds for equitable relief against the debtors, and all the other defendants are proper parties, the trustee as holding the legal title, and the trust creditors as interested in both the subject-matter and the object of the suit. They were all interested in obtaining or resisting the relief prayed for in the bill, or granted in the decree complained of. Plaintiff's grounds of equitable relief are not so distinct and unconnected as to sustain separate bills. It is merely the case of one creditor with two judgments, and two claims which are made inchoate liens upon the specific property, by filing his bill to remove the deed of trust as an impediment fraudulently put by the debtor

in the way of their satisfaction; and he could not maintain separate and distinct suits thereon, impeaching the deed of trust. And "to support the objection of multifariousness to a bill in equity, because the bill contains different causes of suit against the same person, two things must concur: First, the grounds of suit must be different; second, each ground must be sufficient as stated to sustain a bill." *Brown v. Deposit Co.*, 128 U. S. 403, 410, 9 Sup. Ct. 127.

Is the bill inconsistent,—is it framed with a double aspect, praying relief in the alternative on two inconsistent cases, two inconsistent states of facts? Two answers may be made to this: First. Alternative relief is not prayed for in either original or amended bill. It simply prays that the deed of trust may be declared fraudulent, and set aside, as to plaintiff's claims; that the lands, or so much as may be necessary, may be sold to pay the same; and for general relief. Discovery is sought from the various defendants, and various allegations are made in order to bring out such discovery, and some of these facts alleged for that purpose are of different natures, and some, perhaps, inconsistent. But they are not the state of facts that go to make out plaintiff's case as the foundation for the relief prayed for; they are merely ancillary to the case alleged. For example, plaintiff alleges that notes given for vendor's liens retained by R. T. Talbott in his sale of the tract of land of 197½ acres to defendant Samuel J. Heatherly are apparently outstanding; that plaintiff has no means of knowing what amount of said purchase money, if any, remains unpaid, or which of defendants are entitled to receive the same. He therefore charges that the whole has been paid, and that the lien reserved in the deed has therefore been satisfied and extinguished; so that, if the parties stand out, the bill may be taken for confessed, and delay avoided. So, plaintiff charges that it, and other creditors put, in order of preferment, low down in the deed of trust, will wholly lose their debts if the rents and profits are not sequestered and held for those ultimately entitled. I fail to see how that amounts to any inconsistency of any kind. It charges that the large debt secured to defendant Crim, high up in the deed of trust, (virtually in front,) is fictitious, having no real existence,—good, however, between parties, but not good against plaintiff; but, if a genuine debt, large assignments of bonds, notes, etc., have been made to him by the debtor, or one of the debtors, enough to pay it. It prays a discovery as to this large debt secured, its postponement, etc., all of which may well consist with plaintiff's case as he makes it in his bill. The cattle (100 head of three year olds) are granted and described in the deed of trust as embraced in an executory contract of sale, Heatherly to keep the cattle, to be delivered any time from August

20 to September 20, 1889. The deed of trust was dated and executed January 31, 1889, but the right was reserved to feed the hay, grain, etc., mentioned in the deed of trust to the cattle until they were delivered,—some seven or eight months. This may have been the best that could have been done, but it is not on its face so conclusively so as to justly debar plaintiff from alleging it to be otherwise, and praying for a receiver. I need not consume time as to various other objections; such, for example, as that the trustee is an attorney at law, the son-in-law of defendant Crim; that as to some of the debts the debtor is but surety, and that he has solvent cosureties. Such allegations do no harm, if they do no good, as it turns out in this particular case.

The next and last ground assigned why the demurrer to the bill should have been sustained is that plaintiff had no ground of equitable relief except to assail the deeds of trust as fraudulent, and that this is sought to be done by the simple allegation "that plaintiff charges that said deed of trust was made by said Samuel J. Heatherly with intent to hinder, delay, and defraud plaintiff and the other creditors of Samuel J. Heatherly in the collection of their said claims." The law is well settled that a general charge is not sufficient, (*Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909, where the charge is, "Said last-named deed of trust is fraudulent and void, and the act of making it not within the corporate purposes for which said company was formed," etc.) for such a naked charge of fraud would be a mere conclusion of law, without any statement of circumstances or evidentiary facts by which it could be supported, or from which it could be drawn. The bill must allege the specific acts or language which constitute the fraud, or connect them with some specific act; for, until connected with some specific act for which one person is in law responsible to another, they have no more effect than other words of unpleasant significance. *Ambler v. Choteau*, 107 U. S. 586, 591, 1 Sup. Ct. 556. The particulars of the fraud must be set out, (*U. S. v. Atherton*, 102 U. S. 372,) and some injury as the result of such fraud. "It is most essential to the administration of justice in a court of equity that the nature of the case, where it is constituted of fraud, should be most accurately and fully stated in the bill of the plaintiff. It is impossible to give relief merely on the general charge that something has been done by a party, or has been obtained from a party, under the influence of fraud. It must be shown in what the fraud consists, and how it has been effected." Lord Westbury, in *Land Co. v. Conybeare*, 9 H. L. Cas. 711; 1 Bigelow, *Frauds*, c. 8, p. 114 et seq.; *Walt, Fraud. Conv.* § 141. Fraud is the judgment of law on facts and intents. *Pettibone v. Stevens*, 15 Conn. 26; *Sturtevant v. Ballard*, 9 Johns. 342. But this bill fully

meets and fulfills the requirements of that test. It charges that the debtor Samuel J. Heatherly was insolvent, of which fact defendant Crim had knowledge; that the debt secured by the deed of trust to defendant Crim of \$8,100, to which a preference was given, was fraudulent and fictitious, and that the trust debtor was not indebted to said Crim in any sum whatever, and that said claim was secured and preferred in said deed of trust with intent to defraud, hinder, and delay the plaintiff and other creditors of the grantor Samuel J. Heatherly, with intent to repay the same to said Heatherly for his own use and benefit; that unless the 100 head of cattle are sold at once, and they are fed until September 20, 1889, as required by the trust deed, they will, without profit to the creditors, consume all of the grain and other provender, worth \$800; and that the whole property conveyed is wholly insufficient to pay the claims charged on the property thus conveyed in trust for their payment. In the amended bill the charge is made that Samuel J. Heatherly was trying to borrow money for the ostensible purpose of paying debts for which he was not then pressed, but in fact for the purpose, and with the intent, to place the same beyond the reach of his creditors; and that defendant Crim, with full knowledge of all the facts and circumstances set forth, and well knowing that the real purpose and intent of Heatherly was to obtain all the ready money he possibly could upon the credit of his real and personal property, and thus place the same beyond the reach of his creditors, on the 31st day of January, 1889, entered into a corrupt and fraudulent agreement with the said Samuel J. Heatherly, whereby it was agreed that, if Heatherly would secure certain debts for which Crim was responsible as his indorser, he (Crim) would let Heatherly have the further sum of \$6,500 in cash, provided Heatherly would secure him for all said sums by deed of trust conveying all his property, real and personal, to a trustee for that purpose; that on January 31, 1889, by deed of trust of that date, this scheme was consummated, and preference given the \$6,500 paid over by Crim to Heatherly, who never used any part thereof to pay any debts, and that he never intended to use the same for that purpose, etc. Whatever else the bill may lack or be deficient in, explicitness of detail of facts and intents constituting fraud in the judgment of the law is no part of its deficiency or lack of statement; for the facts which constitute the fraud alleged are set out, and, if true, they make out the charge.

The second assignment of error is that the answers of Timothy Male and others were not filed at rules or in court and therefore became no part of the record. Timothy Male and five other defendants attempted to file answers charging that the trust was made to defraud them and other creditors, as charged in plaintiff's bill, and prayed, al-

so, for affirmative relief, that the deed might be set aside for such fraud, etc. These defendants had their answers marked "Filed" by the clerk on the 16th day of February, 1889, which was not a rule day, and not in term. Answers, etc., except in cases of injunction, can only be filed in court or at rules. See *Goddin v. Vaughn*, 14 Gr. 102, 130; *Hayzlett v. McMillan*, 11 W. Va. 464, 478. The five answers, viz. of C. C. Martin & Co., Thompson & Jackson, Timothy Male, the Webster Wagon Company, and of Amos Whiteley, should all have been treated by the court as filed at the same time, viz. at March rules, 1889, and it was error in the court to treat them as filed at any earlier date, viz. the respective dates at which they were left with the clerk to be filed.

The fourth assignment of error relates to the sustaining of exception No. 10, taken by plaintiff to defendant Crim's deposition taken on his own behalf. On the 24th day of October, 1890, plaintiff took the deposition of a witness. On the 29th day of November he gave defendant Crim his affidavit of that date, stating, among other things, that on the — day of February or March, 1889, and at a subsequent day, (date not given,) the suggestion was made to him by plaintiff's counsel that if he would guaranty to them—plaintiff and one of the defendants assailing the deed of trust—that he (witness) would testify to enough to gain this cause, they would give him (the affiant) a sum of money named, which affiant refused to accept. On the 19th day of October, 1891, defendant Crim commenced the giving his deposition on his own behalf, which was protracted until the 28th day of October, 1891, when it was closed, and near its close, on direct examination, he was asked if he had had any conversation with the witness Chrislip, and in answer to that question produced the affidavit of Chrislip, detailing all that Chrislip said about it. To the deposition of Crim, plaintiff indorsed 10 several exceptions, the tenth one being to so much of the answer of Crim on his redirect examination to question No. 3, etc., as details the statements made by A. G. Chrislip in regard to conversations pretended to have taken place between Chrislip and plaintiff's counsel, as the same was irrelevant, incompetent, immaterial, and not admissible, and the affidavit and testimony of defendant Crim in introducing and filing the same. The court overruled all the exceptions except No. 10, which it sustained by order of November 12, 1891. There was no error in this action of the court. It was not proper to attempt to bring this matter into the evidence in the cause. If defendant supposed there was any foundation for the charge of an attempt to tamper with the witness, it should have been brought to the attention of the court in some one of several proper modes. It can only be excused on the ground that the suit seems to have developed a great deal of bitterness between

some of those connected with it and defendant Crim. What steps, if any, the court took to have the charge investigated do not appear.

Appellants' assignment of error No. 5. It was error to hear the cause before it was matured at rules, and to dismiss the cause as to defendants C. J. and H. L. Roy. H. L. Roy was examined as a witness for plaintiff, and the record shows that Pickens was served with process, but that neither of the Roys ever appeared, or were served with the writ of summons. All three were made parties to the original bill, and served with process, but neither ever entered any appearance at any time. There was a written contract dated October 1, 1888, by which Pickens sold and delivered to defendant Samuel J. Heatherly 100 head of two year old cattle, for which Heatherly was to pay Pickens $3\frac{1}{4}$ cents per pound when weighed at the scales, and Heatherly paid down on the cattle \$1,057.50. By this contract, Heatherly agreed to keep the said cattle until the 20th day of August, 1889, at which time, or, rather, say at any time between August 20 and September 20, 1889, Pickens agreed and bound himself to buy said cattle back again at $4\frac{1}{4}$ cents per pound, payable at the scales in cash, when weighed. It was signed by both parties, and afterwards signed by the two Roys, who state, in writing in the contract above their names, that they together were a half partner with Dever Pickens in the said within contract, and thereby ratified the said contract to the extent of one-half of said Pickens' liability therein. The trustee in the deed of trust, M. Peck, to whom the cattle were conveyed and transferred, was directed to feed and keep these cattle, and carry out and fulfill this contract on the part of Heatherly, for the benefit of his creditors thereby secured; and this contract, and the recital thereof, and direction thereby given in the deed of trust, are stated and alleged in plaintiff's original bill. There is no allegation on the subject in the amended bill. Pickens is not, but the two Roys are, made parties defendant to the amended bill. The evidence tends to show that this 100 head of cattle were worth at the contract price, at the day of delivery, about \$3,000. They were an important part of the subject-matter of the suit. Pickens and the two Roys were interested therein, with nothing to show that they had ever relinquished such interest. They were proper parties in plaintiff's case as made by his pleadings, and in the relief sought, and the order of sale entered by the court, and in the proceeds. The cause should have been matured as to them; at any rate, it should not, in the interest of the other defendants, have been dismissed by plaintiff, as was done as to defendants Pickens and the two Roys. The trustee, M. Peck, under the order of the court, sold these cattle for cash on the 3d day of October, 1889, at \$3.17 per 100 pounds, to defendant Crim, for

\$4,270.30, and the purchase money seems to be in court to the credit of the cause. They were interested in the cattle; are interested in the proceeds of sale, in the decision made, or to be made, which ought to have provided for and settled their claims or rights, if any, in the matters decided; and, as these proceedings manifestly affect their rights and claims, they should have been retained as parties, so that they would have been bound by the orders and decrees of the court in that behalf, and the matters of conflicting claims settled completely, and not left half done. I would conjecture that they were willing to relinquish all claims under their contract; but it should not be left to conjecture, but should have been settled, one way or the other, by the estoppel that would have resulted from simply retaining them as parties. I do not know that putting them back would now answer any useful purpose. I infer not. It has passed that point. The low price at which the cattle sold, compared with what they were to give, has worked a practical settlement.

Assignments Nos. 6 and 7, that no sale should have been decreed and made pendente lite without ascertainment of the "valid liens" against the property "admittedly" older than those decreed, or to disburse the surplus proceeds of sale of the tract of land of 197½ acres, called in the deed of trust the "Talbot Tract," which appears, from allusions made to it in testimony, to have been sold in some suit brought to enforce the vendor's lien, and still pending. That suit ought to have been heard with this one, or have been referred to in some way, so that it could have been looked into, if necessary; and the decree complained of, and this record, show that such looking into was necessary in the court below, and, as the case stands, if affirmed, would be necessary here. The record shows that J. Hop Woods and J. M. Kirk had attached this 197½ acres before it was conveyed by the deed of trust; that it had been sold to enforce payment of some balance of purchase money, secured by vendor's lien reserved, in some suit in the name of J. W. Proudfoot, still pending. All this certainly appears from something incidentally let fall by one or more of the witnesses, but vaguely and obscurely, as to what the court must know definitely and clearly before making it the subject of a decree in this, an independent suit against this land, as one of the tracts embraced in the deed of trust herein assailed for fraudulent preference given. And, more than that, this decree proceeds on the theory that there is a surplus in court to the credit of the Proudfoot suit, after satisfying the plaintiff's vendor's lien. This surplus, if any, (which I take to be doubtful from what is said about it by the witness,) is still real estate, so far, at least, as the enforcement of specific liens against it before sale are concerned. See Pickens v.

Kniseley, 36 W. Va. 794, 15 S. E. 997; Fowler v. Lewis, 36 W. Va. 150, 14 S. E. 447; 3 Pom. Eq. Jur. § 1167.

The gist of the decree of December 23, 1892, appealed from, reads as follows: "And the court, having maturely considered the pleadings and proofs in these causes, is of opinion that the deed of trust executed by Samuel J. Heatherly to Melville Peck, trustee, on the 31st day of January, 1889, was made by the said Heatherly with intent to delay, hinder, and defraud his creditors, and especially the plaintiff in said first-named cause, and the several defendants, C. C. Martin & Co., Thompson & Jackson, Timothy Male, Webster Wagon Co., and Amos Whiteley, in the collection of their several demands against him, and the petitioner, James A. Williamson, in the collection of his debt of \$153.52, with interest from the 18th day of February, 1889, and two dollars and eighty-five cents against him, mentioned in his said petition No. 1, and that the said Melville Peck, trustee, had notice of said fraudulent intent of Samuel J. Heatherly. It is therefore adjudged, ordered, and decreed that the said deed of trust dated January 31, 1889, executed by Samuel J. Heatherly to Melville Peck, trustee, as to the several debts due from Samuel J. Heatherly to the plaintiff, the Zell Guano Co., and to the several defendants, C. C. Martin & Co., Thompson & Jackson, Timothy Male, Amos Whiteley, Webster Wagon Co., and as to the debt of \$153.52 due to the petitioner, James A. Williamson, is fraudulent and void; but nothing herein contained shall in any manner impair the force, effect, or priority of any valid lien against the real estate of Samuel J. Heatherly which existed on or before January 31, 1889, in favor of any of the parties to these causes, or which may have been since acquired by any of them; and all such rights not extinguished, and all remedies to enforce the same, are reserved to such parties, respectively. And it appearing to the satisfaction of the court from the pleadings and proofs herein that the defendant Samuel J. Heatherly, on the 31st day of January, 1889, was indebted as follows: To the Zell Guano Co., \$1,221.82, amounting, on the 13th of October, 1892, including interest and \$8.00 costs, to the sum of \$1,496.05; to the defendant C. C. Martin & Co., \$342.96, with interest from the 7th of November, 1888, amounting, on the 13th of October, 1892, to \$422.95; to Thompson and Jackson, \$1,044.27, amounting, on the 31st of October, 1892, including interest and \$24.70 costs, to \$1,316.57; to Timothy Male, \$49.50, with interest from February 11, 1889, and \$2.40 costs, amounting, on the 13th of October, 1892, to \$62.80; to Webster Wagon Co., \$2,212.16, amounting, on the 31st of October, 1892, including interest, to \$2,667.02; to Amos Whiteley, \$1,820.15, amounting, on the 31st of October, 1892, to \$2,218.97; to James A. Williamson, his said debt, amounting, on

the 31st of October, 1892, to \$190.00,—all of which remains unpaid,—it is further adjudged, ordered, and decreed that the defendant Samuel J. Heatherly do pay to the plaintiff, the Zell Guano Company, the sum of \$1,496.05; to the defendant C. C. Martin & Co., \$422.95; to Thompson & Jackson, \$1,316.57; to Timothy Male, \$62.80; to Webster Wagon Co., \$2,667.02; to Amos Whiteley, \$2,213.97; and to petitioner, James A. Williamson, \$190.00,—with interest upon each of said several amounts from the 31st day of October, 1892, until paid. And the court being further, of the opinion that the plaintiff in said first-named cause, by the institution of its suit on the 2d day of February, 1889; and the several defendants,—C. C. Martin & Co., by the filing of their answer on the 6th day of February, 1889; Thompson & Jackson, by the filing of their answer on the 12th day of February, 1889; Timothy Male, by the filing of his answer on the 16th day of February, 1889; Webster Wagon Co., by the filing of its answer on the 18th day of February, 1889; Amos Whiteley, by the filing of his answer on the 23d day of February, 1889; and the said Williamson, by the filing of his petition No. 1 on the 7th day of September, 1891,—severally acquired liens upon the real and personal property of the said Samuel J. Heatherly in said deed of trust, and upon the proceeds of the sale thereof, mentioned in the report of said special commissioner, Peck, for the amounts of their several debts, in the following order of priority, that is to say: First, Zell Guano Company, for \$1,496.05, as of the 2d day of February, 1889; second, C. C. Martin & Company, for \$422.95, as of the 6th day of February, 1889; third, Thompson & Jackson, for \$1,316.57, as of the 12th day of February, 1889; fourth, Timothy Male, for \$62.80, as of the 16th day of February, 1889; fifth, Webster Wagon Company, for \$2,667.02, as of the 18th day of February, 1889; sixth, Amos Whiteley, for \$2,213.97, as of the 23d day of February, 1889; seventh, James A. Williamson, for \$190.00, as of the 7th of September, 1891,—it is further adjudged, ordered, and decreed that out of the residue, if any, of the proceeds of the sale of the tract of 197½ acres of land, conveyed to said Samuel J. Heatherly by Richard T. Talbott, remaining after satisfying to him or his assignees, F. M. Durbin, Isaac W. Proudfoot, and Martin E. Lawson, the unpaid purchase money on said tract of land, and the proceeds of the sale of said personal and other real property of the defendant Samuel J. Heatherly in said deed of trust mentioned, there shall be paid to the last-named creditors of Samuel J. Heatherly, in the order of priority above declared, the several amounts above ascertained to be due them, respectively, with interest from the 31st of October, 1892, together with the plaintiff's costs in said first-named cause, and the costs of said several defendants, C. C. Martin &

Co., Thompson & Jackson, Timothy Male, Webster Wagon Company, and petitioner, Jas. A. Williamson, upon his petition No. 1; and that, until the same be fully paid, no part of the proceeds of the sale of said personal and real property of said Samuel J. Heatherly shall be applied to the satisfaction of any of his other debts mentioned in said deed of trust. And the court being further of the opinion that, from the want of proper parties to the petition No. 1 of said James A. Williamson, the questions arising on the face thereof in regard to the relief therein prayed for against the said Samuel J. Heatherly as a cosurety with him on the official bond of James E. Heatherly, as late sheriff of Barbour county, cannot be properly determined, all rights of said Williamson in respect thereto are reserved to him, and he hath leave to amend his said petition, and to make additional parties thereto. And the court not having before it sufficient facts to determine whether any, and, if any, what, liens existed against the real estate of Samuel J. Heatherly before the execution of the said deed of trust, or the character, amounts, or priorities thereof, or to which lands the same attach, it declines for the present to direct the sale of any of said lands. And it further appearing to the court, from the report of Special Commissioner Melville Peck that he sold the personal property mentioned in the deed of trust on the 3d day of October, 1889, for the sum of \$4,890.25, of which, on that day, he received in cash \$4,409.25, and \$481 in notes bearing interest from that day; that he paid out for expenses attending said sale \$17.25; and that his lawful commission for making said sale, and for collecting and disbursing the proceeds thereof amount to the sum of \$106.81,—it is ordered that the said report and sale be confirmed, and that said Peck be allowed to retain said two sums out of the proceeds of said sale as of the date thereof. And the court having ordered the said commissioner, out of said proceeds, to pay James A. Williamson, sheriff, the sum of \$351.74 on the — of October, 1889, and to John Shank, sheriff, \$326.55 on the 22d day of May, 1891, on account of taxes due from the defendant S. J. Heatherly upon the real and personal property in said deed of trust mentioned, which sums have been paid by said Commissioner Peck, it is further adjudged, ordered, and decreed that said Peck be allowed, upon said proceeds, further credits as follows: For said \$351.74 so paid Williamson, as of October 3, 1889, and for said \$326.55 paid Shank, as of May 22, 1891. And the court, with the assent of Commissioner Peck that there is remaining in his hands, out of the proceeds of said sale, including interest accrued thereon to the 22d day of December, 1892, the sum of \$4,920.01, applicable to the payment of the amounts hereinbefore decreed to be paid, it is further adjudged, ordered, and decreed that the said Special Commissioner Peck, out of

the moneys in his hands, do pay, first, to the Zell Guano Company, its costs herein incurred up to this date, and then pay to said Zell Guano Company, C. C. Martin & Company, Thompson & Jackson, and Timothy Male the several debts hereinbefore decreed to them, respectively, with interest thereon from the 31st day of October, 1892, until paid, in the order of priority hereinbefore declared, and their costs, and the residue of said \$4,889.85, amounting to \$——, with interest upon said residue as aforesaid, to the Webster Wagon Company, in part satisfaction of the debt hereinbefore decreed to be paid to them. All other questions touching the amounts, validity, and priority of the several debts claimed to be due the other defendants, and touching their rights to participate in the proceeds of the real estate of said Samuel J. Heatherly in the deed of trust mentioned, after the satisfaction of the several debts hereinbefore provided for, are reserved for such future orders and decrees as may be proper to be made herein."

In the case of *Johns v. James*, 8 Ch. Div. 744, following *Garrard v. Lauderdale*, 3 Sim. 1, it was held that a trust deed by which property is conveyed for the benefit of creditors does not, of itself, create a trust for any of the creditors, but that such an assignment was a mere revocable and controllable private arrangement for the convenience of the debtor, and that there was no trust for the benefit of the creditors; it was a mere revocable mandate, unless the creditor has himself executed the deed,—has been a party to it, and assented to it. See *Johns v. James*, *Brett Lead. Cas. Eq.* 21, 23, and notes; *Lewin, Trusts*, (1st Amer. Ed., by Flint, from 8th Eng. Ed.) c. 20, top page 509 et seq., and notes. And this would be true in this state in such a conveyance to secure debts generally, to which no trustee or creditor is a party; but if it has been sanctioned by previous assent or subsequent ratification, although by subsequent assent or ratification, by act in pais, by trustee or cestui que trust, before the rights of other parties attach, it becomes irrevocably binding. *Skipwith v. Cunningham*, (1837,) 8 Leigh, 271, since followed. See *Spencer v. Ford*, (1843,) 1 Rob. (Va.) 648; 1 *Bart. Ch. Pr.* 102. Deeds of trust have been the favorite mode of securing debts and creating specific liens, and have long been recognized and regarded, to some extent, by statute; and, although not recommended by the revisers, the legislature caused sections 5, 6, c. 117, of the Code of 1849 (now sections 5-8, c. 72, Code W. Va.,—see Ed. 1891, p. 638) to be inserted,—a provision that has been in constant use for more than 40 years. And when, for any proper cause, a court of equity is called upon to take control of the trust property, the general rule is to go on and have the trustee execute and administer the trusts under its direction, and with its sanction, especially where the court, having taken control, prop-

erly sets it aside in part, and lets it stand good as to the residue; the general rule being that, where a decree is entered which manifestly affects the rights and remedies of all the trust creditors, the court goes on and provides for the rights of all the trust creditors in the matter decided, and others having prior specific liens on the property to be sold, ascertaining and arranging such liens, not by piecemeal, but by decrees ascertaining the rights of all, and doing complete justice to all, according to their respective rights, before selling the property, or before distributing the proceeds, if a sale has been made, as is sometimes proper, in advance of such ascertainment. This mode of proceeding as to judgment liens is required, and the mode prescribed, by section 7, c. 139, of the Code. See Ed. 1891, p. 882. So that it was error to distribute, in this case, any surplus fund left over from the sale of the tract of land of 197½ acres—the Talbott tract—at this stage of the cause, when there is nothing in this record to show the amount of such surplus, how it arose, or where it is, or really who is entitled to it.

Assignment No. 8. That it was error to decree payment of the claim of defendant Timothy Male because the record shows it paid. Male was examined as a witness, and his evidence does not show it paid, but assigned by him to defendant A. S. Polling.

Assignment No. 9 has already been considered. The court should go on and ascertain the facts necessary to fix and classify the liens, and determine who are entitled to participate in the proceeds of the sale of the lands, and in what order, and to what extent.

Assignment No. 10 is based on the contention that the decree complained of sets aside the trust deed in toto in favor of plaintiff and other impeaching creditors, although but one of the many debts secured is in any way assailed. This contention is not well founded, except as matter of inference. The decree itself has no such effect by the language used, but may have such meaning and ultimate effect by necessary implication. It reads as follows: "It is adjudged, ordered, and decreed that the said deed of trust, * * * as to the several debts due from Samuel J. Heatherly to the plaintiff, the Zell Guano Co., and to the several defendants, C. C. Martin & Co., [naming the others] is fraudulent and void." Nor does its language anywhere, as far as I can discover, justify any other interpretation than the one which restricts the invalidity expressly pronounced to its effect on the claims of the creditors specifically named, leaving the others in full force and effect, except as to what may follow as the result of the opinion of the court that "Melville Peck, trustee, had notice of the fraudulent intent of Samuel J. Heatherly, the trust debtor." So important a matter should not have been left in such a state of doubt, leaving the rights of the other credit-

ors unsettled and in confusion. The deed of trust assailed as fraudulent in this suit was executed on the 31st day of January, 1889, by defendant Samuel J. Heatherly, by which he conveyed to defendant Melville Peck, trustee, all his property, real and personal, to secure and pay all his debts, divided into eight classes, with priority given in the order in which they are numbered: (1) Taxes, etc., outstanding against the grantor, Samuel J. Heatherly; (2) certain holders of vendors' liens on a tract of land called the "Talbot Tract," containing 197½ acres; (3) Joseph N. B. Crim, the sum of \$8,100; (4) a debt to Leonard Mallonee; (5) a debt due the First National Bank of Grafton; (6) to George W. Dickinson and various other creditors, naming them; (7) to Aldine S. Poling, \$300, etc.; (8) and, last, the claim of plaintiff and the other impeaching creditors, and all his other creditors. The personal property was worth about \$5,000, and the land about \$12,000 or \$15,000. Defendant Samuel J. Heatherly had become very much involved in debt as surety or indorser for his son. He had his liabilities and his own debts listed, as far as he could, and posted up, and found that all his property would not pay them. He then set about trying to borrow \$5,000 or \$6,000 by giving a deed of trust on his land for the purpose of putting that much out of the reach of his creditors. J. N. B. Crim had a list of these debts, and knew that Samuel J. Heatherly was broken up, not having property enough to pay these debts against him, yet he loaned him \$6,500 in money, part of the \$8,100, and had the deed of trust executed, as already mentioned. The loan was fictitious, being only intended to help defendant Heatherly to put that much of his property beyond the reach of his creditors, the identical money in the same packages (except \$475) being returned to defendant Crim on the 8th day of January, 1891. He contemplated, when it was loaned, that some of it should be used by Heatherly in satisfying certain liens against the property embraced in the deed of trust, but for some reason this purpose was not carried out; perhaps because, before all the money loaned was paid over to defendant Heatherly, this suit assailing the deed of trust was instituted.

This brings me to what I regard as the turning point in the case: Can this court say, as the circuit court has said, that the trustee had notice of the grantor's fraudulent intent, and, if so, what is the effect? It has long been the settled law of this state that the trustee and creditors in such a deed of trust are purchasers, and not creditors, under the statute against fraudulent conveyances, and that it is not necessary to the validity of a deed of trust that it should be executed by the *cestui que trust*,—the creditor secured. The deed operates to pass the legal title as soon as executed by the grantor and the trustee, and can only be avoided by the dissent,

express or implied, of the *cestui que trust*. *Skipwith v. Cunningham*, (1837,) 8 Leigh, 271. This is based on the presumption that it is beneficial, and, being beneficial, is acquiesced in, until in some way renounced, and hence the assent of the grantee is implied in all conveyances—First, because of the supposed benefit; secondly, because it is incongruous and absurd that, when a conveyance is completely executed on the grantor's part, the estate should continue in him; thirdly, to prevent the uncertainty of the freehold. *Id.* 282. In this case the trustee executed the deed of trust, and thereby affirmatively accepted it, and, the legal title being vested in him, a trust arose in behalf of the creditors in whose favor it was declared, and such trust is irrevocable, and so continues until disavowed or disclaimed by the *cestui que trust*. Seven of the creditors, including the plaintiff, soon expressed their dissent, disclaiming to take under the trust deed, and uniting with the plaintiff in assailing it, and in their favor the decree complained of was entered. Six of the creditors claiming under the deed insist that it is valid, and they, together with the trustee and trust debtor, make up the eight appellants. There can be no reasonable doubt that the deed was executed with the intent to hinder, delay, or defraud the grantor's creditors. Did the trustee participate in it, or have notice of it? When the deed of trust was completed, after dark, the bank was closed, and the money loaned was not paid until the next day, \$5,145, and the residue, \$1,355, on the 4th of February, by check. What there can be about the time of payment, as compared with the precise time when the deed of trust was executed and recorded, that could possibly be construed as untrue in any practical, substantial sense, or as affecting the question of fraudulent intent, I am wholly unable to see. It was contemporaneous with the making of the deed, for all practical purposes, just as it was intended to be. I can see no harm in doing it in that way, and certainly no inculcating significance in the trustee knowing that it was thus done. He was the son-in-law, and to some extent the legal adviser, of defendant Crim. Neither relation disqualified him from being made the trustee. Such relationship is no badge of fraud; at best, it could only be a circumstance which might, in connection with other things, indicate one in whom secret confidence might be reposed by one of the trust creditors, but not by the trust debtor. Mr. Peck answers both the original bill and the amended bill fully, upon all points calling for answer from him: That the transaction, as far as he had anything to do with it himself, or had any knowledge of the intent and purpose of the grantor, or of any creditor secured, was perfectly bona fide, without any desire or intention on their part to hinder, delay, or defraud plaintiff or any other person; that he is a purchaser for valuable consideration of the trust property, without no-

tice or knowledge of any fraud or fraudulent intent on the part of any one; that he wrote the deed of trust; that up to that time he had no knowledge of either the property or the debts of defendant Samuel J. Heatherly, or of his son, James E. Heatherly, or that he was insolvent; that he believed defendant Samuel J. Heatherly to have been solvent, and on December 10, 1888, believed and supposed him to be worth \$35,000 or \$40,000 above all his own debts and those for which he was liable for others. His deposition was taken, and he testifies to the same facts, and that he had not a particle of interest in any debt secured, direct or indirect, as far as he knew, nor any notice or information, of any kind or character, that any one was attempting or intending to commit any fraud about the execution of the deed of trust; and I have searched this record through and through carefully, without being able to find any fact or circumstance fairly tending, in any degree, to bring home to him any notice of or participation in the fraud or fraudulent purpose of the trust debtor. Therefore, it was error in the circuit court to hold, as it did, in the decree complained of, "that the said Melville Peck, trustee, had notice of the fraudulent intent of Samuel J. Heatherly." Although it was right in holding that the deed of trust was executed by the grantor with the intent to hinder, delay, and defraud plaintiff, and the other creditors who impeach its validity, so far as it is made to secure the debt of \$8,100 it is not, and would not be, right, on the facts disclosed by this record, to hold, inferentially, such deed voidable as to any of the other trust creditors named therein, for the reason that there is no evidence tending in the slightest degree to show that any of such other claims are fictitious, or in any way fraudulent or otherwise invalid, or that such other creditors, personally, or by their agent, the trustee, participated in or had notice of the fraudulent intent or contrivance of the grantor, but, so far as appears, they are honest debts, entitled to be paid, as provided for in the deed of trust. The debt of \$8,100, designated as "No. 3" in the order of payment mentioned in the deed of trust, should be remitted to the foot, and placed in a new class, "No. 8," to be paid last in the order of priority, but plaintiff and other creditors, whose claims were decreed them in the decree complained of, must hold their place assigned them, and have no right to be called up to No. 3, or to occupy the place made vacant by the removal therefrom of the claim of \$8,100, but such vacancy is to be filled by closing up those in the rear in the order named; for, although the rule in this state is that his diligence is to be rewarded who has enlarged the fund to be distributed by removing some fraudulent contrivance that concealed it, yet the qualification of the rule is as well settled as the rule itself, that he cannot displace or impair any prior, valid, subsisting lien, and this has been

held to be a proper qualification of the rule on principle. Here, the good faith of these claims was attacked by charging and attempting to bring home to the holders thereof, in the person of their agent, the trustee, notice of, if not other participation in, the fraud of the grantor; but they have successfully withstood such charge, and their claims still stand as just and honest ones, as prior liens upon the fund as a whole, still subsisting, and not to be debarred of any increase of share incident to their right to hold the place assigned them. These lienors are without fault, with claims without taint, with equal equity, and a legal right. Why should they be put aside or superseded in the order of priority against the fund as a whole, which the deed of trust has given them? But this the court does by its decree, and for such error appellants have also just ground for complaint. See *Hardcastle v. Fisher*, 24 Mo. 70, and *Cohn v. Ward*, 36 W. Va. 516, 15 S. E. 140, where the qualification of the rule is discussed, and vindicated, I think, on principle, as well as on authority, although upon the question there is some conflict. For these errors the decree complained of must be reversed, and the cause remanded for the claims and liens to be ascertained and put in their proper order of priority, and the trust property or fund ascertained and administered under the direction and control of the court. Reversed and remanded.

HULINGS v. HULINGS LUMBER CO. et al.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1893.)

CORPORATIONS — BOARD OF DIRECTORS — FRAUDULENT CONVEYANCES — VENDOR'S LIEN — SUBROGATION — CHECK AS AN EQUITABLE ASSIGNMENT — CREDITOR'S BILL — ORDER OF DISTRIBUTION.

1. A corporation receives its certificate of incorporation and organizes under the act of February 28, 1877, called the "Boom Law." See Code, (Ed. 1891,) p. 1004. The board of directors must be composed of those who are stockholders, but they are not required to be residents of this state.

2. A corporation is unable to pay its debts or further carry on the business for which it was incorporated. Two of the board of directors compose a firm, which is a creditor at large of the corporation for a relatively large amount. The board of directors ordered the conveyance of all its property, real and personal, to be made to a trustee, to secure and pay its debts, giving a preference to the claim of the firm composed of the two directors. These two directors, in violation of the statute, (section 52, c. 53, Code,) were present at the board while the subject of ordering the conveyance giving their claim such preference was being considered, but they did not vote on that question. *Held*, the conveyance giving such preference made by virtue and in pursuance of such order is *prima facie* fraudulent and void as to the preference thus given, when assailed by the creditors, and will be so declared, unless it be shown on behalf of such preferred creditor by the most clear and convincing proof that such preference was not only free from fraud, but was in itself, under the circumstances, both fair and reasonable.

3. Those who sold and conveyed land to the corporation reserved on the face of the conveyance a lien on the land for the payment of the balance of the purchase money. A third person, at the instance of the corporation, advanced the money to pay off and lift such purchase-money notes, with the understanding that he was to hold them as additional security for the money thus loaned and advanced. *Held*, such third person, so paying and lifting from the vendors the purchase-money notes, is entitled, as far as may be necessary, to be subrogated to such vendors' liens.

4. A check operates as an equitable assignment pro tanto from the time it is drawn and delivered, as between the drawer and the payee or holder.

5. A general assignment for the benefit of creditors does not defeat the check holder, although the check be not presented to the bank for payment until after such assignment.

6. A case in which it is *held* that creditors assailing a deed of trust as illegal and fraudulent, and succeeding as to one, and only one, of the claims thereby secured, are not entitled to occupy, in the order of payment out of the trust fund, which is treated as a whole, the place thus made vacant, or to displace, or in any manner lessen or impair, the claims of the bona fide creditors, who are without fault, and therefore retain the place given them in the trust deed.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; Joseph T. Hoke, Judge.

Action in equity by M. Howard Hulings, trustee, against the Hulings Lumber Company, Kenneweg & Co., and others. From the decree rendered, defendants Kenneweg & Co. and others appeal. Reversed.

Dayton & Dayton, C. F. Teter, J. P. Scott, and A. Jay Valentine, for appellants. Carl I. Heydrick and C. Heydrick, for appellees Mitchell & Co. Jos. Sprigg, for appellee First Nat. Bank of Cumberland. A. B. Parsons and W. J. Hulings, for appellee Hulings Lumber Co.

HOLT, J. This is a suit in equity, brought in the circuit court of Tucker county in February, 1891, by the appellee M. Howard Hulings, trustee, against the Hulings Lumber Company and the various creditors of that corporation, in order to receive the instructions and directions of the court, and conform his action thereto, in his administration of the trusts imposed upon him by the deed from the Hulings Lumber Company to him, dated December 1, 1890. Defendants Kenneweg & Co. and 14 other creditors of the Hulings Lumber Company, who are appellants, answered, and by way of prayer, etc., under the statute for affirmative relief, attacked the deed of trust as illegal, fraudulent, and void, and prayed that it might be set aside. Plaintiff replied specially to these various answers, and the issues were made up. On the 10th day of March, 1891, the cause was referred to Commissioner Adams, who was directed to ascertain and report the property, real and personal, of the Hulings Lumber Company, the state and condition of the title thereto, the liens thereon, to whom owing, with their respective

amounts, order, and priorities,—all the facts touching the authorization and execution by the defendant corporation of the three deeds of trust in the bill and proceedings mentioned. In execution of this order, the commissioner took a great deal of testimony touching these matters, and on the 9th of June, 1891, returned a very full report, to which various exceptions were taken and filed. The commissioner filed a supplemental report. On June 20, 1891, the court, without passing upon the report or exceptions thereto, and by consent of all parties, decreed the sale of all the property, real and personal, in this state, belonging to the Hulings Lumber Company, and appointed commissioners to make the same. A sale was made at the price of \$95,005, and reported, but the court, by decree of August 28, 1891, refused to confirm the same for inadequacy of price, set it aside, and directed a resale, and by the same decree ordered the First National Bank of Cumberland to pay Kenneweg & Co. \$947.25, amount of a check in controversy. On the 2d of December, 1891, the cause came on for hearing on the merits, on the commissioner's report, exceptions thereto, and other papers, and the court, on mature consideration, overruled all the exceptions, except that of Ann M. Garrison, which was sustained, placing her claim in the seventh class. In all other respects the report of Commissioner Adams was approved and confirmed, subject to certain modifications set out in the decree. By this decree the court held valid the three deeds of trust on the property in question, and directed the payment of the various liens in the order thus provided for, and as reported by the commissioner. From this decree these 15 defendants, on January 30, 1892, obtained this appeal, assigning the following grounds of error: (1) It was error to overrule the various exceptions to the commissioner's report. (2) It was error to uphold, under the circumstances, the debt of \$35,000 of defendants F. W. Mitchell & Co. (3) It was error to refuse to hold all three deeds of trust nullities, and to refuse to decree defendants' several debts as just liens on the property of the corporation, in the order of the filing of their several answers praying such affirmative relief. (4) It was error, in any event, to sustain the debt secured in the last trust deed to defendants Hulings & Co., and to refuse to postpone it to petitioner's debts.

The important facts of the case are as follows: On the 20th day of February, 1884, Marcus Hulings, Willis J. Hulings, Noah F. Clark, John E. Butler, George W. Dorr, of Oil City, Pa., and William B. Maxwell, of St. George, W. Va., received from the secretary of state of West Virginia, their certificate of incorporation, creating and declaring them from that date a corporation, by the name of the Hulings Lumber Company, until the 1st day of February, 1915. See Sess.

Acts 1885, p. 467. This certificate is the charter of the company. Quite a controversy has been raised and discussed as to what chapter of our Code or act of the legislature this company was organized under. This is due, in part at least, to some acts which were not incorporated into the revisals subsequent to the revisal of the West Virginia Code of 1868, especially Act Feb. 28, 1877, (see Acts 1877, p. 178;) as amended by Act March 10, 1881, (see Acts 1881, p. 296;) as again amended by Act Feb. 9, 1882, (see Acts 1882, p. 15;) again amended by Act Feb. 20, 1883, (see Acts 1883, p. 34;) again amended by Act Feb. 27, 1885, (see Acts 1885, p. 47;) again by Act Feb. 20, 1880, (see Acts 1889, p. 39.) This act, authorizing the erection of booms, etc., was originally confined to a few counties in the state, and the amendments were chiefly confined to making it apply from time to time, to additional counties. The act of March 10, 1881, introduced for the first time the county of Tucker as one of the counties to which the act of February 28, 1877, applied. This was the only amendment of section 1, but, in addition, sections 21, 23, 24, and 26 were amended and re-enacted; so that the act as thus amended, reads as we now find it in the Code of 1891, (Append. p. 1004,) except the addition of other counties, by amendments of section 1 afterwards made. This company was organized for the purpose of buying, selling, and manufacturing timber, etc., for operating lumber mills, constructing a boom in Tucker county on Cheat river within two miles, and below the mouth of Shafer's Fork, etc. When we look at the act of 1877, as amended by the act of 1881, authorizing the construction of a boom in Tucker county, and by the twenty-first section conferring the power, among other things, to purchase, sell, and hold timber lands, there can be no question but that this lumber company, owning a boom, sawmills, and about 25,000 acres of timber lands on Cheat river and its waters, was organized under this act, for by no other statute do we find all these powers conferred. Under this act, therefore, it received its charter or certificate of incorporation. It organized at Oil City, Pa., on the 20th of February, 1885; Marcus Hulings having subscribed for 100 shares, of \$100 each; Willis J. Hulings, 1,275 shares; Noah F. Clark, 10 shares; George W. Dorr, 10 shares; and William B. Maxwell, 5 shares,—making 1,500 shares, of \$100 each, \$150,000, the amount of the capital stock, of which \$25,000 were paid in pro rata by the stockholders. The board of directors then and there elected were Noah Clark, J. E. Butler, J. C. Simpson, Samuel Justice, Marcus Hulings, George W. Dorr, and W. J. Hulings. W. J. Hulings was elected president, J. E. Butler treasurer, and D. W. Osburn secretary. Its principal office or place of business has always been Oil City, state of Pennsylvania, with a branch office at St. George, Tucker county, W. Va., the county where much of its property is

situated. On the 6th day of February, 1886, the lumber company, being in need of some thirty or forty thousand dollars to pay off and lift from the several vendors the balance of the purchase moneys respectively due them on the several tracts of land which they had sold and conveyed, reserving on the face of the conveyances liens for such unpaid balances, induced defendants F. W. Mitchell & Co., bankers of Oil City, to lend the money, \$35,000, by giving them a deed of trust to secure the same on the various tracts of land, comprising about 24,800 acres. It was also a part of the agreement that F. W. Mitchell & Co. were to hold, as further security for the money loaned, the purchase-money notes with their vendor's liens thus paid to the original vendors and taken up. This agreement was carried out. The deed of trust of February 6, 1886, on all these lands, (29 tracts,) was duly executed by the company, conveying the same to C. M. Husbands, Jr., trustee, and was duly acknowledged and admitted to record in the counties of Tucker and Randolph, where the lands lie, and the purchase-money notes were lifted and turned over to F. W. Mitchell & Co., who still hold them, unpaid, as further security under the agreement. On the 1st day of July, 1889, the lumber company, being still further in need of money to carry on its operations and pay its debts, conveyed all its real property situate in Tucker county, describing it, to William H. Wise, trustee, to secure the payment of 75 bonds, of \$1,000 each, which deed was also duly executed, acknowledged, and admitted to record in the county of Tucker. These bonds were never sold, but were hypothecated to various banks and individuals as security for money loaned the lumber company, aggregating the sum of about \$49,500. Both of these trust deeds are recited as subsisting liens in the trust deed of general assignment to pay debts executed to M. Howard Hulings, trustee, the plaintiff in this suit.

It is claimed on behalf of appellants that all three of these deeds of trust are nullities, and therefore confer no liens and give no preferences, because the directors, one and all, are now, and have been from the beginning, nonresidents of this state, and that it is subject to section 49, c. 53, of the Code, which on this point reads as follows: "They [the stockholders] may in general meeting by a bylaw prescribe the number of which the board [of directors] shall consist; but unless a different number be so prescribed there shall be five directors. They may also by bylaw prescribe the qualifications of directors; but if it be not otherwise provided, every director must be a resident of this state and a stockholder." But, in my opinion, this point is not well taken, for the following reasons: (1) This company obtained its certificate or charter of incorporation under section 3, c. 121, of the Acts of 1877, giving—First, the name of the proposed corpora-

tion; second, the place at which it was proposed to construct its boom, dams, etc., within two miles below the mouth of Shafer's Fork of Cheat river, Tucker county; third, the place at which shall be established and maintained the principal office, viz. Oil City, state of Pennsylvania; fourth, the time of commencement, etc.; fifth, the amount of capital stock, viz. \$150,000, the number of shares, 1,500, each of the par value of \$100; sixth, the names and places of residence of the several persons forming the association for incorporation, and the number of shares subscribed by each, showing that 5 of the corporators subscribing for all the capital stock, except the nominal amount of 5 shares out of the 1,500, are nonresidents of this state, and residents of Oil City, Pa. (2) Section 6 of the act of 1877 provides that every corporation organized under the provision of this act shall hold its first meeting at such time and place as may be designated by the corporators thereof, and all subsequent meetings at such place or places, in or out of this state, as the directors may from time to time appoint, except as hereinafter specially provided; and the stockholders shall have authority at their first meeting or any subsequent meeting to fix and determine the place of meeting (in or out of this state) of the directors, and the principal office or place of business of said corporation. Such corporation shall have and maintain an office or place of business in this state for the transaction of business, specifying what must be done and kept there with great detail and particularity; and so with section 7. The act of 1877 comprehends the provisions of section 49 of chapter 53 of the Code, covering the same ground to their exclusion in the case of boom companies. Like section 48, c. 53, it prescribes that, if the by-laws fix no place for the annual meeting of the stockholders, then it shall be held at the principal office or place of business of the corporation; in this case, at Oil City. It provides that the number of directors shall be not less than 5, nor more than 13, and prescribes as their qualifications that they shall be stockholders, not that they must be residents of this state and stockholders, as in section 49; thus covering the ground completely, in default of by-law, both as to the place of meeting and the number and qualifications of directors. Chapter 181 of the Acts of 1872-73, to which it is made subject, relates to the right of the voting stockholder to cumulate his votes, (see Acts 1872-73, p. 535,) and section 29 of the act of 1877 does not alter the construction in this respect; for section 49, c. 53, on this point, as well as on many others, is plainly excluded by this act as covering fully the same grounds with inconsistent provisions. In fact, the main purpose of companies such as this is to buy and own timber lands, and manufacture and sell lumber; and this cannot be done, so far as holding the necessary quantity of tim-

ber land is concerned, under any other act or chapter. See fifth clause of section 21 of the act of 1877. Any other construction than this would contravene its main purpose, and render idle and nugatory its charter.

Defendants Willis J. Hulings and John E. Butler, who were the partners composing the firm of Hulings & Co., conveyed to the corporation property estimated at about \$7,000, consisting of mills, boom, saw logs, tools, horses, and camp equipage; and Marcus Hulings and wife conveyed to it about 21,000 acres of timber lands, situated in the counties of Randolph and Tucker. When Mr. Hulings obtained title to these lands, he gave his notes for deferred payments, his vendors retaining in their respective deeds liens therefor; and at the time of his conveyance to the corporation there were outstanding, and not yet due, \$28,837.70 of these liens, with interest, and in his deed to the corporation he retained a vendor's lien for the same amount, agreeing, however, that the discharge of any of these liens to his vendors should work a discharge pro tanto of the lien retained by him. Subsequently the Hulings Lumber Company acquired title to about 4,000 acres of other lands, by consummating mere options to purchase, which M. Hulings held, and upon which vendor's liens were retained in the deeds of conveyance to the extent of about \$8,750. This includes interest to June 12, 1891. Thus, the Hulings Lumber Company, in the year 1885, became the owners of about 25,000 acres of land, charged with the payment of these sums, to the amount of \$28,837.70; for the payment of which the vendors selling to M. Hulings retained liens upon the face of their respective conveyances, which are of record; and the notes given therefor are not paid, but have been assigned or transferred, and remain unpaid in the hands of other parties, most of them in the hands of defendants F. W. Mitchell & Co. Soon after the organization of the corporation, viz. on November 4, 1885, a directors' meeting was held at Oil City, which has always been the place of the principal office, until, on June 13, 1890, it was changed to Hulings, W. Va., with a branch at Oil City. At this meeting, on November 4, 1885, J. E. Butler, J. C. Simpson, Samuel Justice, George Dorr, Marcus Hulings, and W. J. Hulings constituted the board of directors, and were the owners of 90 per cent. of the stock. W. J. Hulings was president, J. E. Butler was treasurer, and D. W. Osburn was secretary, and there was no change in the personnel of the board or the officers down to March 9, 1887, when, Dorr having resigned, at a meeting of the stockholders they were all selected, except that F. H. Steel was elected a director in the place of G. W. Dorr. This act of 1877 vests all the corporate powers in the board of directors, and section 1, c. 52, which treats of corporations, generally declares what a corpora-

tion shall be, and enumerates its powers; and among them it may sue and be sued; plead and be impleaded; contract and be contracted with, by simple contract or specialty; purchase, hold, use, and grant estate, real and personal; appoint officers and agents, prescribe their powers, duties, and liabilities; take bond and security from any of them, and fix and pay their compensation; and make ordinances, by-laws, and regulations for the government of its council, board, officers, and agents, and the management and regulation of its property and business,—such in fact as the common law itself makes it. See Report of Revisors of Code of 1849, p. 323. The directors of a corporation are, as to all purposes of dealing with others, the corporation itself, and, when convened as a board, they are the primary possessors of all the powers possessed by the corporation. What they do as the representatives of the corporation the corporation itself is deemed to do. See *Ellerman v. Stock Yards Co.*, (N. J. Ch.; filed Dec. 18, 1891,) 23 Atl. 287, 35 Amer. & Eng. Corp. Cas. 388, and notes of editor. A director duly elected or appointed is a director de jure. Those who usurp the office of director, and exercise the functions of the board of directors, under color of the election or appointment in itself not legal, become directors de facto; and the official acts of such board are valid in reference to rights which innocent third parties or strangers to the corporation may thereby acquire, for they are not bound to know—often have no right to know—what goes on in the privacy of the council chamber of the directors or stockholders. The board of directors, at this meeting held at the principal office in Oil City, Pa., on the 4th day of November, 1885, entered an order in their record or minute book, by which they authorized the president, Willis J. Hulings, to negotiate a loan for the purpose, among other things, of paying off the balance of the indebtedness for its lands; and he reported to a meeting of the board held on the 14th of December, 1885, at the same place, that he had negotiated a loan for \$35,000 from defendants F. W. Mitchell & Co., a firm composed of F. W. Mitchell, F. H. Steel, and W. H. Wise. At a directors' meeting held February 6, 1886, at the principal office, W. J. Hulings, the president, presented, and was authorized to execute, to C. M. Husbands, trustee, and did execute, the deed of trust of February 6, 1886, by which the Hulings Lumber Company, by its president, conveyed to the trustee various tracts of land in the counties of Tucker and Randolph, embracing about 24,800 acres, in trust to secure to F. W. Mitchell & Co. the payment of the loan of \$35,000, and the vendors' notes, secured by vendors' liens, retained, were lifted and put in their hands, as assignees or transferees, to hold as additional security for their loan to the lumber company, which loan, with 6 per cent. interest,

payable semiannually, was due November 1, 1887. This is deed of trust No. 1, already referred to.

But in the mean time—that is, from February, 1885, to February, 1886—many of these notes given for the purchase of these lands had fallen due, and defendants, Hulings & Co. took up these notes to the amount of \$8,299.02, with interest to June 12, 1891, composing a part of said sum. They also paid taxes and advanced other sums to the corporation, amounting in all, with interest to December 5, 1890, to \$30,383.07. On December 7, 1886, the Spring Garden Bank of Pennsylvania brought suit in equity, by foreign attachment, in Tucker county, to make these lands liable for a debt claimed by the bank to be due it from Marcus Hulings, upon the ground that the corporation was not in existence when the conveyance was made to it by Marcus Hulings, and that it was voluntary and fraudulent as to his creditors. Such proceedings were had in the court below that on September 7, 1887, a decree was entered holding the deed void, and referring the cause to a commissioner to ascertain and report the liens on the lands, etc.; and, upon the coming in of the commissioner's report, the court, on 14th May, 1888, made a decree fixing the amounts and priorities of the various liens on the land, and directed a sale thereof. From this decree the defendant here, the Hulings Lumber Company, appealed, and this court reversed it, holding the conveyance good. See *Spring Garden Bank v. Hulings Lumber Co.*, 32 W. Va. 357, 360, 9 S. E. 243.

In February, 1889, it was determined to enlarge the business, and in anticipation thereof, it seems, the stockholders had each donated one-third of his holdings of stock to the treasury of the company, thus putting into the treasury \$50,000 of stock, which was to be sold at par; and, F. H. Steel and Willis J. Hulings having purchased \$20,000 of this treasury stock at par, J. C. Forgie & Co., on February 5, 1889, were induced to purchase the remaining \$30,000 at par. At a regular meeting of the directors held at Oil City on July 15, 1889, and at another meeting of the directors held at the same place on the 19th day of August, 1889, at which all the directors were present, and at which all the stock was present and represented, except 41 shares out of the 1,500 shares, the president and secretary were authorized and directed to prepare \$75,000 of its first mortgage bonds, of \$1,000 each, bearing 6 per cent. interest, and payable to bearer, with interest payable semiannually, evidenced by coupons of \$30 each, attached,—from 1 to 15, inclusive, due and payable July 1, 1890; 16 to 30, inclusive, due and payable July 1, 1892, etc.; and 61 to 75, due and payable July 1, 1894. See *State v. Standard Oil Co.*, 49 Ohio St. 137, point 2, 30 N. E. 279. To secure the payment of these bonds, the Hulings Lumber Company,

by its president, Willis J. Hulings, by deed dated 1st July, 1889, and duly recorded in the counties of Tucker and Randolph, granted and conveyed to William H. Wise, trustee, all its property in the state of West Virginia, consisting of 24 800 acres of land, situate in those two counties, together with a narrow-gauge railroad, five miles in length, the rolling stock and equipments, the saw-mills and machinery, and all other improvements constructed and erected on the property. This is deed of trust No. 2, already mentioned.

These bonds were originally intended in part to pay off the Mitchell & Co. debt, but were afterwards, by resolution of the board of directors, directed to be hypothecated for other purposes. On August 11, 1890, the president of the Hulings Lumber Company borrowed of the First National Bank of Cumberland, Md., \$10,000, for 4 months, and placed 10 of these bonds as collateral security with the bank; and on August 8th the president of the company borrowed the further sum of \$10,000 of this bank, and deposited \$15,000 of these bonds as collateral. Both sums borrowed were placed in the bank to the credit of the lumber company, and paid out on its checks. The president also borrowed of Simpson, Clapp & Co. \$7,500, and deposited \$15,000 of these bonds as collateral; of George W. Delameter \$6,000, and deposited with him \$10,000 of them as collateral; of Drexel & Co. \$6,000, and deposited with them \$11,000 as collateral; and deposited with Geo. F. Craig & Co. \$15,000, the residue, but they were all equally secured and payable pro rata. At Oil City, December 1, 1890, at a meeting of all the directors, who were also owners of all the stock, except 43½ shares, a resolution was offered and adopted which, after reciting that the Hulings Lumber Company was indebted in various sums, amounting in the aggregate to about the sum of \$141,000, the greater portion of which had already matured, and the residue would mature in a few days, and that it was unable to provide the money to meet its debts, although the value of its real and personal property was believed to be greatly in excess of its entire indebtedness, authorized and directed the president of the company to execute an assignment or deed of trust of all its property, real and personal, to such person as he should deem suitable for that purpose, in trust for all the creditors of the company, with preference in favor—First, to Hulings & Co., for the amount of their just claim; second, to Kay Bros. for \$2,800; and next, to use his discretion in making preference in regard to the other indebtedness of the company, but to be subject to the Husbands deed of trust, and to the Wise deed of trust. This is deed of trust No. 3, already mentioned.

Hulings and Butler, who composed the firm of Hulings & Co., were present, but did not vote. The preference to them was

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not suggested by either of the partners, but by other directors, who knew that Hulings & Co. had been lending the company large sums of money for four or five years, which was expended in betterments of the property, which advancements had been audited and approved by three several disinterested auditing committees, at a time when none of the present creditors at large had any existence. This resolution was carried into effect by the deed of the Hulings Lumber Company of December 4, 1890, by which, by its president, it granted and conveyed all its property, real and personal, to M. Howard Hulings, in trust for the various creditors, and in the order of preference therein named: (1) The debt of F. W. Mitchell & Co., of about \$39,000, secured by the Husbands deed of trust, (No. 1;) (2) for the holders of the 75 \$1,000 bonds under the Wise deed of trust, (No. 2;) (3) all just labor claims, etc., (these have been paid, and are not involved;) (4) Huling & Co., their debt of \$22,907.08, then amounting to \$30,383.07; (5) Kay Bros. & Co., \$2,800; (6) pro rata all other indebtedness of the grantor incurred for merchandise, machinery, and supplies; (7) pro rata all other indebtedness of the grantor not then paid. The trustee was to take possession at once, wind up as rapidly as possible, and pay the debts secured. In 60 days afterwards, he brought this suit to administer his trust under the authority and direction of the circuit court of Tucker county, as already mentioned.

As to the validity of the Mitchell & Co. loan of \$35,000, secured by the Husbands deed of trust. It has already been shown that this company was incorporated under the act of 1877, as amended by the act of 1881, and that it was not governed by section 49 of chapter 53 of the Code; that its directors might all be nonresidents of the state; and that the proper place of meeting both of stockholders and directors was at their principal office or place of business at Oil City, as mentioned and set forth in the charter, unless otherwise prescribed by the by-laws, for in these respects the act of 1877, as amended, is inconsistent with section 49 of chapter 53 of the Code, (see section 29 of the act of 1877;) and, besides, it was the place of meeting prescribed by the by-laws. When this loan was negotiated, and the Husbands deed of trust was executed, F. H. Steel, a member of the firm of F. W. Mitchell & Co., was not one of the board of directors, and did not become one until, after that transaction, he was elected to fill the place of George W. Dorr, resigned. The validity of the Wise deed of trust is attacked on the same grounds, which need not be further discussed. These creditors who hold these 75 \$1,000 bonds can only secure the amount of their debts for which these bonds were hypothecated, \$49,500, and interest, and they do not claim any more. This question touching the validity of these

two deeds of trust was directly submitted to the commissioner. All the books, etc., of the company were to be submitted to him, and the officers to be examined by him. This was done, and Willis J. Hulings rendered before him, on oath, a full, and, as far as I can see, a frank, statement of all the details of the transaction of the board of directors and meetings of stockholders; and the commissioner reports them valid and subsisting liens, and this is confirmed by the circuit court. After a searching examination, this record discloses, so far as I can discover, no substantial ground for impugning the entire good faith of these two trust deeds of the two deeds made to secure them, or to question their honesty or validity in any respect whatever. The claim of F. W. Mitchell & Co. was the aggregate of certain valid and subsisting vendors' liens, retained on the face of the deeds of conveyance to Marcus Hulings before the corporation had any existence. F. W. Mitchell & Co. became the holders of these liens for full value, and at the instance and at the request of the corporation, before any member of this firm had become a director, and by no act of the board of directors since the election of F. H. Steel as a director has their security been improved, or any advantage in any way been gained by them. The bondholders under the Wise deed of trust advanced their money in good faith, upon the hypothecation of these bonds thereby secured, and are clearly entitled to have their money paid back, with its interest, out of the proceeds of the sale of the property, and they ask no more. And this is the law, whether the apparent and acting directors were directors *de jure* or only directors *de facto*. Having already seen that this corporation was created under the act of 1877 and amendments thereof, and that it was not necessary for the directors to be residents of this state, and that they were directors *de jure*, as well as *de facto*, that question, and the questions connected therewith, discussed by counsel, upon the hypothesis of their not being officers of the corporation *de jure*, need not be further considered, except that I wholly fail to appreciate the force of the argument based on any state policy against nonresident directors. The real estate, sawmills, and other property were in this state. The articles of incorporation were recorded in Tucker county, and in the office of the secretary of state; also a copy of their by-laws. It had an office and place of business in this state, in Tucker county, where its property was, and its business of manufacturing lumber was carried on, as required by section 6 of the act of 1877. It was not a corporation created by nonresidents, under the laws of this state, for the purpose of manufacturing lumber in some other state; and I do not see how it differs in any respect from any other corporation organized under the laws of this state for

the purpose of carrying on business therein. In what state the stockholders may happen to reside is a matter wholly indifferent. Not only were their timber lands, boom, sawmills, etc., in this state, but in this state this corporation kept an office for the transaction of business, where an exhibit of all transfers of its stock is kept, in which are kept, for the inspection of any officer or stockholder, books wherein are recorded the amount of capital stock subscribed, and by whom, the names of the owners of its stock, the number of shares held by each person, and the number by which each of said shares is respectively designated, and the amount owned by them respectively, the amount of stock paid in, and by whom, the transfer of said stock, the amount of the company's assets and liabilities, and the name and place of residence of all its officers. It also had a person appointed by power of attorney to accept service of any process or notice.

I see no trouble as to subrogating F. W. Mitchell & Co. to the vendors' liens. It is true that they were, in the ordinary sense, extinguished by payment made to the original vendor of the land out of money advanced by Mitchell & Co., but they were not destroyed, but turned over to these bankers, for the purpose, and with the understanding on the part of the debtor corporation which had agreed to lift them, that they should be treated as still subsisting, and that, as far as it could be done without injury to the rights of others, Mitchell & Co. should be substituted to the rights and remedies of the lienors. This doctrine of subrogation is said to be a creature of courts of equity, suggested by, or with qualification adopted from, the civil law, so administered as to secure substantial justice, without regard to form, and often independently of any contractual relation, and therefore is not allowed where it would work injustice to the rights of others, or defeat or impair any higher supervening equity. See *Sheld. subr.* (2d Ed.) § 1 et seq. Mitchell & Co., having become, or being about to become, creditors by specific lien on the same property, had a right, on that ground, also to lift the vendor's lien, and keep it alive as additional security for the money loaned.

This brings us to the main point of controversy; that is, the validity of the third deed of trust, executed December 5, 1890, conveying all the property of the corporation for the benefit of all the creditors to M. Howard Hulings, trustee, called the "Hulings deed of trust." The question as to the good faith and validity generally of this assignment to secure and pay creditors was also submitted to Commissioner Adams, with directions to take testimony, examine the books and papers of the lumber company, examine on oath the officers of the corporation and others, and report thereon, together with such other matters as he might deem perti-

ment or any party require. This the commissioner has done, returning with his report all the books and papers put in evidence before him, together with all the testimony taken touching the matters referred. In this case the company was insolvent, and two of the directors, on December 1, 1890, when the resolution was passed authorizing and directing this deed of trust, and the preference given the debt of Hulings & Co. to be thus preferred, were the two partners, Willis J. Hulings and J. E. Butler, who composed the firm, and were present; and, although they did not suggest such preference or vote on the adoption of the resolution, this conveyance was prima facie fraudulent and void as to these appellants, who were creditors of the grantor, the Hulings Lumber Company; and the burden is on Hulings & Co., the preferred creditors, to remove this presumption of fraud by clear and convincing proof that such conveyance was fair and reasonable, and absolutely free from fraud. *Sweeny v. Refining Co.*, 30 W. Va. 443, 4 S. E. 431; *Hope v. Salt Co.*, 25 W. Va. 789. Still, it was held that an insolvent corporation, having ceased to do business, has the same power as an insolvent individual to prefer a creditor in a general assignment of all its property for the payment of its debts. *Burr v. McDonald*, 3 Grat. 215; *Pyles v. Furniture Co.*, 30 W. Va. 123, 2 S. E. 909. At the time this trust deed was made, there was nothing in the policy of our statutes which forbade an insolvent corporation to prefer creditors, but the statute on the subject is now changed. See latter clause of section 2, c. 74, Code 1891, (Acts 1891, c. 123.) So that the question is in this case, have Hulings & Co. removed the prima facie presumption of fraud by clear and convincing proof that such conveyance was fair and reasonable, and absolutely free from fraud? Where questions purely of fact are referred to a commissioner in chancery, his finding will be given great weight, though not as conclusive as the verdict of a jury. *Reger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375. In such case his findings will be given great weight, and should be sustained until it plainly appear that they are not warranted by any reasonable view of the evidence, and this view operates with peculiar force in the appellate court, when the findings of the commissioner have been approved by the decree of the court below. *Moore v. Ligon*, 30 W. Va. 147, 3 S. E. 572. Every presumption is in favor of the correctness of the decision of the master. *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355. If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors of law which affected the result. See *Welling v. La Bau*, 34 Fed. 40; *Mason v. Crosby*, 3 Woodb. & M. 258; *Gott-*

fried v. Brewing Co., 22 Fed. 433; *Jaffrey v. Brown*, 29 Fed. 476; *Central Trust Co. v. Texas & St. L. Ry. Co.*, 32 Fed. 448; 1 *Fost. Fed. Pr.* (2d Ed.) § 315; 2 *Bart. Ch. Pr.* p. 656; 2 *Daniell, Ch. Pr.* p. 1317.

What are questions purely of fact within the meaning of the rule? However much Blackstone's definition of "municipal law" has been criticised, it remains with slight modifications (expressing, perhaps, what is already implied) the definition given by common-law courts to this day. See 1 *Hammond's Bl. Comm.* p. 95, notes of editor; 1 *Bish. Crim. Law*, §§ 1, 2, note; *Bouv. Law Dict.*; *Black. Law Dict.* Municipal law is a rule of civil conduct, prescribed or recognized by the supreme power in a state, commanding what, in its opinion, is right or convenient, and prohibiting what is wrong or inconvenient. The rule of civil conduct is based upon certain principles, which can neither be ignored nor left out. These principles, controlled in their application by custom, constitute the common law. The rule, as a definition, makes the principle applicable to a definite class, by one or more common sense, practical characteristics. The point of law is contained implicitly in the judgment of the court, and springs out of the facts guided by the prayer for relief, as shown by the pleadings, to which a rule or principle of law is applied. Hence the point of law implied in the order or judgment prayed for, and given or refused, is always mixed with the facts of the case, in the sense of springing out of them, as the result of the application of some principle or rule. But that is not the true meaning of the term "a mixed question of law and fact." A fact, as distinguished from the law, may be taken as that out of which the point of law arises; that which is asserted to be or not to be, and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule of law. The true meaning can be better shown by an illustration. The question of negligence as a want of ordinary care is generally a mixed question of law and fact, one for the jury, under the instructions of the court. See 2 *Thomp. Trials*, §§ 1662, 1705; *Cooley, Torts*, (2d Ed.) pp. 800, 801, et seq. The prudent man, for the occasion, with reference to what he would do, and therefore what the defendant must have done under the circumstances, is formed in the minds of the jury by the light of the facts as they find them to be, under the instructions of the court as to what the law requires him to do in a given or supposed state of facts, which there is some evidence tending to prove, and so on through all the complications of the various questions of negligence. The questions of fraud are still more complicated, for they hardly ever occur alone, but, whatever the evidentiary facts may be, the question whether they make out a case of fraud or not is a question of law. So, whether the evidence tends

to show fraud is a question of law. See 2 *Thomp. Trials*, § 1935. See, also, *Hooe v. Marquess*, 4 *Call.* 416. There being such evidence, it is generally said to be a mixed question of law and fact, and therefore one for the jury or commissioner. Actual fraud, fraud involving guilt, (scienter guilty knowledge,) may be said to be anything false said or done (not by way of promise de futuro) to the injury of the property rights of another. But the case here involved does not belong to that class, but to what is called "constructive fraud," depending upon a fiduciary or confidential relation between the parties. There was no actual falsehood or deceit, no concealment of facts which the party ought to have made known, but participation in an act which, if held good, would violate a confidence and trust, which the law implies and imposes in a given state of facts, pronouncing such violation of the trust as in some cases conclusively, in others *prima facie*, fraudulent. In this case we start out with the preference given the claim of *Hulings & Co.* as *prima facie* fraudulent. So far as the commissioner had the witnesses before him, and saw and heard them testify, he is the judge of their credibility, as far as it depends on manner and general demeanor. The commissioner reaches the conclusion that the preference given the claim of *Hulings & Co.* is valid, being without taint or suspicion of fraud or unfairness; and he gives the following statement of the evidentiary facts that bring him to this conclusion: "(1) The evidence and records before me clearly show that this sum remained due and owing *Hulings & Co.* several years before the creation of the debts due the persons on whose claims their claim is preferred. (2) These advances were made to the company, which had valuable property, and but little money, to enable it to put things in motion, and give the property available value, with the promise, and no doubt expectation, of speedy repayment out of the timber manufactured into lumber and sold. (3) \$8,000 of it was to lift for the company vendors' liens reserved on the faces of the conveyances from the several vendors on the lands sold and conveyed to *Marcus Hulings*, which the company was bound to pay as a part of the consideration of the purchases and conveyance of these same lands by *Marcus Hulings* to the company; also taxes on these lands. This began in February, 1885, and ran through the years 1886 and 1887. And (4) during these same years *Hulings & Co.* advanced to the lumber company over \$22,000 cash, to pay hands, buy logs and supplies, and pay running expenses, all shown in detail by itemized statements, duly proved, and with vouchers, consisting of checks drawn by *Hulings & Co.* on the *Oil City Trust Company*, to the order and for the account of the *Hulings Lumber Company*. This account was audited by two different audit-

ing committees, of disinterested persons, in the years 1886 and 1888. That the firm of *Hulings & Co.* is composed of *Willis J. Hulings* and *John E. Butler*, who are directors of the *Hulings Lumber Company*; but they did not vote for the resolution giving them the preference, nor did the suggestion thereof come from them, or either of them, though present at the meeting, but was proposed by and voted by the three other directors of the company, who had no interest of any kind in the claim; and that this claim amounts to \$31,063.19, with interest included, computed to 12th of June, 1891." The members of the firm of *Hulings & Co.* were examined by the commissioner, and no doubt he was impressed favorably by, among other things, their full and unreserved statements on all points touching the inquiry he had before him for investigation.

I cannot agree with the commissioner in the conclusion he draws from these facts; for, although the two directors of the lumber company who compose the firm of *Hulings & Co.* did not suggest the preference given their claim, nor vote for it, yet, in violation of the statute, (see section 52, c. 53, Code,) they were "present at the board while the same was being considered," thus bringing them within the rule laid down in *Sweeny v. Refining Co.*, 30 *W. Va.* 443, 4 *S. E.* 431, and *Hope v. Salt Co.*, 25 *W. Va.* 789. The directors of this corporation, of which the members of the firm of *Hulings & Co.* were two, occupy the relation of trustees to this corporation and its property. It was insolvent, without one cent to pay its creditors, save what was conveyed by this deed of trust No. 3. Neither the corporation itself, nor its stockholders, had any longer any beneficial interest in the property, except upon remote and unlikely contingencies; and therefore they are not affected by the fraud in law, if any, of the corporation, brought about by its board of directors. In such case the creditors alone can be affected; in this case, the creditors at large,—those without specific liens. The capital stock was issued and transferred in payment on these 24,800 acres of timber land, and the boom, mills, and lumber plant thereon sold and conveyed to the corporation, and was worth, no doubt, all that the vendors received for it in stock, at par, viz. about \$120,000; so that this "real estate," as we may call it, including therein all the appliances situated on it for cutting, hauling, catching, and manufacturing logs and lumber, represented, as to the creditors, the capital stock paid in. Thus, the stock subscribed has all been paid up. Neither the individual members, the stockholders, nor their property are liable to the creditors. This substitute for and representative of the capital stock constitutes the sole fund to which the creditors may look for the satisfaction of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the

individual liability which exists in other cases. So far as creditors are concerned, it is regarded in law as a trust fund, pledged for the payment of the debts of the corporation. *Wood v. Dummer*, 3 Mason, 308; *Sawyer v. Hoag*, 17 Wall. 610; 1 Beach, Priv. Corp. § 116. See *Hope v. Salt Co.*, 25 W. Va. 789; *Lamb v. Pannell*, 28 W. Va. 663; *Sweeny v. Refining Co.*, 30 W. Va. 443, 4 S. E. 431. See, also, *Mor. Priv. Corp.* § 803; *Wait, Insol. Corp.* § 162; *Cook, Stock, Stockh. & Corp. Law*, §§ 199, 661. "The giving of a mortgage by solvent corporations, to secure payment to a director is viewed with suspicion, but it is legal when perfectly free from actual fraud. [Citing, among others, *Hope v. Salt Co.*, 25 W. Va. 789; *Hotel Co. v. Wade*, 97 U. S. 13.] But, where the corporation is insolvent, an entirely different question arises. There has been difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay a debt to a director in preference to debts due others, either by turning out property to him, or by giving him a mortgage on corporate assets." *Wait*, (see cases cited.) In this state, being *prima facie* fraudulent, I do not think that it has been shown before the commissioner by clear and convincing proof that the preference for the \$22,000 and odd was fair and reasonable to the nonpreferred creditors. The outside creditors, who do not know what is going on indoors, had a right to expect from their trustees a fair and reasonable disposition of their trust property; at least, the right to expect that their trustees would not virtually take all their trust property to pay their own debt. If it be said that the preferred claim of *Hulings & Co.* of \$22,000 has been twice audited and found correct, the reply is, no one questions its perfect fairness and correctness, or that it was advanced to the lumber company when they were in great need, and before these debts of appellant were created, and upon a promise of speedy repayment; but the reply of appellants to this is that their claims have been audited by the commissioner of the court, and also found correct and to be due and payable, and, if not as old as the preferred debt, they were old enough to be in existence when the lumber company failed and made the assignment, and when the two preferred directors occupied with their co-directors the relation of trustees to the corporation and its property, and that this property was a trust fund, pledged for the payments of appellants' claims, on the same footing as the claims of other creditors at large; at least, that their trustees, also, as creditors at large, could not fairly and reasonably consent to or claim the preference awarded them.

Hulings & Co. advanced some \$8,000 to the lumber company for the purpose of lifting vendors' liens, with the understanding that they were to hold these liens or purchase

money notes as security for the money thus advanced. I see no reason why the firm of *Hulings & Co.* may not be allowed this item of their claim, and be substituted to the rights and remedies against the respective tracts of land that the original vendors had, but without any right of recourse in case of deficiency, as it is easily separable from the rest of their account, having been kept separate and distinct. But it must also be in subordination to the creditors under trust deed No. 1 and trust deed No. 2, (1) because they were large stockholders in the lumber company, one having 625 1-3 shares, the other 100 shares, both being directors, one also the president, the other the treasurer, and induced strangers, *Mitchell & Co.* and the holders, by hypothecation of the mortgage bonds, to advance and lend their money on the faith, if not representation, that the two deeds of trust given to secure them were not impaired by any higher lien held by a firm composed of two directors, who were respectively president and treasurer and large stockholders; (2) because *Hulings & Co.*, seeing the fairness of this, by their pleadings and otherwise, showed themselves to be content with such subordination of their specific lien. It is true that by a supplemental answer, filed November 23, 1891, they claim a first lien on the lands on which the notes lifted by them were, in the deeds of the original grantors, retained as vendors' liens; but this was after their first answer, insisting on the validity of the *Hulings* or third deed of trust, after the pleadings were made up, the evidence all in, also the commissioner's report,—in fact, after the land had by consent been decreed to be sold; and the best bid obtained was not enough to reach their claim. Under these circumstances, and at this stage of the case, it would not be equitable to permit *Hulings & Co.* to displace to that extent the mortgage bondholders, and, under the familiar doctrine and principles of subrogation, would not be allowed; and this also disposes, in advance, of their counter assignment of error No. 2.

As to the rest of their claim against the *Hulings Lumber Company*, they were mere general creditors; early ones, it is true, but not in any other respect standing on higher ground than the other creditors at large. As to this part of their claim, though honest to a cent, and in every other respect, they put off securing it too long to now obtain preference over the others who occupy the same ground, except that they are subsequent in time. The board of directors, in the meeting of December 1, 1890, at which the directors *Willis J. Hulings* and *J. E. Butler* were present, passed the resolution directing the general assignment by deed of trust No. 3, reciting that the lumber company was then indebted in various sums of money, amounting in the aggregate to about the sum of \$141,000, part of which had already matured, and that the greater por-

tion of the residue would mature in a few days; that the company was unable to provide for the payment of the said indebtedness already matured; and proceeded to authorize and direct the assignment by which the control of its affairs and property passed out of its hands; thus showing that the corporation was insolvent, not being able any longer to meet its obligations, or to carry on the business for which it was incorporated. It would be a strange trusteeship and strange trust property if such dealings with it, in violation of the statute, could pass muster in a court of equity, for the trust and confidence properly given by the creditors of the insolvent corporation to its trustees would be thereby violated.

Hulings & Co., appellees, make three counter assignments of error:

(1) The circuit court, by its decree of 20th of June, 1891, erred in decreeing that the First National Bank of Cumberland should pay to Kenneweg & Co., defendants and appellants, the sum of \$947.25, instead of directing that the same should be paid over to M. Howard Hulings, trustee. The facts, as far as they appear, are as follows: On the 5th of December, 1890, the defendant Hulings Lumber Company had on deposit, to its credit, in the First National Bank of Cumberland, Md., the sum of \$1,301.98. It owed to defendant Kenneweg & Co. a negotiable note, payable at that bank, for \$947.25, falling due, not counting days of grace, on 6th December, 1890, which Kenneweg & Co. had left at the bank for collection. On the morning of the assignment, viz. 5th December, 1890, but before its execution, the lumber company, by its president, drew a check on the Cumberland Bank, payable to the cashier, for \$947.25, and sent it by mail to the cashier, with instructions to pay the Kenneweg note, and send the note to the office of the Hulings Lumber Company. The cashier received the check and letter, but, before the payment, the bank had heard of the assignment, and refused to apply the money to the payment of the note, for the reason given by the bank to Kenneweg & Co.,—that the Hulings Lumber Company was largely indebted to the bank, and they (the bank) had been informed that the lumber company had made an assignment. We will suppose that the making of the assignment, as then in force, was communicated by the same letter. Commissioner Adams reported against the claim of Kenneweg & Co., holding that the money in the bank passed to M. Howard Hulings' trustee, by the general assignment of all property of every kind made by the company afterwards, but on the same day, viz. 5th December, 1890, for the payment of all claims and demands in the order specified. Kenneweg & Co. excepted to the commissioner's report on this point, and the court, by decree of 20th June, 1891, held the exceptions to be well taken, and ordered the First

National Bank of Cumberland to pay to Kenneweg & Co. the said sum of \$947.25, in payment of their note. Whether it was a fraudulent transfer of this particular fund does not arise, being nowhere raised by the pleadings or otherwise. The question when and under what circumstances the death or insolvency of the drawer of such a check has the legal effect to countermand its payment—when the check is to be regarded as an equitable assignment—has given rise to a great deal of discussion, and to some differences of opinion. It was, in this case, an order to the cashier of the bank to transfer the deposit pro tanto of the lumber company to the account of Kenneweg & Co., in discharge of the note of the drawer, then there for collection. If the cashier or bank was the agent of the lumber company to pay, it was also the agent of Kenneweg to collect; and although the letter containing the check and instructions also contained, perhaps, the information as to the making of the trust deed, the check having come into the hands of Kenneweg's agent to collect, it may be regarded as issued, and, as between the lumber company and Kenneweg, operated as an equitable assignment of that amount. The bank did not and does not itself claim it, and no one impeaches it as fraudulent and voidable. The bank continued to hold the check, money, and note until the controversy as to the money virtually in court between Kenneweg and the trustee should be settled; so that it is a question of ownership, depending on equities, and not what the stakeholder could do. The letter is not produced. Mr. Shriver, the cashier, testifies, but is not examined on this point. It is probable that the letter spoke of the general assignment for payment of debt, and of the preference given the bank for its debt of \$20,000, and the fact of insolvency, if it then existed, was not a fact communicated, but only inferred, for the officer who sent the check says in his testimony that the lumber company was not then insolvent. Although the trust deed was afterwards acknowledged, and delivered on the same day, no express mention was made of this deposit, and it did not operate *proprio vigore* as a revocation of the check. As a matter of honesty and fair dealing under the common usage in such matters, it is generally regarded as a fraud on the part of the drawer of a check, in payment of his debt, to countermand it without some good cause, and such fraud should not be encouraged by the law's approval. (2) As a matter of public policy and general convenience, the law's approval of the unlimited right of revocation would tend to weaken confidence in checks as money, and impair the usefulness of banks as places of deposit for convenient paying, as well as for safekeeping. (3) Regarded as an equitable assignment, it has all the elements of a contract of sale or transfer of negotiable paper, without incon-

venience to the bank, or undue restraint upon the proper power of revocation. (4) So much for principle pointing to the proper rule. And, as matter of authority, so long ago as 1835, in the case of *Brooks v. Hatch*, 6 Leigh, 534, such check or order was held to be an equitable assignment pro tanto of the fund thereafter to come into the hands of the drawee; citing *Row v. Dawson*, 1 Ves. Sr. 331; *Peyton v. Hallett*, 1 Caines, 363; and *Cutts v. Perkins*, 12 Mass. 206. In the case of *Clayton v. Fawcett*, (1830,) 2 Leigh, 19, the letter of *Fawcett* would have been adjudged an equitable assignment but for the condition contained in it that the payment was to depend on the drawer's being absent; citing, on the subject of equitable assignment, *Duke of Chandos v. Talbot*, 2 P. Wms. 608; *Theobalds v. Duffoy*, 9 Mod. 102; and *Bates v. Dandy*, 2 Atk. 207. In *Anderson v. De Soer*, (1849,) 6 Grat. 363, the same doctrine is laid down; and in *Bank v. Kimberlands*, (1880,) 16 W. Va. 555, 558; and *Bell v. Alexander*, (1871,) 21 Grat. 1, 6. Upon the subject of a check duly issued operating as an equitable assignment, see 2 *Daniel*, Neg. Inst. (4th Ed.) § 1618b, note; *Id.* § 1635 et seq.; *Pease v. Landauer*, 63 Wis. 20, 22 N. W. 847; *Stoller v. Coates*, 88 Mo. 514; *Roberts v. Corbin*, 26 Iowa, 327; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212, and see cases cited; *Sav. Inst. v. Adae*, 8 Fed. 106; *Bank v. Coates*, *Id.* 540; *Row v. Dawson* and *Ryall v. Rowles*, 2 White & T. Lead. Cas. (4th Amer. from 4th Eng. Ed.) 1531, 1533; *Grant, Banks*, side pp. 50, 51, citing *Tate v. Hilbert*, (1793,) 2 Ves. Jr. 111; *Rev. Rep.* 175, referring to *Rolls v. Pearce*, 5 Ch. Div. 730, a case of *donatio mortis causa*. On same subject, see *Austin v. Mead*, *Brett*, Lead. Cas. Eq. 122, 15 Ch. Div. 651, and *Burke v. Bishop*, 27 La. Ann. 465, treating the check as a mandate. On nature of a check, see 2 *Daniel*, Neg. Inst. c. 49, § 1566 et seq.; *Bolles, Banks*, § 53 et seq.; *Bullard v. Randall*, 1 Gray. 606. On nature of bank contracts and duty to pay checks, see *Bolles, Banks*, §§ 32, 80, et seq.; 2 *Morse, Banks*, (3d Ed., by Parsons,) c. 36, § 565 et seq. On revocation of checks, see 1 *Morse, Banks*, c. 28, § 397 et seq.; revocation by death, section 480; by insolvency, section 400a. On assignment in equity, see 1 *Beach*, Mod. Eq. Jur. 326; 2 *Story*, (13th Ed.) § 1044. On the French law on the general subject, see note 2 to section 1040a. On subject of handing a key, etc., so as to enable buyer or donee to take possession, see 2 *Schouler*, Pers. Prop. § 67. On equitable assignment, see *Id.* §§ 76, 75; *Elam v. Keen*, 4 Leigh, 333; 1 *Schouler*, §§ 74, 77, et seq. This is not a case of a suit at law against the bank, but in equity, where the court has the fund under its control and all the parties before it, including the stakeholder; and I do not understand any decisions of the supreme court of the United

States as not treating it as a good, equitable assignment, as between the payee and the trustee. Certainly such is the settled rule of law in this state.

The second and third counter assignments of error have been already disposed of. Although the state may have had an inchoate lien for the taxes on these lands, yet there was none to which *Hulings & Co.* could be substituted by paying them, or thereby give them any other standing than that of creditors at large of the corporation.

In my view, the court should have permitted defendants *Hulings & Co.* to have retained the place in the order of payment given them by the deed of trust to *M. Howard Hulings*, trustee, so far, and so far only, as the claim reported for them by Commissioner *Adams* is made up of notes, etc., which were secured by vendors' liens on the real estate of the *Hulings Lumber Company*, lifted and held by defendants *Hulings & Co.*; their amounts, and the several tracts of land to which they apply, to be ascertained by the court in any proper mode. As to the rest of their claim reported by Commissioner *Adams*, they should come last in the deed of trust, not simply in the last class. But those creditors of the lumber company who, by their answer or other pleadings, have successfully assailed the claim of *Hulings & Co.*, are not to occupy in the order of payment out of the trust fund the place thus made vacant; for, although the settled rule in this state is that his diligence is to be rewarded who has enlarged the fund to be distributed by removing some fraudulent contrivance that has concealed it in part, or illegal preference that would, under the trust deed, have consumed it, yet the qualification of the rule is as well settled as the rule itself that such impeaching creditors cannot displace or lessen any prior, valid, subsisting liens which still stand as just and honest, nor can the latter be debarred of any increase of share incident to their right to retain against the trust fund, as a whole, the place in the order of payment assigned them; for, having equal equity and a legal right, and being without fault, they are not to be thrust aside or superseded by those who come after them in the order of payment prescribed by the trust deed. See *Guano Co. v. Heatherly*, 18 S. E. 611, (decided at this term;) *Cohn v. Ward*, 36 W. Va. 516, 15 S. E. 140. The deed of trust stands valid as to them, and the rule laid down in *Sweeny v. Refining Co.*, 30 W. Va. 443, 4 S. E. 431, and other cases where the trust deed was set aside in toto, has no application, except that it gives them preference over the displaced trust creditors.

The decree of December 2, 1891, is reversed, and the cause remanded, with directions to modify and correct the same in accordance with the views here expressed, and, as modified and corrected, to be again entered and carried into execution.

MACKIN v. TAYLOR COUNTY COURT.

(Supreme Court of Appeals of West Virginia.
Nov. 25, 1893.)

**TAXATION—APPEAL FROM ASSESSMENT—PARTIES—
VALUATION—REVIEW IN CIRCUIT COURT—RIGHT
OF COUNTY COURT TO BRING ERROR.**

1. A county court is not a party to an appeal taken under section 7, c. 36, Acts 1891, for reassessment of lands by a landowner, from the decision of a county court refusing to reduce the valuation of his land made by a commissioner under said act, and cannot maintain a writ of error from this court to the decision of a circuit court upon such appeal.

2. Power of taxation. Its character discussed.

3. Assessment of taxes and valuation. The character of the act discussed.

4. Is the jurisdiction conferred upon circuit courts by section 7, c. 36, Acts 1891, to entertain an appeal from a decision of a county court touching valuation of land by a commissioner to reassess lands, valid, under the constitution? Is the action of the circuit court on such appeal judicial in nature?

5. Can the supreme court of appeals entertain a writ of error to the decision of a circuit court on such appeal?

(Syllabus by the Court.)

Error to circuit court, Taylor county; Joseph T. Hoke, Judge.

Proceedings by Emily Mackin against the county court of Taylor for the correction of an assessment for taxation. From the judgment rendered, the county court brings error. Dismissed.

T. S. Riley, Atty. Gen., and L. M. La Follette, for plaintiff in error. W. R. D. Dent, for defendant in error.

BRANNON, J. Emily Mackin, feeling herself aggrieved by the valuation of a tract of land for taxation by a commissioner to reassess lands, applied to the county court of Taylor county for correction, and, that court having refused her relief, she appealed to the circuit court; and, that court having lessened the valuation of the land, the county court of Taylor county obtained this writ of error. Our jurisdiction in the case is challenged, and therefore we must at once pass upon that question, since we can render no judgment on the merits if we have no jurisdiction.

The complaint of Mrs. Mackin is not that her land is not subject to taxation, but that an excessive valuation, arrived at by improper process, was placed upon the land. Fixing the value of property for purposes of taxation is an essential and indispensable part of the assessment of taxes, where the taxation is based on its value. How, without it, can the individual's tax be known or collected? It is a sine qua non to the collection of revenue. Thus, it is plain that this court is asked to exercise jurisdiction in a matter which is purely one of valuation for assessment of taxes upon a taxpayer's property. That important function of government, the assessment of taxes, in our free republic of America, national and state, unlike the

case in imperial or autocratic governments, belongs exclusively to the legislature. It is a legislative power, and in no sense judicial. This doctrine results from the very nature of our government, and is universally recognized. *Meriwether v. Garrett*, 102 U. S. 472; *Cooley, Tax'n*, 32; *Heine v. Commissioners*, 19 Wall. 655; *Van de Griff v. Haynie*, 28 Ark. 271; *Desty, Tax'n*, 81; Opinion of Lee, J., in *Eyre v. Jacob*, 14 Grat. 426, and opinion in *Com. v. Moore*, 25 Grat. 954; *Cooley, Const. Lim.* 479. By our constitution, §§ 2, 5, art. 10, the power of taxation is expressly vested in the legislature. It would be its prerogative without that grant. The duty of ascertaining taxable values, and of imposing and assessing taxes, rests in the wisdom and discretion of the legislature. It possesses unquestionable power to assess taxes itself, so far as the rightful power is concerned; but the inconvenience of so doing renders this impracticable, and therefore the legislature may perform this duty through such officers, agents, or tribunals as it may choose. *State v. Mayhew*, 2 Gill, 487; *Van de Griff v. Haynie*, 28 Ark. 271; *Hardenbergh v. Kidd*, 10 Cal. 402; 1 *Desty, Tax'n*, § 97. The power to impose taxes and assess property value for taxation being thus purely legislative, the judiciary cannot exercise it, cannot do any act, without authority of the legislature, which is an act of assessment of value for taxation or imposition of a tax, because the constitution, by article 5, divides the state government into three distinct departments,—legislative, executive, and judicial,—and prohibits either from exercising the powers of the other. In this great constitutional provision, common to all American states, lies the very soul of free government, distinguishing it from tyrannical government, and is the best guaranty of order, harmony, safety, and liberty. The simple fact that one of these departments is invested with a certain function or power negatives the idea that another department may exercise it, because it would defeat the principle and letter of article 5, separating them and their functions. If, then, the act which this court is, in this case, asked to exercise, be one in its nature essentially an act of taxation,—one relating to or forming part of the procedure in taxation,—we cannot exercise the jurisdiction. It is such an act. We are called upon to act in the matter of appraisal of land for tax purposes. The commissioner appraised it. Then the county court appraised it, by approving the commissioner's action. Then the circuit court lowered the valuation. And this court is either to fix another valuation, or adopt that of the county or circuit court. In other words, this court is asked to do an act that is simply one of valuation,—an indispensable act in the process of taxing this land. It is a legislative function, and we cannot perform it, unless there be a lawful delegation of authority to perform it. If we entertain this

writ of error, we perform that function. Whence does this court get authority to entertain this writ of error? If even any statute could give it, where is the one that does give it? I hardly know under which of two acts the application for reduction of value was made. The petition for writ of error says it was made under section 94, c. 29, Code, while other parts of the record indicate that the valuation was one made by a commissioner reassessing lands under chapter 36, Acts 1891, and the application for relief under section 7 of that act. I regard the latter as the case. But in this case it is a matter of no import, for similar legal principles apply, and bring us to the same conclusion.

Section 7 of chapter 26, Acts 1891, provides that any one feeling aggrieved by the assessment of his land under that chapter may apply to the county court for relief, and, if refused, may have the evidence certified, and appeal to the circuit court. There it stops, without giving any appeal or writ of error to this court. If it be said that the chapter providing for appeals and writs of error to this court in cases generally comes in, and it was not necessary expressly, here, to grant such appeal or writ of error, then I ask, why expressly grant an appeal to the circuit court, when there stood the writ of certiorari for correction of errors in county courts? The reason why an appeal is given by said statutes from the county court to the circuit court is that, if not expressly granted, there could be no relief by certiorari, or in any other mode, but the decision of the county court would be final, because it is a rule of law that when once a tax valuation is made, in due course, it is final, unless the legislature has provided for a review; and when the particular mode of review has been resorted to, and fails to afford relief, there is no relief by appeal to the courts. The taxpayer is confined to the redress accorded by the legislature in its grace; and this because it is matter of taxation, confided exclusively to the legislature, which can give just such remedy for correction, or none, as it deems proper, and the matter being legislative, and not judicial, the courts cannot interfere. *Cooley, Tax'n*, 523, 529; *Insurance Co. v. Pollak*, 75 Ill. 292; 2 *Desty, Tax'n*, 623; *Wade v. Commissioners*, 74 N. C. 81; *Stewart v. Maple*, 70 Pa. St. 221; *International, etc., R. Co. v. Smith Co.*, 54 Tex. 2; *Gilpatrick v. Inhabitants*, 57 Me. 277, and cases cited; *Osborn v. Inhabitants*, 6 Pick. 98. The legislature having accorded to the taxpayer an appeal from the county court to the circuit court, and provided for no appeal to this court, negatives an intent to allow an appeal to this court. It knew that, without an allowance of such appeal, none could be had. There is good reason for the omission to concede such appeal. The act grants an appeal from the commissioner to the county court, and from it to the

circuit court. Should it go further, and allow application to this court, and thus enable every one disposed to litigate his assessment so far, and in large measure hamper and embarrass the collection of revenue necessary for the operation of government?

But is this writ of error justified by section 3, art. 8, of the constitution, or section 1, c. 135, of the Code, prescribing generally the appellate jurisdiction of this court? It may be suggested that it falls under that provision giving this court appellate jurisdiction in cases concerning the right of a corporation, county, or district to levy tolls or taxes. This does not apply, as the right to levy taxes on this land is not in dispute, but only its valuation, and under this clause the right to levy taxes must be involved. *Miller v. Navigation Co.*, 32 W. Va. 52, 9 S. E. 57. Again, here the state is levying taxes, not merely a county or district. Does it fall under the provision that a party to a controversy in any circuit court may have a writ of error in "civil cases where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars?" It does not come under that clause, because it relates to the judicial functions of this court; that is, to its appellate jurisdiction in judicial matters. To shelter a writ of error under this clause, the subject-matter must be of judicial nature,—a civil case, in the judicial sense of the word "case;" and this proceeding is not a case or matter, in that sense, but one in assessment of taxes,—simply administrative; in fact, legislative. What was the nature of the proceeding before the county court on appeal? That it was nonjudicial is settled by unquestionable authority. In *Upshur Co. v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, *Rich* applied to the county court to reduce the valuation placed on land by the assessor, and the matter was removed into the federal court on the theory that it was a suit; but the United States supreme court held that the county court, acting upon an assessment of taxes, was acting, "not as a judicial body, but as a board of commissioners without judicial powers, only authorized to determine questions of quantity, proportion, and value," and that the proceeding was not a "suit," within the meaning of the act allowing removal of suits from state to federal courts. In *Kansas Pac. R. Co. v. Commissioners of Ellis Co.*, 19 Kan. 587, the court said: "The proceedings before the county commissioners were not judicial, but in assessment. Section 65 of the tax law, under which these proceedings were had, provides simply for the correction of an assessment. It prescribes notice to the taxpayer as a condition of valid action, but such notice does not turn the proceeding from one in the nature of an assessment into a judicial inquiry. Indeed, unless the legislature had prescribed notice, it is doubtful whether any were essential. Correcting an assessment is no more of a judicial act than

making the assessment originally. True, it involves a determination, but so does almost every political or executive act. It is not a judicial determination."

So it is clear that the action of the county court in such a matter is not judicial. But it may be thought that the action on appeal in the circuit court is judicial; not any longer administrative, or in assessment. Surely, the inherent nature of the act has not so quickly changed, from its transfer to the circuit court. It is still in assessment for taxes, the same as it was before the county court. The theory that the action of the circuit court is judicial must be founded, not on any change in the character of the matter involved in the circuit court, but on the fact that the circuit court is technically a court of record proceeding according to the course of the common law, exercising judicial functions. But it is clear that the action on this matter is the same in nature as is that of the county court, as shown by several adjudications which I will now cite: Under chapter 52, Acts 1883, a railroad company, complaining of the assessment of its property for taxes, took an appeal from the board of public works to the circuit court, and, excepting to its action, obtained a writ of error to this court; and this court held that the action of the circuit court in the matter was "merely administrative, not judicial; the court acting in such case as an appellate assessment or tax tribunal, and exercising powers distinct from those belonging to it as a court or judicial tribunal, in the legal sense of that term." Judge Snyder used language in which he is sustained by abundant authority; and it is pointedly applicable, as the circuit court, under that act, as under this act, either confirmed the assessment or made a new one. He said: "The whole scope and purpose of the statute, it seems to me, is to make the court simply an assessor to review the action of the board of public works; and, if dissatisfied with said action, it may make a new assessment, and fix the true value of the property. The action of the court is of the same character, with the same elements of discretion and judgment, as that possessed by the said board, and none other. Both act according to the evidence attainable, and according to their best judgment and discretion. It is true the judgment of the court must succeed that of the board, and is in review of the latter, but that does not alter the nature of the act to be performed. Both act as assessors, and their acts are plainly ministerial, and not judicial. The fact that a ministerial act is performed by a court does not change the nature of the act, and make it judicial. In *McClure v. Maitland*, 24 W. Va. 561, this court decided that orders and decrees of the circuit court, entered in proceedings for the sale of forfeited land for the benefit of the school fund, are merely ministerial or administrative acts, and in

no manner judicial, and that, therefore, no appeal would lie from such orders and decrees to this court." *Pittsburg, C. & St. L. Ry. Co. v. Board of Public Works*, 28 W. Va. 264. In that case this court refused to entertain the writ of error because, as it said, and as I say, a writ of error lies only from a court of record; and it is not enough that the court be one of record, but its action in the particular transaction or matter must be judicial in nature, not simply administrative or ministerial. That case obviously controls the decision of this case. It cannot be said that there is a difference between that case and this, in the fact that that case went by appeal from the board of public works, which is not a court, whereas this went from a court,—the county court to the circuit court. The county court is not a court, technically,—a judicial court,—except as to probate matters; and it was, when acting in correction of tax assessments, held by the supreme court of the United States, in the *Upshur County Case*, above cited, to be not a court, but a mere assessment board; and therefore it is no more a court, as to that, than the board of public works. The decision of this court in 28 W. Va. 264, above cited, is sustained by the cases cited by Judge Snyder, and others I have met. In *Kimber v. Schuylkill Co.*, 20 Pa. St. 366, an act allowed a freeholder dissatisfied with a decision of the commissioner in adjusting taxes to appeal to the court of common pleas, which was to affirm or reduce the assessment. The court of common pleas was a court of record. The supreme court would not entertain certiorari. It said: "It is very easily seen that the legislature did not intend to give this court the jurisdiction to hear the case over again, and reverse the decree of the common pleas. * * * The judges, when hearing these appeals, are acting as assessors of taxes. We venture to hope that it will be many years before we will be called upon to review the assessments of every man in the commonwealth who is dissatisfied with the taxes charged against him. * * * When a special jurisdiction is conferred on inferior courts, no appeal lies to this court, unless expressly given." This case shows that it was a mere tax assessment, though on appeal to a court of record, and no appeal would lie to the supreme court; and, second, that the taxpayer had no remedy beyond the court specified by the tax act for his relief. It made no difference that the appeal from the auditor assessing corporate property was to the circuit court in the *Michigan case* (*Auditor General v. Pullman Palace Car Co.*, 34 Mich. 59,) cited by Judge Snyder in 28 W. Va. 268. The supreme court refused to entertain a writ of error. I therefore reach a like conclusion with that expressed by him,—that the decisions establish, beyond the propriety of a difference of opinion, that the decision of

a designated officer or board, be it a court or not, in reviewing a tax assessment, is no more judicial than was the original assessment by the assessor; and such decision, even though it be by a court or other tribunal of record, is not judicial, and cannot be reviewed by a supreme court or appellate court possessing judicial appellate powers only.

I will add that another consideration forbidding the theory that, when the matter reached the circuit court, it became a case, in the judicial sense, so as to give a writ of error to this court, is that it went to the circuit court by appeal. The act in question does not provide for exceptions, but simply says the evidence may be certified. On the appeal, new evidence may be adduced. It is only a new trial of the matter. The *prima facie*, and most proper, meaning of an "appeal,"—though it has different meanings, according to its use,—is a process continuing the same suit, in order to obtain a rehearing in the appellate court, wherein new evidence may be allowed, and a new trial as if never tried, as in appeals from justices. See in *Bailey v. McCormick*, 22 W. Va. 102, 103; *Bratt v. Marum*, 24 W. Va. 652; *Fouse v. Vandervort*, 30 W. Va. 331, 4 S. E. 298; 2 *Tucker*, 336.

Thus I have shown that there is no act expressly giving a writ of error to this court on the decision by a circuit court of an appeal from a county court in a matter of correction of an assessment for taxes, and also that no writ of error lies under the general statute providing for appeals and writs of error. And I entertain the opinion held in *Pittsburg, C. & St. L. Ry. Co. v. Board of Public Works*, 28 W. Va. 264, that as the jurisdiction of the supreme court of appeals, whether original or appellate, is, by the letter and true spirit and intention of the constitution, wholly judicial, the legislature could not confer jurisdiction of any other cast or quality upon that court, and that if it were, by explicit enactment, to confer power on this court to entertain a writ of error or appeal, or other form of process to review a decision of the county court in a matter of correction of an assessment of value for taxation, the act would be void, as contrary to article 8, § 3, of the constitution. For the reason that the jurisdiction of the supreme court of Kansas is confined to matters of judicial nature, it was held in *State Auditor v. Atchison, etc., R. Co.*, 6 Kan. 500, that a statute giving an appeal to its supreme court from the appraisement of railroad property for taxes was unconstitutional, because the power to tax is legislative, and valuation for taxation was a necessary incident to that power, and not such judicial power as could be conferred on the supreme court. The opinion in that case more clearly expresses this distinction than I have elsewhere found. See *Story, Const.* § 1761.

As this court, by the constitution, is incompetent to receive jurisdiction in such a matter as this, we ought not to give section 1, c. 135, Code, such a construction and application as to militate against the constitution. The second point in *Pittsburg, C. & St. L. Ry. Co. v. Board of Public Works*, 28 W. Va. 264, distinctly holds that the constitution repels such a writ of error from this court.

Had the circuit court jurisdiction of the appeal? It may be said that it had not, as the matter is not judicial, but administrative, and that the legislature could not confer upon a court of judicial functions, like the circuit court, power to act upon such a matter, nor on persons holding judicial positions this non-judicial function. If this were so, then it would be a question whether this court ought not to entertain the present writ of error; for, if the circuit court entertain and act upon a matter outside its jurisdiction, it might plausibly be said that in assuming jurisdiction, and thus deciding it had jurisdiction, it created a judicial question, which would come within the authority of this court,—that is, upon and as to the sole question of the circuit court's jurisdiction, and also as involving the constitutionality of a law. But the best opinion which I can form is that the circuit court had jurisdiction in the matter, because, and only because, the legislature, in its grace and liberality to the taxpayer, conceded him this appeal to the circuit court. The legislature, having exclusively the power of taxation and all steps incident thereto and essential to its existence, may select the agents by which it may ascertain the taxable value of property, instead of doing so directly itself. *Van de Griff v. Haynie*, 23 Ark. 270. Now, there is a difference between the supreme court of appeals and circuit courts, in respect to their capacity to have conferred upon them such jurisdiction. While, as I have above sought to show, this court could not be given such jurisdiction, because its appellate functions are confined to judicial matters, yet it is different with circuit courts, since section 12, art. 8, of the constitution, after conferring upon them certain supervisory, original, and appellate jurisdiction, adds the clause, "They shall also have such other jurisdiction, whether supervisory, original, appellate or concurrent, as is or may be prescribed by law." I think this clause authorizes the legislature to confer upon the circuit court the right to entertain this appeal. The presence of this very important court among the people in every county; its readiness, facility, and competency in the hearing and trials of matters by witnesses, juries, and otherwise; the obvious necessity of a power in the legislature to render available and useful its functions in the administration of government, by charging it with jurisdiction of additional matters, as time and expediency may suggest; the whole cast, structure, and purpose of this court, as seen

in the constitution,—tell us that we ought not to give a narrow construction to this clause. To do so would defeat the purpose of the convention which framed the constitution, and cramp the usefulness of the circuit courts. Besides this, there is the plain act of the legislature giving the appeal to the circuit court. If we doubted, we would, in deference to the act of the representatives of the sovereignty of the people, numbering among them many of the ablest minds of the state, recognize its validity. Courts cannot too often repeat what has been so often stated that it seems threadbare,—that all courts, while they must defend the constitution, and the rights of the people under it, even against the legislature, yet in so doing they must move with the most solemn caution, resolve all doubts in favor of the act, and never, except where the act is very plainly, palpably, and beyond doubt, violative of the constitution, overthrow an act of the legislature. Opinions in *Bridges v. Shallcross*, 6 W. Va. 568, and *Com. v. Moore*, 25 Grat. 954; *Slack v. Jacob*, 8 W. Va. 612. How did the Virginia county courts, which were judicial and of general jurisdiction, so many years correct assessments and lay county levies? If there was a show of constitutional power after the constitution of 1851, how as to this before that? *Ballard v. Thomas*, 19 Grat. 14. How did the court get jurisdiction in *McClure v. Maitland*, 24 W. Va. 561, under the act of 1872-73, selling school land? But in order not to be misunderstood, though the circuit court has lawful jurisdiction to entertain an appeal from the county court in the matter of correction of an assessment of taxes, yet it is only by delegation by the legislature to the circuit court of its taxing power,—not in any sense a judicial act, but simply administrative or ministerial, and not the subject of a writ of error to this court. I have not overlooked the fact that the case of *Pittsburg, C. & St. L. Ry. Co. v. Board of Public Works*, 28 W. Va. 264, overrules the second point of the syllabus in *Low v. County Court*, 27 W. Va. 785, which held that an appeal lies, under section 94 of chapter 161 of the Acts of 1882, from a judgment of a county court refusing to correct an assessment, where it is claimed that the party assessed with taxes is not chargeable therewith. Does it mean that no appeal lies to the circuit court from the county court? I think not. Taking the opinion in 28 W. Va., it is plain that the court did not decide on the question of the jurisdiction of the circuit court of an appeal from the county court, and that this decision means only that there is no jurisdiction in this court in such case.

Another difficulty in the way of the county court's success has just occurred to me. How can it prosecute this writ of error? The case before the lower courts was not a suit. The county court was not a party. The state and the taxpayer were the only parties, in

any sense. The statute (Acts 1891, c. 36, § 7) gives an appeal to the circuit court only to the landowner and the state, not to the county court. As it could not prosecute an appeal in the circuit court, how could it possibly complain of error, when it could not have been a party in that court. The state, only, was engaged in tax valuation, and the county was interested only consequentially, under and through the state. The state represents it. It is not a party.

I think it proper to decide this case both on want of jurisdiction, and want of right in the plaintiff in error to prosecute the writ of error, giving both as reasons for dismissal, and making a syllabus as to both points, under the requirement that we shall decide all points arising on the record; but, as the plaintiff in error is held as having no right to maintain a writ of error, the syllabus is confined to that point; Judges ENGLISH and HOLT not deeming it necessary to adopt a broader syllabus in this particular case, as the county court has no right to maintain the writ. Writ of error dismissed.

PARR v. LINDLER.

(Supreme Court of South Carolina. Dec. 1, 1893.)

HOMESTEAD EXEMPTION—RIGHTS OF MINOR HEIR—FORECLOSURE PROCEEDINGS—PERSONAL JUDGMENT—COLLATERAL ATTACK—PAROL EVIDENCE.

1. A claim by plaintiff that the land in dispute was sold under execution while he was entitled to a homestead exemption in it, to last till he was 21 years of age, as the heir of the execution debtor, was correctly excluded from the jury, when it appeared that he was over 21 when he brought suit, and the land was not the family residence of the judgment debtor when the debt was contracted, nor thereafter, and that plaintiff was never in possession of the land.

2. Parol evidence is not admissible in a collateral proceeding to attack a judgment and execution, when the records thereof do not disclose on their face any jurisdictional infirmity.

3. A personal judgment for a deficiency on a foreclosure proceeding cannot be rendered till after the sale and a report thereof have been made. Pope, J., dissenting.

Appeal from common pleas circuit court of Fairfield county; J. J. Norton, Judge.

Action by Henry L. Parr against Simeon O. Lindler. From a judgment for defendant, plaintiff appeals. Reversed.

Ragsdale & Ragsdale, for appellant. Barron & Ray, McDonald, Douglass & Obear, and James G. McCants, for respondent.

McGOWAN, J. This action was brought for the recovery of possession of a tract of land originally belonging to one Henry W. Parr, and for convenience known as the "Mill Tract." It was admitted that the said Henry W. Parr was the common source of title, and that the plaintiff, Henry L. Parr, as his only son and heir, was entitled to the land, unless he had been in some way divested of the title thereto. The defendant,

however, claimed that he has a claim of title from Henry W. Parr, and, if that claim of title is what he claims it to be, then he would defeat the title of the heir at law. His claim is that under certain executions this land was sold by the sheriff, and purchased by one Freshley, at sheriff's sale, and by subsequent chain of title has become the property of this defendant. This makes it necessary to consider the force and effect of these proceedings under which the land was sold by the sheriff:

Some time prior to 1858, Henry W. Parr, of Fairfield, executed to W. R. Robertson, then commissioner in equity, a bond for land purchased at his official sale, and to secure the same gave two mortgages of two separate tracts of land,—one to the commissioner himself, and the other to one Coleman, one of his sureties on his bond; and in 1871 he, the said Parr, executed another bond and mortgage to one Edward Pollard, of still a different tract of land. In 1876 the said Henry W. Parr died intestate, seised and possessed of some personalty and several tracts of land besides these mortgaged as above stated, and leaving as his only heir at law a son, Henry L. Parr, then an infant of tender years. Letters of administration on the personal estate of the deceased, Parr, were granted to one William B. Elkin. Soon after, two separate actions were brought against the said heir and administrator for the purpose of foreclosing the mortgages above described, as having been executed by the intestate, Parr, in his lifetime, entitled as follows: No. 1: "Clawney, as clerk, v. Henry L. Parr and William B. Elkin, as administrator," etc. No. 2: "Edward Pollard v. Henry L. Parr and William B. Elkin, as administrator." The records of these cases were admitted in evidence, and it appeared that in each case the lands mortgaged were sold, and for an alleged deficiency an execution was issued by the clerk, and that under such execution issued in the case of "Clawney, as clerk," the sheriff levied and sold the Mill tract of land of the deceased mortgagor, Henry W. Parr, which was not included in any of the mortgages. The plaintiff insists, therefore, that the whole proceedings were void, for the reason that there was really no judgment in the aforesaid cases, or either of them, which authorized the issuing of an execution against the estate of the intestate, real or personal. First. He offered parol testimony tending to contradict the records, upon the alleged ground that, being under 14 years of age at the time the actions were brought, he was not personally served with summons, as the law required, and therefore the whole proceedings were void as to him, as not having been made a party. Second. He further insisted that, from a mere inspection of the records, it appears that the execution under which the land was sold was absolutely void, as, in a proceeding to foreclose a mortgage, a

judgment for a deficiency can be had only when the sale is completed, and it cannot be known what the deficiency will be until the coming in of the report of sales, and the confirmation thereof. Third. He further insisted that, even if the proceedings under which the Mill tract of land was sold by the sheriff were perfectly regular and legal, he would still be entitled to recover the land, upon the ground that he was entitled to a homestead in the land, and, the sheriff not having done his duty in laying it off to him, the sheriff had no authority to levy and sell the same.

The judge charged the jury fully upon the whole case, but we will not attempt to consider all the questions discussed by him, but confine ourselves to the points complained of. Under the charge, the jury found for the defendant, and the appeal comes to this court upon the following exceptions by plaintiff: "(1) For that his honor erred in charging the jury the following: 'The homestead law, as it existed at that time, gave to the plaintiff, Parr, an exemption of \$1,000 of real estate, to be selected by himself, until he arrived at the age of twenty-one years, and provided that the remainder of that land might be sold under execution. The then defendant (now plaintiff) proves that he is now (23) twenty-three years of age. This action was commenced this year. So that he would not be entitled, even if the other judgment was out of the way, to recover possession of this land, the term for which it was exempted to him having expired before the commencement of this action.' (2) For that his honor should have charged the jury that the homestead laws create no new estate, nor do they invest estates already existing with any new qualities or restrictions, but secure and provide for an exemption by forbidding the process of the court to sell certain property for the payment of debts, and that, if the jury believe that the plaintiff's ancestor owned the land in dispute in fee, that such fee, upon his death intestate, descended to his heirs, who, upon such showing, would be entitled to recover, unless the defendant could prove title out of him by some process or operation of law. (3) For that his honor should have charged the jury that the judgments and executions through which defendant claimed title were void from a mere inspection of the record, and should have instructed the jury that an execution cannot be issued for a deficiency on a decree for foreclosure until there has been a sale, a judicial ascertainment of such deficiency, and a judgment entered therefor. (4) For that his honor erred in refusing to allow the plaintiff to prove that the judgments and executions through which the defendant claims were fraudulent and void, and that such fraud was known to the defendant, and to all the parties through whom the land in dispute passed to him." The defendant also gave notice that, in the hearing of the appeal herein, he would ask

that the judgment appealed from be sustained on other grounds than those named by the trial judge: "(1) His honor correctly excluded the question of homestead from the consideration of the jury for the additional reason that the land in dispute was not the family residence, nor lands appurtenant, of the judgment debtor, when the Pollard debt was contracted, nor at any time thereafter; and the plaintiff has never resided on, nor been in possession of, said lands, and has never been entitled to a homestead therein. (2) The sheriff's deed conveying the land in dispute is fully supported by the judgment, execution, and sale in case of Samuel B. Clawney, as clerk, v. Henry L. Parr and W. B. Elkin, as administrator," etc. From the view which the court takes, it will not be necessary to consider the different questions debated as to the alleged right to homestead, the alleged payment in fact of the case of Clawney, as clerk, or the alleged incapacity of Sheriff Ruff, on account of interest, to make the sale under the execution in that case. As it seems the most natural, we will consider the other exceptions in their inverse order.

Exception 4 of the plaintiff complains of error in refusing to allow him to offer parol testimony to impeach the judgments and executions through which the defendant claims. The records were in evidence, and did not disclose on their face any jurisdictional infirmity, but in that regard seemed to be *prima facie* regular. We think, therefore, without going again into the argument, that the testimony offered was not admissible for the purpose indicated, in this collateral proceeding, not being a direct proceeding instituted for that purpose. We think there was no error in refusing to admit the testimony. See *Turner v. Malone*, 24 S. C. 398.

Exception 3 of plaintiff makes the point that the judge erred in charging that the judgments under which the defendant claims were not, as alleged, void from the mere inspection of the records, but were valid, upon which executions for deficiencies could be issued. In subdivision 7, of section 188, of the Code, it is declared that, "in actions to foreclose mortgages, the court shall have power to adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage," etc. When must the order for such payment be made? The judge charged as follows: "Upon an inspection of this record, and having considered the objections raised by plaintiff's counsel, I have concluded that, although there are irregularities in them, they are within the jurisdiction of the court, and when rendered were the judgments of the court, and that they were binding and valid judgments of the court. Counsel have called my attention to the case

of Young against somebody, in which it was adjudged that no judgment can be rendered for the deficiency at the time that a judgment foreclosing the mortgage was rendered. The judgment of the court in this case has been rendered. If an appeal had been taken, the judgment would have been reversed, as in the case of Young; but the case of Freer and Tupper has been decided, and, although prior to the case of Young, I don't think that the judgment pronounced in that case is affected by the case of Young, because, in the case of Freer and Tupper, the question came up, as it does in this case, upon a question as to whether the judgment was sufficient or not in another case, and not upon a direct proceeding to set aside the judgment. * * * The judgment in these two cases was this: that so much was due, and that the land (mortgaged) be sold and applied to that judgment, and that the defendant (plaintiff) have execution for the deficiency when the report of sales was made. In one of the cases no report of the sales was made, but in the other the report of sales was made, and no order confirming the sales. It shows the deficiency, and that an execution was, by previous order of the court, required to be issued. That involves a very nice question of law, but one which it is my duty to decide, and I decide that the judgment was a judgment upon which the execution could issue," etc. Was this error? We agree with the circuit judge that the general subject of foreclosure was within the jurisdiction of the court which rendered the decree. But there cannot arise here any question as to whether this is a collateral or a direct impeachment, for everything which a mere inspection of the record discloses is already in evidence and before the court. It is simply a question of power. See *Tederall v. Bouknight*, 25 S. C. 280. Could the court, in advance, render a valid judgment for a deficiency not yet ascertained, which might or might not ever exist? There was no adjudication of the court, after the sale, that there was a deficiency, or, if so, for what specific sum; that being left to the plaintiff himself, or the sheriff, a mere ministerial officer. It seems to us that this was something more than a mere irregularity; indeed, contrary to the very nature of a judgment for the payment of money and the creation of a lien. The case in hand, we think, furnishes a good illustration of the uncertainty and confusion necessarily incident to such a course. The doctrine of the elementary writers is that the judgment for the deficiency must be after the sale, and for a specific sum already ascertained. "A judgment, upon the foreclosure of a mortgage, does not become a lien upon any property not contained in the mortgage until a sale has been made, the deficiency ascertained, and a judgment entered. * * * The judgment must be for a specific sum. If it be that an execution issue for any deficiency which may exist after selling certain designated prop-

erty, in all these cases there is no judgment lien," etc. See *Freem. Judgm.* (3d Ed.) §§ 339, 340. "The judgment contemplated is one for the balance of the debt remaining after applying towards it the proceeds of the sale. The first step is to ascertain what the amount of this balance is. Therefore, a judgment for a deficiency can be had only when the sale is completed; and it can only be known what the deficiency is, upon the coming in of the report of sale, and the confirmation of it. The usual practice is for the referee to state the amount of the deficiency in his report of the sale, etc. There can generally be no contingent judgment for such deficiency entered beforehand," etc. 2 *Jones, Mortg.* § 1709. Besides, we think this question has already been decided in this state. It is true that the case of *Freer v. Tupper*, (1883,) 21 S. C. 75, is cited as holding the contrary, but that case plainly shows that it was decided on exceptional grounds, one of which was the failure of the defendant to raise the question of no judgment when served with summons to renew the execution. In the case of *Dial v. Gary*, (1887,) 27 S. C. 171, 3 S. E. 84, this court expressly reserved the question, which was substantially an admission that the question was still an open one. In *Hull v. Young*, (1888,) 29 S. C. 71, 6 S. E. 938, it was held that, in an action for foreclosure of a mortgage, no personal judgment for a debt, or any part thereof, can be rendered against the mortgagor on his bond until after sale, and then only for the deficiency reported to be unpaid. In delivering the judgment of the court, the chief justice said: "In an action like this, it seems to us that no personal judgment for any specific sum of money can be rendered, even against the mortgagor, until the mortgaged premises have been sold, and the proceeds applied to the mortgage debt, for he can only be called upon, in such an action, to pay any deficiency in the proceeds of sale of the property pledged by him for payment of the debt; and we do not see how such deficiency can be ascertained until the property has been sold, and the proceeds applied, and hence we do not see how any judgment for any specific sum of money can be rendered until the amount of such deficiency has been thus ascertained. This view is supported by the case of *Warren v. Raymond*, 12 S. C. 9. We think, therefore, it was error to render judgment, to be enforced by execution, for any specific sum of money, before the mortgaged premises were sold, and the proceeds of such sale were found to be insufficient for the payment of the mortgage debt, where the plaintiff would be entitled to judgment for such deficiency, to be enforced against the mortgagor by execution," etc. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the circuit court for a new trial.

POPE, J. I dissent, and refer to my opinion in the case of *Cook v. Jennings*, 18 S. E. 640, to be filed to-morrow, as expressive of my views.

McIVER, C. J. I concur fully in the conclusion reached by Mr. Justice McGOWAN in the leading opinion in this case, but it may not be amiss to add thereto the following considerations: It being conceded that the title to the land in dispute descended to the plaintiff upon the death of his father, the only question is whether he has legally been divested of such title. This the defendant claims has been done by the sale by the sheriff under the alleged execution issued to enforce the payment of the deficiency remaining after the sale of the mortgaged premises in the case of *Clawney, clerk, v. Elkin*, as administrator of the mortgagor, and the present plaintiff, as his heir at law, supported by the alleged execution issued to enforce the payment of the deficiency remaining after the sale of the mortgaged premises in the case of *Pollard* against the same parties. The jury having been instructed that the sale by the sheriff could not be sustained under the execution in the *Clawney* case, we need not—and, indeed, cannot—consider the correctness of such instruction in a case like this,—trial by a jury,—even under the notice given by respondent's counsel, assailing the correctness of such instruction. *Bonham v. Bishop*, 23 S. C. 105, recognized in *Amaker v. New*, 33 S. C. 37, 11 S. E. 386, and *Fleming v. Fleming*, 33 S. C. 510, 12 S. E. 257. So that it seems to me that the only question now presented in the case is whether the circuit judge erred in charging that the sale might be sustained under the alleged execution issued in the *Pollard* case. The position taken by counsel for respondent, that this question has not been properly raised by the exceptions, cannot be sustained. That question, as it seems to me, is the turning point in the case, and was sufficiently presented by the third ground of appeal. It, therefore, must be considered. As I understand it, the circuit judge, while recognizing the decision in the case of *Hull v. Young*, 29 S. C. 64, 6 S. E. 938, in which it was held that, in an action for the foreclosure of a mortgage of real estate, no personal judgment can be rendered against the mortgagor for any deficiency until the amount of the same has been ascertained by a sale of the mortgaged premises, and an application of the proceeds of such sale has been made to the mortgage debt, yet he instructed the jury that the judgment for the deficiency, not having been appealed from, must stand as a valid judgment, even though erroneous, and therefore constituted a sufficient basis for the execution issued to enforce it, under which the sale in this case was made, or to which it might be referred; and he cited the case of *Freer v. Tupper*, 21 S. C. 75. That case, however,

does not support the view taken by the circuit judge. There the question arose upon a motion for a nonsuit, based upon the claim that there was no evidence of a sale of the mortgaged premises, and hence no basis for a judgment for any deficiency; but the court held that there was some evidence that there had been a sale, and the court held that there was no error on the part of the circuit judge in submitting that question of fact to the jury, and no error in refusing the motion for a nonsuit. Besides, as shown by Mr. Justice McGOWAN, there was another ground amply sufficient to sustain the judgment in that case. If, then, as is most conclusively shown in the opinion of Mr. Justice McGOWAN, no personal judgment can be rendered for any deficiency until after the sale of the mortgaged premises, when, alone, the amount of such deficiency can be ascertained, it follows, necessarily, as it seems to me, that anything purporting to be a judgment for such deficiency, rendered before the amount thereof could possibly be ascertained, would be a mere nullity, and would afford no basis for an execution to enforce it. Indeed, it is utterly incomprehensible to me how a judgment for the payment of money could be rendered before the amount thereof had been, or could possibly be, ascertained. Again, it seems to me that, after a sale of the mortgaged premises has been made, the question whether there is any deficiency, and, if so, the amount thereof, is a judicial question, upon which the mortgagor has a right to be heard, as grave and difficult questions might be presented as to the application of the proceeds of the sale of the mortgaged premises, which surely ought not to be left to the decision of a mere ministerial officer, who makes the sale, but which should be determined by the court. Indeed, the proceedings in this case, after the sale of the mortgaged premises, furnish a striking illustration of the propriety and necessity for the rule contended for. If, then, no judgment can be rendered for any deficiency until the amount thereof has been judicially ascertained, it is quite clear that no execution can be issued to enforce such so-called "judgment," and any paper purporting to be such is a mere nullity, and affords no authority to the sheriff for making a sale. Inasmuch, therefore, as the validity of a sale made by the sheriff depends upon the inquiry whether the power has been conferred upon him by any valid process of law, it follows that, unless such power has been conferred upon him, any attempted sale is a nullity, and confers no title upon the purchaser. If, as was held in *Sims v. Randall*, 2 Bay, 524, a sale made by a sheriff under an execution which had lost its active energy before any levy was made is absolutely void, surely a sale under an execution which had never had any vitality must be likewise void. See *Sheriff v. Welborn*, 14 S. C. 480, and the cases therein cited. This, therefore, is not

a case, as the circuit judge seemed to suppose, of a sale under an execution issued to enforce a judgment which was simply erroneous, but it is a case of a sale under an alleged judgment which the court had no authority to render at the time it was entered.

COOK et al. v. JENNINGS et al.

(Supreme Court of South Carolina. Dec. 2, 1893.)

LIMITATIONS—CLAIMS AGAINST ESTATES—ORDER OF PAYMENT—EXEMPTIONS.

1. Under Code, § 131, requiring an acknowledgment of debt or new promise to be in writing signed by the obligor, but providing that "payment of any part of principal or interest is equivalent to a promise in writing," an indorsement on a sealed note, of a payment, with a statement signed by the payor that he made the payment as heir of the maker of the note, arrests the running of the statute.

2. When a decree of foreclosure is rendered against a debtor in his lifetime, with an order that execution issue against him personally for any deficiency, but no sale is made or deficiency ascertained till after his death, the claim for such deficiency does not rank as a judgment against his estate. *Pope, J., dissenting. Farr v. Linder, (S. C.) 18 S. E. 636, followed.*

3. Where personal property exempt to deceased as head of a family under the act of 1868 has been sold with the rest by the executor, the holder of a specialty executed by deceased before 1868 has no claim on the proceeds of the exempt property, to the exclusion of other specialty creditors, but ranks with them.

4. Where the executor does not ask for a fee for his attorney, the decree of distribution should not provide for it.

Appeal from common pleas circuit court of Fairfield county; J. J. Norton, Judge.

Bill by William A. Cook, Susannah L. Boyd, and James R. Curlee, administrators d. b. n. of the estate of Lawrence J. Cook, deceased, against Robert H. Jennings, executor of the will of Nathan C. Robertson, deceased, George H. McMaster, survivor of the firm of Ketchin & McMaster, Mary C. Rion, executrix of the will of James H. Rion, deceased, W. G. Roche, and Julia R. Robertson. From a decree distributing the estate of said Robertson, plaintiffs appeal. Modified and affirmed.

Ragsdale & Ragsdale, for appellants. James G. McCants, McDonald, Douglass & Obeare, and A. S. & W. D. Douglass, for respondents.

POPE, J. Such proceedings were had in the action of appellants against the respondents in the court of common pleas, on its equity side, for Fairfield county, that his honor, Judge Norton, filed his final decree therein on the 2d January, 1893, wherein he directed the respondent R. H. Jennings, as executor of the last will of Nathan C. Robertson, deceased, to distribute the balance of his testator's estate in his hands, to wit, the sum of \$783.84, as follows: "(1) To the costs

and expenses of administration, including a reasonable fee to his attorney, if he have one; (2) to the plaintiffs' costs and expenses of this suit, not including counsel fee to their attorneys nor including the proving of their claim before the referee; (3) to the judgment now held by Mrs. Julia R. Robertson, and her costs and expenses in this suit, including proof of her claim before the referee; (4) pro rata to the specialty debts of plaintiffs, of Geo. H. McMaster, and of the estate of Rion, and their respective costs of suit, including proof of their claims; (5) to the account of W. E. Roche, and his costs of suit and proof of claim." From this decree the plaintiffs below have appealed, as follows: "The plaintiffs except," etc., "(1) because the said decree deprives the claim of the plaintiffs of its proper rank in the administration of the assets of the estate of Nathan C. Robertson, deceased; (2) because his honor should have held that the claim of the plaintiffs was superior in rank and preferred to all other claims proved in this action against the estate of Nathan C. Robertson, deceased, and was entitled to be first paid; (3) because his honor should have held that, in so far as the funds in the hands of the executor represented an exemption which was liable only for the payment of the plaintiffs' claim, that the same should be applied exclusively thereto; (4) because his honor erred in holding that the demand of Mrs. Julia Robertson was a judgment at the death of the testator, N. C. Robertson, and superior in rank to the claim of the plaintiffs; (5) because his honor should have held that the claim of Mrs. Julia Robertson was not, at the time of testator's death, a judgment, in contemplation of the act of the general assembly providing for the order of payment of the debts of decedents' estates; (6) because his honor erred in holding that the claims of G. H. McMaster and the estate of Rion be paid pro rata with the claim of plaintiffs; (7) because his honor erred in sustaining the claim presented by the estate of James H. Rion, deceased, against the estate of N. C. Robertson, deceased,—the said claim not being a debt of the said N. C. Robertson, deceased, and no evidence having been submitted by the representative of the estate of Rion to show that the said N. C. Robertson was liable for said debt as heir at law; (8) because his honor should have held that the said claim of the estate of Rion was presumed to have been paid, from lapse of time; (9) because his honor erred in holding and directing that the executor of the estate of N. C. Robertson, deceased, pay to his attorney a fee out of the assets in his hands before paying the claim of the plaintiffs."

As it will be seen, the contention here is between creditors of the estate of N. C. Robertson, deceased; and, to correctly apprehend the status of the claims of each one of said creditors, we will reproduce so much of the report of the referee, Mr. Cathcart, as relates to these claims: "(1) The claim presented by

Mrs. Mary C. Rion as executrix, etc., of James H. Rion, deceased. This is a sealed note executed to James H. Rion, dated 19th February, 1868, due on the 19th February, 1869, and signed by Martha P. Robertson. On the back of said note appears the following indorsement, to wit: 'Paid on the within note one hundred dollars. 24th December, 1888. The above amount was paid by me as heir at law. [Signed] N. C. Robertson.' On this note there was due on the 24th September, 1892, \$430.36. (2) W. G. Roche. Account against N. C. Robertson for \$10.50. (3) G. H. McMaster, as the survivor of the firm of Ketchin & McMaster, sealed note as a claim against N. C. Robertson. Note dated July 5, 1869, and signed by M. P. Robertson and M. C. Robertson. This note had sundry credits indorsed on it. Amount due on said note up to 24th September, 1892, \$106.52. (4) Mrs. Julia R. Robertson's claim. Judgment against N. C. Robertson, she being now the holder of, and legal owner of, the judgment in the case of Henry L. Elliott, John P. Matthews, Jr., and Joseph H. Cummings against N. C. Robertson. Amount due on said judgment, for principal and interest, up to 24th September, 1892, \$505.06. (5) On bond of N. C. Robertson as administrator of the estate of Lawrence J. Cook, deceased, \$5,546.28. This bond bears date 3d November, 1857." The small sum of \$783.84, in the hands of the executor, represents the estate to be divided, and this sum arose from a sale of the personal property of testator by the executor.

It seems that the testator, N. C. Robertson, was twice married. His first wife, Martha P. Robertson, died after the 13th January, 1872, but the exact date is not furnished by the case. He then married Julia W. Robertson, who survives him; he having died on 13th April, 1890. By his first wife, Martha P. Robertson, at her death, as her sole heir, he inherited 800 acres of land, which was sold to pay her debt under mortgage, and realized a sufficiency for that purpose; leaving over \$1,000 to be applied to his debts, besides 100 acres sold by him for \$325. These facts are important, in connection with the claim of Mrs. Rion as executrix. It must be borne in mind, however, that there is no evidence here that the amount now in court is in any manner derived from the estate of the first wife, Mrs. Martha P. Robertson. Just here it may be stated that the evidence does not disclose any application for an exemption under the law by Mrs. Julia W. Robertson out of the personal property of her deceased husband. An examination of the grounds of appeal shows to us that the appellants antagonize Mrs. Rion's right to appear as a claimant here at all, and that they insist that, not only is the claim of Mrs. Julia W. Robertson no judgment, but also that, if that fact were admitted, the proceeds of the sale of personal property in the hands of the executor could not be applied to such judgment, because the ap-

pellants alone hold a claim that was anterior to 1868, when a homestead in lands and an exemption of personal property were provided for the head of a family in this state, and which, under the decisions of our courts, could defeat such exemption. All that Mrs. Rion claims that is allowed by the circuit judge is that the claim she presents be regarded as a sealed debt dated prior to April 16, 1868, and for which N. C. Robertson is liable. There can be no question that her claim is under seal, and bears date the 28th February, 1868; but, then, it was not executed by N. C. Robertson, but by M. P. Robertson, his wife. To avoid this difficulty, she claims that N. C. Robertson, having become possessed of her entire estate at her death, as her sole heir at law, and such estate being large in value, as compared with the claim she is now presenting, must be held liable therefor, as a sealed note of the date referred to; and she points to his recognition of this obligation during his lifetime by having paid \$100 on her claim in April, 1888, as such heir at law. The appellants complain that the circuit judge failed to declare this sealed note paid by lapse of time, but a moment's reflection will show that this position is untenable, if an heir at law, by making a payment on a note made by one from whom he inherited can arrest the statute, for this note was dated in February, 1868, and did not become due, by its own tenor, until 12 months thereafter,—in February, 1869,—and this payment of \$100 by the heir at law was made in April, 1888,—less than 20 years from the maturity of the note. So the question is resolved, at last, into the status fixed by law of the heir at law, as to debts due by that one from whom he inherited. The circuit judge referred this matter to sections 1952, 1953 of the General Statutes of this state. The appellants lay stress upon section 131 of our Code, as well as the case of *Sepaugh v. Smith*, 35 S. C. 613, 14 S. E. 939. The section of the Code referred to is as follows: "No acknowledgement or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this title [Time of Commencing Civil Actions] unless the same be contained in some writing signed by the party to be charged thereby: but payment of any part of principal or interest is equivalent to a promise in writing." No advantage can accrue to the appellants by citing this authority. The law fixed the liability upon Robertson, if he inherited the lands of Mrs. Martha P. Robertson, to pay her debts, if the inherited property was sufficient in amount to do so. In his lifetime, Robertson recognized his duty to pay this debt by paying \$100 thereon, and when, on the back of that sealed note, he, in writing, acknowledged that he paid that \$100 as heir at law of Martha P. Robertson, he fulfilled all the requirements of this section of the Code. Nor can any support be derived by

the appellants from the case of *Sepaugh v. Smith*, supra. The case just cited was when one action was brought on a note upon which credits were indorsed, but such credits contained no statement by whom such payments were made. Without the credits, the note was barred by the statute of limitations. This court held that, when credits were relied upon to prevent the bar of the statute of limitations, such credits contained the new promises to pay what remains unpaid of the old debt, and should have been complained upon as plaintiff's cause of action; citing *Fleming v. Fleming*, 33 S. C. 510, 12 S. E. 257. In the appeal at bar, no such question arises. This creditor, Mrs. Rion, as executrix, after the pleadings were made up, under an order of reference, was merely required to present and establish her demand, and she relies upon this new promise in writing of N. C. Robertson to pay what remained unpaid of the old note after the credit was allowed. Exceptions 7 and 8 must be overruled.

Exceptions 4 and 5 present a very interesting and serious question. It seems that Mrs. Julia W. Robertson is now the assignee of what purports to be a judgment amounting on the 24th September, 1892, to \$505.06. The history of this alleged judgment is that in 1877 certain plaintiffs brought an action against N. C. Robertson on certain notes secured by mortgages of lands, and such proceedings were had in that action that, by the report of a special referee, it was determined that N. C. Robertson was due such plaintiffs on the notes sued on, to the amount of \$2,738.15. This report was ordered by Judge A. P. Aldrich 28th October, 1878, filed and confirmed: "It was further ordered and adjudged that the mortgaged premises described in the complaint," etc., "be sold; * * * that, if the proceeds of sale be insufficient to pay the amount so reported due, * * * the said clerk [who was ordered to make the sale] specify the amount of such deficiency" in his report of sale, and that the defendant pay the same; * * * and that the said Henry L. Elliott and the said plaintiffs have execution thereof." Sale of the lands not having been made, on the 3d March, 1888, an order was passed by his honor, Judge Witherspoon, renewing said order for sale on the first Monday in November, 1888, or some convenient sales day thereafter. N. C. Robertson died the 3d of April, 1890. The mortgaged premises were sold the first Monday in January, 1891, by the clerk of court, who reported such sale to the court, specifying in said report that there was a deficiency of \$450.81. This report was confirmed by the court. It is thus manifest (1) that the debt of plaintiffs in that action was ascertained on a day certain, for a certain amount, due by N. C. Robertson, and that Robertson acquiesced therein; (2) that at the same time the mortgages were adjudged to be fore-

closed, and a sale ordered to be made, with directions for an application of the proceeds of sale to the certain debt of plaintiffs, as fixed in the decree; (3) that this original order for sale was renewed in 1888; (4) that N. C. Robertson, the defendant in that action, died in 1890; (5) that the mortgaged premises were not sold in his lifetime, but were sold in January, 1891; (6) that a balance of \$450.81, was found and reported due after the death of Robertson, to the plaintiffs.

The appellants now contend that, as to this balance of \$450.81, it is not entitled to rank as a judgment, and assail the decree of the circuit judge as erroneous, when he adjudged to the contrary. As the appellants state this proposition: "When a simple decree of foreclosure is rendered against a debtor in his lifetime, but no sale is made thereunder, and no deficiency ascertained to exist until after his death, does a claim against his estate for a deficiency reported after his death rank as a judgment, or does it take the rank of the instrument upon which such decree of foreclosure is rendered?" They cite in support of their position *Ex parte Farrar*, 13 S. C. 254; *Hull v. Young*, 29 S. C. 65, 6 S. E. 938; 5 *Amer. & Eng. Enc. Law*, 240; *Schouler, Ex'rs*, § 426; *Williams, Ex'rs*, (5th *Amer. Ed.*) 905; *Redf. Wills*, 256; *Warren v. Raymond*, 12 S. C. 9; *Freer v. Tupper*, 21 S. C. 75; *Jones, Mortg.* § 1709. We may as well just now announce our conclusion in this matter, and afterwards compare the authorities with such conclusion by us, to see if there is not a confusion of ideas on this subject, which has arisen more as a question of practice than a substantial difference as to the principles of law by which this question should be settled. At any rate, in this state, we desire that the law on this subject shall be declared. We recognize no difference in this state in judgments at law and decrees in equity. They are now the same, and are defined in section 266 of our Code: "A judgment is the final determination of the rights of the parties in the action." Wherever and whenever a court has made a final determination of the rights of the parties in the action, such is a judgment. The distinction between judgments and interlocutory judgments consists in the final determination of the rights of the parties in an action, in the one case; and such determination of those rights of the parties in an action as are not complete or final, needing some other adjudication by the court, is an interlocutory judgment. It frequently happens, in law and in equity, that courts are called upon to pass orders to assist the performance of judgments on the law side and on the equity side of the court, and such orders are administrative, and do not attain the dignity of judgments. It is necessary, in determining upon what is the judgment in any particular case, to look to the pleadings and the parties. When parties, under no

disabilities under the law, in an action, procure or submit to a judgment of a court, they are concluded by such judgment, and are so concluded in all cases by the terms of the judgment. When, therefore, parties complain upon an indebtedness as due by the defendant, or for which he is responsible, and at the same time a lien of any character upon property of such defendant exists in favor of such party, who complains, and is set up in said complaint, and the court is asked to adjudge such property sold to pay such indebtedness, and a judgment of the court is passed in the action, wherein is ascertained the exact amount due by the defendant to the plaintiff, and the property covered by the lien is ordered to be sold to satisfy such exact amount so ascertained to be due, with the right in the plaintiff, after a sale of the property covered by the lien has failed to pay that sum so ascertained to be due, to issue an execution for the deficiency so adjudged to be due, such final determination of the rights of the parties to the action is a judgment, and should be so respected everywhere. We think the claim here set up answers all these requirements. Let us examine some of the authorities relied upon, to see wherein they differ from our conclusions, if there be any such difference:

First, the case of *Ex parte Farrar*, supra: Here, a bill in equity had been filed by *Farrar Bros.* against *Lewis Dial* and others; a report thereon made by the commissioner in equity, to which exceptions had been filed by both sides, which came on to be heard by Chancellor Carroll, who, in his decree, sustained some of the exceptions, and overruled the others, and ordered the commissioner to reform his report. An appeal from the decree of the chancellor was taken to the supreme court before the commissioner had acted upon the reformation of his report. This appeal was dismissed. *Dial* having died, his administratrix was substituted, on circuit, in his stead, as defendant, and a money decree taken against such administratrix. Meantime, an action had been begun in the court of common pleas, on its equity side, by a certain creditor of the estate of *Lewis Dial*, deceased, against his administratrix, heirs at law, and other creditors, to marshal his estate, sell land to pay debts, call in creditors, etc., and a final decree had, wherein the claim of *Farrar Bros.* was adjudged a simple contract debt. A petition in this last case was presented by *Farrar Bros.*, claiming that their claim, as presented, was without their authority, and also that they were entitled to rank in the distribution of *Lewis Dial's* estate as judgment creditors. The circuit judge sustained the views of *Farrar Bros.*, but the supreme court, in a carefully prepared decision, showed conclusively that the claim of *Farrar Bros.* under the decree of Chancellor Carroll made in 1868 was not a final judgment. It is true, in speaking of the character of that claim, the supreme

court did recognize and enforce the doctrine laid down in *Haskell v. Raoul*, 1 McCord, Eq. 32, that "a decretal order upon which an execution may be taken out is a final decree;" but this test was expressly limited to money decrees, for the language used by the court just before a reference to *Haskell v. Raoul*, supra, was: "To give it such a character, it must be a final decree, and by that we understand [speaking of a money decree] such a decree as not only ascertains that a definite sum of money is due from one party to another, but orders the payment of the same." Apply these principles to the case at bar, and we can see no matter of difficulty in reconciling the two. In *Ex parte Farrar*, supra, they were applying for a money decree, and nothing else, while in the action wherein a judgment is attempted to be set up by Mrs. Julia W. Robertson, the plaintiffs in that action sought, not only a money decree against the defendant therein, but also a foreclosure of a mortgage of land given by him to secure the payment of that very indebtedness for which a money decree was sought. To avoid a multiplicity of suits is the end of the court of equity. To hold that there may be a final judgment in the foreclosure of a mortgage, and then that a suit to enforce the payment of the indebtedness left unpaid is necessary, would certainly place the powers of a court of equity in a dwarfed condition. But it is suggested that such is not a legitimate conclusion, because here the court of equity, by its judgment, allowed the plaintiffs, after a sale made of the mortgaged property, to come in and obtain, in this very case, a final money decree for the balance remaining after the proceeds of sale of the mortgaged land had been applied to the indebtedness. This position involves the strange doctrine that there can be two final judgments in the same cause, between the same parties, and it is obliged to be admitted by the parties applying the views entertained by this court that the right to the judgment in foreclosure, and the right to a money decree for the balance, must arise from the allegations of the pleadings, and be within the scope of the relief to which the plaintiffs were entitled under their pleadings, for otherwise the court would violate the fundamental principles of section 297 of the Code: "The relief granted to the plaintiff if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." So, therefore, the pleadings to sustain the dual judgments—one for foreclosure, and one for balance remaining due—must raise such an issue. Where is there any inconsistency in a judgment fixing the amount due, and directing property pledged sold, and proceeds applied to the judgment, awarding execution only for the balance thereafter remaining? Are not ad-

ministrative orders frequently provided for at the foot of final judgments? Wherein is there any inconsistency in regarding leave to issue execution as belonging to cases when administrative orders are, by the final judgment, permitted? We cannot see it.

We will next examine *Hull v. Young*, supra: In the case cited, the defendant, S. O. Young, had made a note for \$300 to the assignors of plaintiffs, and secured its payment by a mortgage upon three several parcels of land,—the Jay place, the Leard place, and the Findley place. All these parcels of land were subsequently sold under judgments junior to the mortgage. One, the Leard place, was purchased by the plaintiffs; one, by an attorney for certain creditors; and the Findley place, by Mrs. Rachel Young. After such sales, action to foreclose plaintiffs' mortgage on the Findley place alone was brought, and to this action S. O. Young and Mrs. Rachel Young were made parties defendant. They set up the defense that the Findley place, in the hands of Mrs. Young, was only liable for its proportion of the mortgage debt. The decree on circuit sustained this position, and fixed the sum of \$80 as the proportion of the debt of \$300, and interest thereon, for which the Findley place was liable; but the decree went further, and adjudged that both S. O. Young and Mrs. Rachel Young were liable to pay this sum to plaintiffs, if the lands, when sold, failed to do so. The decree also adjudged that plaintiffs have judgment against S. O. Young for the sum of \$213.19, with interest and costs. Both S. O. Young and Mrs. Rachel Young appealed. This court held the circuit decree erroneous (1) as to Mrs. Young, because she was not liable to pay any debt to plaintiffs, although the land in her possession was liable to sale to pay the \$80 fixed as its proportionate part of the debt of defendant S. O. Young to plaintiffs, and the circuit decree was so modified. This court held, further, that the circuit judge erred in giving judgment against S. O. Young for \$213.19, with leave to issue execution therefor before any sale of the mortgaged premises. This is the language of the opinion: "We think, therefore, that it was error to render judgment to be enforced by execution against S. O. Young for any specific sum of money before the mortgaged premises were sold, and the proceeds of such sale were found to be insufficient for the payment of the mortgage debt, when the plaintiffs would then be entitled to judgment for such deficiency, to be enforced against the mortgagor by execution. Of course, the plaintiffs, if so disposed, might have brought an ordinary action at law on the note, in which event they would have been entitled to recover judgment, and issue execution for the whole amount due upon the note. But they had a choice of remedies,—the ordinary action on the note and a proceeding to foreclose the mortgage,—and, having adopted the latter, they must be required to pursue the

course appropriate to such a proceeding." Without going further, we might say that there is a marked distinction to be observed in the case we are now reviewing and that presented by *Mrs. Julia W. Robertson*. In the former, the party who was entitled to speak, appealed from the circuit decree, and had it reversed. In the latter, *N. C. Robertson* acquiesced in the decree on circuit, allowing it to become a final decree. We are at a loss to see upon what ground these appellants can now, in effect, appeal from such circuit decree final against *N. C. Robertson*. It is true, if they could, they might impeach it for fraud, but they are powerless to affect it otherwise. It may not be out of the way, however, to observe that we are not disposed to question the judgment of *Hull v. Young*, except in this respect,—that a provision should have been added that, when a party plaintiff chooses to unite a legal and equitable cause of action in one suit, the court is not at liberty to disregard such a union, but must, in its decree, provide for both, so that harmony may be preserved, and that such a decree is, under our Code, if a final determination of the rights of the parties to the action, a judgment.

Warren v. Raymond, supra, we will next examine: In the case named, Chancellor Carroll had pronounced a decree in January, 1868, wherein he adjudged that *Mary Raymond* was due *William M. Thomas* the sum of \$3,371.24, and directed a tract of land that had been mortgaged by *Mary Raymond* to *William M. Thomas* to secure this debt sold, and the proceeds applied to the payment of the same sum of money decreed to be due, but in the decree provided for leave to issue execution only for the balance after application of sale of mortgaged premises. Nevertheless, *Thomas* had his decree enrolled, and issued execution for the whole debt adjudged due, without waiting for any sale. This course was attempted to be justified under the act of the general assembly of 1840 relating to the necessity of the enrollment of decrees in order to make them liens as to third parties, in the light of the decision of *Blake v. Heyward*, Bailey, Eq. 201. But this court held, in an opinion delivered by Chief Justice Willard, which was concurred in by Mr. Justice McIver, with a dissent from Mr. Justice Haskell, that the terms of the decree of Chancellor Carroll forbade *Thomas* from enrolling his decree until after a sale had been made, and, as the judgment on circuit was affirmed by both the state and United States supreme courts, he (*Thomas*) was bound by the terms of that decree. It will be readily seen that the question in that case was lien or no lien of the decree enrolled prematurely by *Thomas* in its effect upon third parties, and, in no sense affected the question whether the decree was to be considered as a final determination of the rights of the parties, as between *Thomas*

and *Mrs. Raymond*, the parties to the original suit, and hence can be of no authority in deciding the issue joined in the case at bar. The case at bar is not a question of lien or no lien. Under our acts for the distribution of intestate or testate estates, provision is made for payment of judgments without regard to the lien of such judgments.

Freer v. Tupper, supra, is the next case cited. This action was a contest wherein the validity of *Freer's* title to a small parcel of land was raised. It seems that *Freer* obtained a judgment against one *Schultz* on note and mortgage. After the mortgage was foreclosed, and sale made thereof, and proceeds applied to the amount ascertained to be due, there was a deficiency, and for this deficiency an execution was issued against *Schultz*. The active energy of this execution having expired, it was, after notice to *Schultz*, renewed, and under this renewed execution the land involved between *Freer* and *Tupper* was sold, and purchased by *Freer*. *Tupper* denied that the original judgment in *Freer v. Schultz* was good, (1) because there could be no money decree or judgment therein; (2) because the execution was without authority of law. These questions were decided in favor of *Freer*. Mr. Justice McGowan, who delivered the opinion of the court, said, among other things: "The complaint in the case of *Freer v. Schultz* is not in the case, and therefore we do not know its precise scope and purpose; but, in the absence of proof to the contrary, we must assume that the action was not for what is called a 'strict foreclosure,'—for the sale of the land, and no more.—but that it was in the usual form, and prayed, not only for the sale of the land, but also judgment for the deficiency of the debt, if there should be any. Taking this view, and reading the decree of foreclosure carefully, it will be found that it adjudged three things: (1) That the sum of \$994.75, besides the costs, were due by *Schultz* to *Freer* on the mortgage debt; (2) that the sheriff should sell the mortgaged premises at a future day, and pay the plaintiff the amount so reported due, viz. \$994.75, or so much thereof as the purchase money of the mortgaged premises will pay of the same; (3) that if the proceeds of such sale be insufficient to pay the amount, etc., the sheriff specify the amount of such deficiency in his report of sale, and that the defendant, *Frederick C. Schultz*, be required, by execution, to pay the same. It seems to us that, taking the whole decree together, it did authorize an execution to issue for whatever might be the deficiency, if any. It is true that the precise amount for which it should issue was not named in the decree, for the reason that at the time it was rendered it could not be foreseen what the land would realize, but it directed the sheriff to make the sale, and apply the proceeds, and that the execution should issue for the

deficiency. * * * But there was a decree for the whole mortgage debt, subject to be reduced by the proceeds of sales, and we cannot say it was fatally defective, in falling "to authorize the issuing an execution for its enforcement." Thus it is manifest that the appellants can derive little comfort from this case. On the contrary, it is similar in the form of the judgment to that complained of in the case at bar.

Let us examine 5 Amer. & Eng. Enc. Law, 240: The language used is, "A decree that does not authorize the issuing of an execution for its enforcement is not entitled to rank as a final judgment, in the administration of the estate." This language or view is perfectly consistent with the ideas we have advanced hitherto. Of course, for a decree to be pronounced a money decree, it must include within it the right to enforce it by an execution, and so the very decree we have been considering does include the power. It is true the execution is only to be issued for such balance as may be due when the money decree shall have credited upon it the land covered by the mortgage. In opposition to this view, it has been suggested that a second application to a court for its judgment is necessary, in order to know what balance may still remain after the mortgaged premises may be sold. We are unable to perceive any substantial difficulty here. A motion addressed to a court in furtherance of the enforcement of its judgment is often resorted to; and, because the adjudication of such motion by a court becomes necessary, we do not call such determination a "final judgment." No more so does this application to a court for the right to issue an execution for the balance. We must always remember that the main object of a code of procedure is to abolish the distinctions which had been allowed to impede the administration of our courts and to produce a uniformity and simplicity in the application of remedies in courts of justice. In this work we are now considering, reference is made, as its authority for the doctrine we have just quoted from it, to the case of *Ex parte Farrar*, supra, and also to *Williams, Ex'rs*, (5th Amer. Ed.) 905. The quotation from this latter work, relied upon, is: "If a decree in equity be not conclusive of the matters in question, *as if it be merely to account, and do not ascertain the sum to be paid*, [italics ours,] it is analogous to a judgment quoad computat at law, and is no complete judgment until the judgment is paid." Now, these two quotations are all the authorities cited in the American & English Encyclopedia for its position. We have already pointed out the true meaning of the case *Ex parte Farrar*, supra; but, as to the quotation from Mr. Williams' work, it seems to us that, properly considered, it does not militate against the views we have expressed, for we have admitted that, if a decree is not finally con-

clusive of the issues raised by and between parties in the action, it is not entitled to the distinction of a final decree. Of course, therefore, a judgment ordering a further account to be taken is in no sense a final judgment, or, if such decree does not ascertain the sum to be paid, it is not to be considered a final judgment. But, mark you, in the matter now discussed by us, there is no further account ordered, nor is there a failure to ascertain the sum due to the plaintiffs by the defendant. The court has decreed what is due, in dollars and cents, by the defendant to the plaintiffs, and in its judgment has ordered how that sum is to be paid by the defendant. But it is made my duty, as the organ of this court, to state that the majority of the court decline to assent to my views herein expressed on the fourth and fifth grounds of appeal herein. They adhere to the views recently expressed by them in the case of *Parr v. Lindler*, (18 S. E. 636,) (recently filed,) to which case I could not agree. The exceptions 4 and 5 are sustained, but I dissent from this conclusion.

The sixth exception, that alleges error in the circuit decree as to the rank of the claims of George H. McMaster and the estate of Rion, is not tenable. We have already considered the claim of the estate of Rion, and determined that it was entitled to rank as a sealed note, and the claim presented by McMaster is confessedly of the same nature; so that, if we decide the questions raised in the first and second exceptions against the appellees, all difficulties as to the rank and order of payment of these claims pro rata with that of appellants is removed. It has frequently been held by this court that the exemption of personal property to the head of a family, in obedience to the mandates of the constitution, creates no estate in said property in the head of the family. The law leaves the title as it found it. But the appellants lay stress upon the fact that they alone could avoid, in law, this exemption, and would have us adopt the view that therefore they alone should have the right to appropriate the proceeds of sale, but we do not see that this follows. The sale of this personal property had been made by the executor of the will of N. O. Robertson, deceased, without any demand for such sale by the appellants. No process, mesne or final, to procure such sale, has ever been set in motion by them. We find the personal property as having been sold by the executor, and the proceeds of such sale held by him for distribution to such of the creditors of the estate of his testator as may be entitled to it. This court will not decide speculative questions. We must content ourselves with the actual. Therefore, whether we would have sanctioned an order to sell this personal property is such a question, and does not arise here. The party who might have resisted such a sale is a party to this action, and

no question of that character was presented or decided on the circuit, where she was entitled to be heard. Certainly, we will not consider it, if raised here for the first time. The laws of this commonwealth provide the order in which claims are to be paid out of the assets of a deceased debtor's estate, and there is no provision in such laws by which appellants' views can be carried into effect. These grounds of appeal are dismissed.

It remains for us to consider the ninth ground of appeal. No question as to the fee to be paid the executor's attorney was raised before the special referee. It seems to have occurred to the mind of the circuit judge as one that might arise, and hence he sought to provide for it. Attorneys are usually careful as to their own rights. We have heard of no such claim presented by any such attorney in this case. It is always safer to meet a question when properly presented to the court. Here, while we can easily see how, as a matter of prudence, the circuit judge felt called upon to so provide in his decree, yet we think he was in error here, and this exception is sustained. It is the judgment of this court that the judgment of the circuit court be modified as required by our having sustained the fourth, fifth, and ninth exceptions, but in all other respects it is affirmed. Let the cause be remanded to the circuit court to enforce the views herein adopted by this court.

McIVER, C. J., and McGOWAN, J., concur.

BELL v. DAVIS.

(Supreme Court of Georgia. Nov. 27, 1893.)

APPEAL FROM JUSTICE'S COURT — JURISDICTIONAL AMOUNT.

Where suit was brought in a justice's court upon an account for \$94.80, to which the defendant filed a plea setting up that he was entitled to sundry credits amounting to \$66.18, and also to a set-off of \$13, and at the trial the plaintiff admitted that \$65.78 of the amounts claimed by the defendant should be allowed, and thereupon a judgment for the plaintiff was rendered for \$29.02, the balance claimed by him, from which judgment the defendant entered an appeal to the superior court, it was error to dismiss the appeal on the ground that the amount claimed in the court below was less than \$50. The exercise of the right of appeal in such cases depends upon the amounts claimed in the pleadings, and not upon reductions which may be made at the trial. Code, § 4157; Reedy v. Helms, 54 Ga. 121; Taylor v. Blasingame, 73 Ga. 111.

(Syllabus by the Court.)

Error from superior court, Burke county; H. McWhorter, Judge.

Action by H. J. Davis against Simeon Bell on account. From a judgment dismissing the appeal from a justice's court after judgment for plaintiff, defendant brings error. Reversed.

Code, § 4157, provides: "Either party be-

ing dissatisfied with the judgment of the justice of the peace, or notary public, and upon all confessions of judgment, provided the amount claimed in said suit is over \$50, may, as a matter of right, enter an appeal from said judgment," etc.

The following is the official report:

Suit was brought in a justice's court on an account for \$94.80, as appeared by the bill of particulars attached to the summons. The defendant filed a plea in which he set up that he was entitled to sundry credits, amounting to \$66.18. He also pleaded a set-off of \$13. On the trial the plaintiff's counsel admitted that \$65.78 of the amount in the defendant's plea should be allowed, and, after hearing evidence, the court rendered judgment against the defendant for the balance, \$29.02, and he appealed to the superior court. The plaintiff moved to dismiss the appeal because the amount claimed on the trial in the court below was under \$50. The motion was sustained, and the appeal dismissed. This ruling is assigned as error, the defendant contending that the sum claimed in the suit, and not that claimed by the plaintiff on the trial, should determine the right of appeal.

Johnston & Brinson, for plaintiff in error. Lawson & Scales, for defendant in error.

PER CURIAM. Judgment reversed.

FREEMAN v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. Nov. 20, 1893.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—NONSUIT.

It appearing from the plaintiff's evidence, fairly construed, that before the telegram offering his son employment was sent the son was under contract to work for another, consistently with which he could not have entered the employment of the sender of the telegram, the nondelivery of the telegram did not cause a failure by the son to obtain the employment to which it related, and there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Rockdale county; R. H. Clark, Judge.

Action by S. B. Freeman against the Western Union Telegraph Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

S. B. Freeman, for himself and as next friend of his minor son, Y. G. Freeman, sued the telegraph company for damages alleged to have arisen from its failure to deliver a telegram sent by S. W. Roberts from Sparta, Ga., November 21, 1887, and addressed to Y. G. Freeman, care of S. B. Freeman, Conyers, Ga. This telegram was: "Will pay your price. Come immediately. Answer." It was alleged that by the failure to deliver this telegram in proper time S. B. Freeman was prevented from getting employment for

his son with Roberts, as a printer in Roberts' printing office, at a salary of \$25 per month and board for 1888; S. B. Freeman having proposed to Roberts to hire Y. G. Freeman to Roberts for said amount, and the telegram being an acceptance of that proposition. The plaintiff was nonsuited, and to this ruling excepts. Upon the trial plaintiff introduced the telegram, and evidence to the following effect: Roberts sought to obtain the services of Y. G. Freeman to work in Roberts' printing office, and was to pay him \$25 a month and his board. He sought Y. G.'s services for an indefinite time, or as long as he gave satisfaction. Was to hire him by the month, but felt bound to keep him as long as he gave satisfaction. He sent the telegram in question. He would not have hired young Freeman if applied to in December, 1887, or in January, 1888, for he had secured another party. S. B. Freeman lived in Conyers in 1887, four or five hundred yards from the telegraph office, and he and his residence were well known to the telegraph operator there. Y. G. Freeman was 16 or 17 years old in November, 1887, and his father controlled his services, and sought to get employment for him. He, S. B., corresponded, among others, with Roberts, and with one Lingo, and made an offer to Roberts, which Roberts finally accepted by the telegram in question. After the telegram was sent by Roberts, Roberts wrote a postal card to S. B. Freeman, postmarked the 28th, asking what Freeman's son was going to do, and stating that he, Roberts, had written young Freeman, telegraphed S. B., and had written Irwin, (young Freeman's former employer,) but got no answer, and that courtesy demanded that he get some answer. S. B. Freeman received this card, and then went to the telegraph office, and asked if there was a telegram for Y. G. or S. B. Freeman, and the operator said there was one for Y. G. The telegram, as handed by this operator to S. B., was addressed to Y. G. Freeman, Conyers, Ga. This postal card was received four or five days after the telegram was sent. S. B. Freeman testified, among other things: Failing to receive the telegram knocked his son out of employment, for he was hunting up little jobs afterwards. Of course he sent him off after they decided Roberts was not going to give the price. He (S. B.) told his son to go down to Irwinton, and go to work there; and if he received any news from Roberts, and Roberts still wished him, he (S. B.) would write him to go from there to Sparta. In a short while young Freeman was out of employment at Irwinton, as his employer there got another printer for a less price. He came home, stayed a while, and went to Elberton for a short time, and the Elberton man got a cheaper printer. He (S. B.) thought his son was in Conyers on November 21, 1887, but did not know for certain what day his son left. His son went to Irwinton with his approval,

and he expected his son to stay there if he never heard from Roberts. Thought he (S. B.) wrote to Roberts as soon as he got the postal, and stated that he was "at the first" of the telegram. That was the same day he got the telegram. Wrote immediately, as well as he remembered, to know if the place was filled; and Roberts wrote back that he had no use for young Freeman, having procured another man in his place. S. B. did not telegraph Roberts after he got this letter; did not know that he could. He did not look at the postal in the way that Roberts still wanted his son, but that he simply wanted him (S. B.) to answer. The evidence of young Freeman does not seem materially different from that of his father, except that he (the witness) had left Conyers just before the 21st. He occasionally afterwards obtained employment for short times at \$20 per month and board and \$15 per month. His father notified him of the telegram, and he wrote to Roberts, stating that he would go from Irwinton to Sparta, and work for Roberts; but Roberts replied he had made other arrangements at that time. This was several weeks after the telegram should have been received. He (witness) was competent and able to do the work at any time from November 1, 1887, to November 1, 1888. His contract to work at Irwinton was for no definite period.

Geo. W. Gleaton, for plaintiff in error.
Bibby, Reed & Berry, for defendant in error.

PER CURIAM. Judgment affirmed.

PEARSON v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

APPEAL—TIME OF TRANSMITTING RECORD.

The bill of exceptions having been served on the 5th day of August, and the record not having been transmitted to this court until August 22d, the writ of error must be dismissed; it affirmatively appearing that the case was not brought to this court within the time prescribed by law. Acts 1890-91, vol. 1, p. 108; Code, § 3213; Calloway v. State, (Ga.) 16 S. E. 379.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Rufus Pearson, having been convicted on a criminal charge, brings error. Dismissed.

Acts 1890-91, vol. 1, p. 108, provides that the practice in criminal cases relating to the settlement, filing, serving, transmitting, and hearing of bills of exceptions shall be governed by the laws then in force relating to bills of exceptions in cases of injunction, in so far as such laws are applicable. Code, § 3213, relating to bills of exceptions in injunction cases, provides that, within 15 days after service of the bill of exceptions on the opposite party, the clerk of the trial court

shall transmit the record to the supreme court.

M. G. Bayne, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Writ of error dismissed.

POPE v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

APPEAL—TIME OF TRANSMITTING RECORD.

The bill of exceptions having been served on July 28th, and the record not having been transmitted to this court until August 22d,—being more than fifteen days from the date of such service,—the case has not been brought to this court in the manner prescribed by law, and the writ of error must be dismissed. Acts 1890-91, vol. 1, p. 108; Code, § 3213; Calloway v. State, (Ga.) 16 S. E. 379.

(Syllabus by the Court.)

Error from superior court, Bibb county; O. L. Bartlett, Judge.

A. P. Pope was convicted on a criminal charge, and brings error. Dismissed.

R. C. Jordan and R. L. Anderson, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Writ of error dismissed.

WINSHIP v. STATE.

(Supreme Court of Georgia. Oct. 24, 1893.)

APPEAL—BILL OF EXCEPTIONS—TIME OF SETTLING AND TRANSMITTING.

The motion for a new trial having been overruled on July 7th, the bill of exceptions having been certified on August 4th and served on August 5th, and the record not having been transmitted to this court until August 22d, and it thus appearing affirmatively that the bill of exceptions was not tendered and signed nor the record transmitted to this court within the time prescribed by law, the writ of error is dismissed. Acts 1890-91, vol. 1, p. 108; Code, § 3213; Calloway v. State, (Ga.) 16 S. E. 379.

(Syllabus by the Court.)

Error from superior court, Bibb county; O. L. Bartlett, Judge.

John Winship was convicted on a criminal charge, and, a motion for a new trial having been overruled, he brings error. Dismissed.

Acts 1890-91, vol. 1, p. 108, makes applicable to criminal cases the laws and practice then in force relating to settling, serving, and transmitting to the supreme court of bills of exceptions in injunction cases. Code, § 3213, relating to bills of exceptions in injunction cases, provides: "The bill of exceptions in such cases shall be tendered and signed within 20 days from the rendition of the decision, and the opposite party be served, within 15 days from such signing, with the bill of exceptions; and the clerk shall, within 15 days from such service,

make out a transcript of the record, and transmit" the same to the supreme court, etc.

M. G. Bayne, for plaintiff in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Writ of error dismissed.

BOSTAIN v. MORRIS et al.

(Supreme Court of Georgia. Nov. 6, 1893.)

JUSTICES OF THE PEACE—PROCEDURE—POSTPONEMENT OF TRIAL FOR SETTLEMENT—EFFECT OF.

1. By the act of October 8, 1885, a justice's court may hold from day to day until its business is disposed of. No limit upon this power results from a publication by the magistrate that his court will continue in session 15 days. Transfer Co. v. Clarke, (Oct. Term, 1892,) 18 S. E. 138.

2. When a pending case is suspended to give opportunity to the parties to settle, and a settlement is attempted, but fails, both parties knowing of the failure, neither is entitled to notice when the case will afterwards come up for trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Morris & Bro. against J. A. Bostain. From a judgment for plaintiffs, defendant brings error. Affirmed.

The following is the official report:

Suit was brought to the March term, 1892, of a justice's court, and the case was set for trial on March 15th. On the trial it appeared that the accounts between the parties were so complicated and mixed up that it would be a hard task to arrive at the true status of the case, and the justice suggested that perhaps a better conclusion could be arrived at by both parties getting together with their accounts, finding out the difference, and settling the matter between themselves. To this both sides agreed, but the case was not dismissed. At the April term the plaintiff's counsel stated to the court that no settlement could be obtained, and the case was reset for trial on the 20th of April, on which day only the plaintiff's side appeared, and judgment was awarded to them. To the levy of the execution the defendant filed an affidavit of illegality, sworn to September 29, 1892. In this affidavit it is alleged that the judgment was not rendered at the legal court day for holding the justice's court, "said court advertising that its court would be open from the first Monday in each month for fifteen days thereafter;" that the 20th of April was not a regular court day, but was two days beyond the April term, which commenced on April 4th; that the court's suggestion that the parties get together and settle the matter between themselves left defendant under the impression that the suit was dismissed so far as the court was concerned, and that he would not have to attend court longer on the case; that it was called up

at the April term without notice to him, and without his knowledge or consent; and that "he does not owe said debt, or any part thereof." On demurrer this affidavit was dismissed by the justice, and on certiorari the judgment of dismissal was sustained, whereon the defendant excepts.

In his answer to the writ of certiorari the justice says: "It is true I advertised my court to hold fifteen days after my regular court day, which is the first Monday in each month, in order to dispose of the business of my court; and it is often the case that cases are set beyond the limit when the docket is burdened with cases, but generally by consent of parties. However, this is not the case always." In his petition for certiorari the defendant says that, after the disposition of the case at the March term, he expected the plaintiff to call at his place of business, and they would adjust the differences between them amicably; that plaintiff never called upon him to adjust the matter; and that defendant heard no more of the case until some time in September.

Thos. L. Bishop, for plaintiff in error.
Hutcheson & Key, for defendants in error.

PER CURIAM. Judgment affirmed.

LEWIS v. WESTERN & A. R. CO.

(Supreme Court of Georgia. Nov. 6, 1893.)

CARRIERS—EJECTION OF PASSENGERS—LIMITATION OF TICKET.

There being no evidence that the plaintiff, in ordering his ticket, communicated to the agent who sold it that a ticket was wanted different from that which he received, and that ticket having expired by its own limitation, according to its face, before he took the train from which he was expelled, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by John H. Lewis against the Western & Atlantic Railroad Company. From a judgment of nonsuit, plaintiff brings error. Affirmed.

The following is the official report:

Lewis sued the railroad company for damages from personal injuries. He was nonsuited, and to this excepts. Upon the trial, the evidence for plaintiff was: Plaintiff purchased a ticket at Birmingham, Ala., to Atlanta via Chattanooga, over the Queen & Crescent and defendant's lines, of the ticket agent at the depot at Birmingham, just before taking the train for Chattanooga, between 2 and 3 o'clock A. M. on February 1, 1892. Plaintiff just asked for a ticket, which he knew was a one-day limit ticket. He had bought and used similar tickets many times before. He left Chattanooga for Atlanta on February 2, 1892, via defendant's road, between 12 o'clock M. and 1 o'clock P. M. of that day. The conductor came to him to collect fares,

and he handed him the ticket above mentioned, which the conductor looked at and returned, saying it was not good, as the limit had expired the day before, and telling plaintiff he would have to pay cash fare if he wanted to ride to the point the ticket read. Plaintiff then told him the ticket was all he had to offer; that he bought the ticket in good faith, expecting a one-day limit on the same, having bought and used the same form of ticket before; and, if the selling agent had made a mistake, it was not his (plaintiff's) fault; and that, in order to protect himself, he must ask the conductor to accept it. The conductor refused to accept it, but said he would see plaintiff later. When the train neared Dalton he came to plaintiff, and asked for the ticket, saying he would wire for instructions on the same. Plaintiff handed him the ticket, and the conductor left him. When the train was approaching Cartersville, the conductor came to him and asked if he had been sick the night before, and incapable of journeying on the last train to Atlanta on the evening of February 1st. Plaintiff told him he (plaintiff) had contracted a very bad cold, and, not knowing the mistake on the ticket, took some medicine to help his cold, and went to bed early, to get the benefit of much needed rest, and to help his cold. The conductor then asked if it would have resulted seriously with him if he had taken that train, and plaintiff told him, "No," he did not think it would have killed him. The conductor then handed him back the ticket, with the remark that under the circumstances he must return it, and collect cash fare, or ask plaintiff to leave the train. Plaintiff received the ticket, and told the conductor he would not leave the train of his own free will. At Cartersville the conductor told him he must get off, and he replied he would not do it. The conductor then said, "You surely do not intend to create a disturbance, and cause me trouble." And plaintiff told him, "No," if the conductor would take his baggage, and assist him by the arm, he would go with the conductor. As the conductor was putting him off, he asked two gentlemen to step to the platform and witness the ejection, which they did. The conductor put him off on the platform, bag and baggage. Plaintiff then said, "Am I off?" and the conductor told him he was. Plaintiff then spoke to the two gentlemen, in the conductor's presence, asking them if they heard and witnessed what was said and passed, and they answered, "Yes." Plaintiff then turned to the conductor, and told him if he would hold the train plaintiff would purchase a ticket to Atlanta, but the conductor refused to do this, saying, if plaintiff got on that train, he would have to pay full cash fare from Chattanooga to Atlanta. The conductor then gave the signal for the train to pull out, and stepped aboard. Plaintiff also stepped on board, and took a seat. When the conductor came to collect fares he demanded of plaintiff full

cash fare from Chattanooga to Atlanta. Plaintiff said that, having gotten on the train at Cartersville, bound for Atlanta, he would pay cash fare from Cartersville to Atlanta, provided the conductor gave him a receipt for his money, saying where fare was paid from and to. The conductor said he would not take fare less than from Chattanooga to Atlanta. Plaintiff then stated his view of the matter, and offered the amount of fare from Cartersville to Atlanta, and told conductor if he rejected it he (plaintiff) would use all means in his power to resist an ejectment. The conductor then took the money, and gave him a cash fare receipt for the same. The coach was nearly full of passengers, who heard and witnessed what was said and done, and the people at the depot at Cartersville heard and witnessed much that was said and done. Plaintiff arrived at Chattanooga between 8 and 9 o'clock A. M., February 1, 1892. He testified that he thought the difference in price between a limited and unlimited ticket between the points in question over the route he took was about \$2.75 or \$3; was not sure whether they sold continuous unlimited tickets from Birmingham to Atlanta via Chattanooga over these roads at that time; and that he could not give the exact hour when trains over defendant's road left Chattanooga for Atlanta, but there were many freight and passenger trains running. The ticket stated, among other things, that it was subject to the stop-over regulations the lines over which it read; that it was good until used unless limited by stamp or written indorsement, or canceled by punch in the margin; and, if limited as to time, would be void after midnight of date canceled by "L" punch in the margin. On the back was stamped: "Union Depot B. Feb. 1, 1892. Birmingham, Ala." And the date, February 1, 1892, appears canceled in the margin.

R. J. Jordan, for plaintiff in error. Payne & Tye, for defendant in error.

PER CURIAM. Judgment affirmed.

ISELL v. STATE.

(Supreme Court of Georgia. Nov. 6, 1893.)

ASSAULT AND BATTERY — SUFFICIENCY OF EVIDENCE — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

The evidence warranted the verdict, and the newly-discovered evidence was cumulative, as to all of it, except such as imputed a declaration to the person assaulted inconsistent with his evidence at the trial, and this declaration had no materiality, save as tending to impeach the witness.

(Syllabus by the Court.)

Error from superior court, Elbert county; H. McWhorter, Judge.

O. F. Isbell was convicted of assault and battery, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

Isbell was convicted of assault and battery alleged to have been committed on Eaverson. He moved for a new trial on the general grounds, and for newly-discovered evidence. The motion was overruled, and he excepted. The testimony for the state was substantially as follows: Eaverson was marshal of Bowman. By ordinances of that town, it was penal for any person to be drunk on the streets, and it was the duty of the marshal to arrest persons guilty of drunkenness or disorderly conduct. The defendant was there, and was drinking. Eaverson told one David to take defendant off, or he would have to arrest him. David said he could not do anything with defendant. Later in the evening, defendant rode his horse across the street or square twice, and when Eaverson went near him he galloped off down the street, and stopped in front of Bagwell's shop. Eaverson went to where he was. He was not then doing anything. Eaverson caught hold of him, and told him to come and go before the mayor. He refused to go, and said Eaverson could not arrest him on his horse. Eaverson replied he would carry him and the horse both. He got down from the horse, on the opposite side, and Eaverson ran around to him with a walnut stick drawn. He hit Eaverson on the head, and Eaverson struck him with the stick, which was a foot and a half long and an inch and a half in diameter. Thereupon, defendant caught Eaverson by the hair, jerked him, and bit him on the face. They scuffled, and Bagwell parted them, and pushed defendant into his (Bagwell's) shop. Eaverson started in there, with his stick drawn in a striking position, and defendant told him to go out of there. Defendant did not strike him, or attempt to strike him, with the iron. Testimony for the defendant was, in brief, as follows: On the day in question the defendant was drinking some, talking loud, but was not disturbing anybody. He and Eaverson were near each other during the day until late in the evening, when the difficulty occurred, up to which time Eaverson had not arrested him, or made any effort to do so. The horse defendant was riding had the habit of "taking the studs," and in the evening, as defendant was riding, the horse stopped suddenly on the street. Defendant had a jug of molasses in his hand, and Eaverson started towards him. Defendant galloped down the street towards Bagwell's shop. He laughed at Eaverson, and said: "Go back, marshal. I am gone." He was sitting on his horse doing nothing, when Eaverson came up. One witness testified that when defendant got off of his horse he saw the stick go up and down, and it looked as if Eaverson struck defendant over the horse. Lester Bagwell testified that he was present at the difficulty; that, after some conversation between the parties, Eaverson told de-

fendant to get down from his horse, and defendant got down on the side opposite from Eaverson, and, just as he got down, witness heard a blow from the stick; and that defendant did nothing, and made no effort to do anything, to Eaverson, until Eaverson struck him with the stick. The newly-discovered testimony is contained in the affidavits of A. A. Seymour and M. C. Bagwell, to the effect that Eaverson struck defendant with the stick before defendant struck him, and that, immediately after the difficulty, Bagwell or defendant, in talking with Eaverson, told him he had struck defendant first, and Eaverson replied, "I don't care if I did."

A. G. McCurry, for plaintiff in error. W. M. Howard, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

GEORGIA, C. & N. RY. CO. v. PARKS.

(Supreme Court of Georgia. Nov. 6, 1893.)

DEFECTIVE RAILROAD CROSSING — CONTRIBUTORY NEGLIGENCE — CONFLICTING EVIDENCE.

The question as to whether the plaintiff could have avoided the consequences of the defendant's negligence was one of fact, for determination by the jury; and, taking the evidence most favorably for the prevailing party, there was enough to warrant a finding for the plaintiff, though there was also enough in the whole evidence to warrant a finding against him. Lumpkin, J., dissenting.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by John R. Parks against the Georgia, Carolina & Northern Railway Company to recover for personal injuries. Plaintiff had judgment, and, a new trial having been denied, defendant brings error. Affirmed.

The following is the official report:

Parks brought an action against the railroad company for damages sustained by him in consequence of a fall from his wagon as he was attempting to drive his team over the defendant's track at a public road crossing. A verdict in his favor was rendered, and the defendant moved for a new trial on the grounds that the same was contrary to law and evidence. The motion was overruled. The declaration alleges that the company, through its agents and employees, was engaged in working upon its roadbed, laying rails, and doing other work thereon, at a point where a public road had been in existence and used by the public, and where the company located its line so as to cross the public highway. In doing this work the company's employees dug up the roadbed at the crossing, and placed cross-ties and tracks upon it, leaving holes or sinks between them, and leaving the crossing in a dangerous and unsafe condition for use by the public, and so kept and maintained it, without notice or warning to those passing along the road,

which facts were known to the company, its agents and employees, but unknown to the plaintiff until he was injured. He approached the crossing with a view to passing over it with a loaded wagon, but owing to the elevation of the roadbed, and the manner in which the dirt had been left at its sides, he did not and could not see its dangerous condition. No warning was given him, although the company's agents and employees were near at hand, saw him approaching, and were aware that he was about to cross the roadbed on the public road, relying upon its safe and proper condition for use by the public. On reaching the crossing, by reason of the careless and negligent manner in which it had been placed and left by the company's employees, the wagon on which he was riding was caused to sink or fall into the opening left by the company at the crossing, and he was thrown violently forward off the wagon, and was injured in a stated manner. He alleges that the injuries were the result of the carelessness and negligence of the company, its agents and employees, in each and all of the acts above set forth. The evidence was directly conflicting. It appeared that the plaintiff was driving a two-horse wagon containing a bale of cotton, on top of which the plaintiff was sitting and driving. The wagon road was inclined upward on each side of the railroad. The company's employees were at work upon the track at this point, and some of them were on the opposite side of the railroad from the plaintiff. He drove up, and stopped his wagon 20 or 25 feet from the railroad, and stood there 10 or 15 minutes. One of the railroad wagons was driven empty over the crossing, and then the plaintiff started to drive over. The railroad track had been filled with earth outside the rails, but not between them, and there was a sink of about a foot in depth from the top of the rails. As the plaintiff attempted to drive across, the mules became frightened when they stepped inside the track, and began to jump. He tried to stop them, but could not, and was thrown from the wagon as it lunged over the rails. He testified that he could not see the condition of the road inside the track until he got there, and first discovered it when he drove into it, and that he had no notice or warning that it was out of repair or unsafe to cross, though he could have been warned by those in charge of the work, who were on the other side of the railroad. On the other hand, the testimony for the company is that the plaintiff could have seen the condition of the premises from where he sat in his wagon, and that he was expressly warned by the company's agent in charge of the track-laying that he could not cross, and would have to wait until they made the crossing, which they would do as soon as possible, and which would have taken about three-quarters of an hour. Other witnesses who were present testified that they did not hear any warning

given to the plaintiff, nor anything said to him, and that the injury occurred about 10 o'clock in the morning, and it was after 2 o'clock before the crossing was fixed. There was testimony that the reason why the plaintiff stopped when he drove up was because he saw the condition of the crossing, and was waiting for it to be so prepared that he could cross in safety. He testified that he stopped to look at the hands work, and let his mules rest, and that, if he had known the crossing was dangerous, he would not have attempted to go over.

Erwin & Cobb, for plaintiff in error. C. H. Brand, J. H. Lumpkin, and Harrison & Peeples, for defendant in error.

PER CURIAM. Judgment affirmed.

LUMPKIN, J., (dissenting.) It being, to my mind, conclusively shown by the evidence that the plaintiff was guilty of negligence in driving his wagon on the track of the railroad at a public crossing while the railroad was in progress of construction, that it was obviously dangerous to cross the same in this manner, and that the exercise of ordinary care and diligence upon his part would have prevented his so doing, the verdict in his favor was contrary to law, although the railroad company may have been guilty of negligence in leaving the crossing in a dangerous condition, and in failing to warn the plaintiff of this fact.

DARGAN et al. v. CAROLINA CENT. R. CO.
(Supreme Court of North Carolina. Dec. 19, 1893.)

EMINENT DOMAIN—RAILROAD COMPANIES—ADVERSE POSSESSION.

Under the charter of a railroad company, (Acts 1854-55, c. 225, §§ 24, 26, 28,) providing that it may purchase land necessary for its road, and may condemn land in the absence of an agreement in regard thereto; and declaring that, in the absence of any contract in relation to land through which its road may pass, signed by the owner, it shall be presumed that the land, together with a space of 100 feet on each side of the road, has been granted to the company by the owner, unless the latter shall apply for an assessment of its value within two years after completion of the road on his land,—the presumption of a grant only arises where there is no contract with the owner; and where it appears that the owner of a lot deeded one-half thereof to the company, keeping the remaining half, which is within 100 feet of the road through the half deeded, and that the company has not exercised dominion over the half not deeded for two years, an action by the owner for an assessment of the value of such half is not barred.

Appeal from superior court, Union county; James D. McIver, Judge.

Action by Nora Dargan and Milton Dargan against the Carolina Central Railroad Company for the assessment of the value of property taken. From a judgment for defendant, plaintiffs appeal. Reversed.

D. A. Covington, F. I. Osborne, and Haywood & Haywood, for appellants. Batchelor & Devereux, for appellee.

AVERY, J. The right of the state to take private property rests upon the ground that there is public necessity for such appropriation, and can be exercised only where the law provides the means of giving adequate compensation to the owner. Where the power to appropriate has been given by statute without sufficient provision for the payment of damages, it has been held to be the intent of the legislature that the right of eminent domain should be exercised only after first obtaining the consent of those affected. *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, 1; *In re Flatbush Ave.*, 1 Barb. 286; *In re Hamilton Ave.*, 14 Barb. 414; 1 Potter, Corp. § 168. Text writers and courts classify the methods of obtaining the right of way for railroads as of three or four kinds; the difference between two of the modes being only that which arises from entering into an executory contract for purchase in one instance, and taking an executed conveyance for the same interest in the other. 1 Harris, Dom. Corp. 35; *Beattie v. Railroad Co.*, 108 N. C. 436, 12 S. E. 913. The charter of the defendant company (Acts 1854-55, c. 55, §§ 26, 28¹) followed substantially the usual formula adopted in framing nearly all of the earlier acts of incorporation in this country, when it provided that "in the absence of any contract or contracts in relation to land, through which said road or any of its branches may pass, signed by the owner thereof * * *. It shall be presumed that the land over which said road or any of its branches may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to said company by the owner or owners thereof," etc. Where no such contract was shown, the undisturbed use by the company of such right of way over a tract of land for two years after the road should be finished, and running over it, by the

¹ Section 24 of this act provides that the company may purchase, have, or hold, in fee or for a term of years, any lands, etc., which may be necessary for said road, etc., without specifying how much it may hold, or what shall be the width of its right of way. The only limit is necessity. Section 26 provides the mode of condemning and valuing such land as the company may demand, in the absence of any agreement in regard thereto. Section 28 provides that, in the absence of any contract or contracts in relation to the land through which the road or any of its branches may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, it shall be presumed that the land, etc., together with a space of one hundred feet on each side of the center of said road, has been granted to said company by the owner thereof, etc., unless the owner of said land shall apply for an assessment of the value thereof, in the manner prescribed, within two years next after that part of said road which may be on said land was finished.

terms of the act, raised the presumption of a grant of the easement by the owner. *Hendrick v. Railroad Co.*, 101 N. C. 623, 8 S. E. 236; *Beattie v. Railroad Co.*, supra. Though the provision in reference to a previous attempt to make some agreement with the owner by which the necessity for instituting condemnation proceedings might be obviated was in different charters couched in terms somewhat variant, many of the ablest courts in this country construed them as imposing the duty upon corporations, as a condition precedent to the exercise of the right of condemnation, of alleging and proving that an effort had been made to purchase the privilege of passing over the land sought to be condemned directly from the owners, or that such proprietors were not *sui juris*. *Lewis*, Em. Dom. § 301, with note 2, p. 394, and notes 6, 7, p. 395; 1 *Wood*, Ry. Law, p. 711. While it is not necessary to give our approval to this doctrine, which has no direct application to our case, it illustrates the rule that statutory provisions for taking property in the exercise of eminent domain must be always construed strictly. 1 *Wood*, Ry. Law, p. 643, and note 2.

The right of the owner to recover damages for the taking by a railway company depends, in any case, upon the answer to the test question whether the corporation has already acquired a vested interest in the land, and whether the owner has a still subsisting right to recover damages for the assertion of dominion over it. *Westbrook v. North*, 2 Me. 179; *Hampton v. Coffin*, 4 N. H. 517; *Railroad Co. v. Nesbit*, 10 How. 395. An interest in the entire right of way of 100 feet on each side would not vest in the company unless it took possession in the exercise of the privilege of appropriating private property conferred by the charter, (sections 26-28,) and the correlative right to sue for the damages would not accrue till the title to the interest vested in the company by such unequivocal entry. It was only in the absence of such a contract as would enable the company to construct and operate its road over the land on which its line was located that its occupation and use of the land for corporate purposes for two years after its line was finished over it could be justly held to have started the statute to running so as to raise a presumption of a grant to the right of way for 100 feet on each side of the center of the track. This is not only a fair construction of the language of the charter, but it establishes a rule that is in accord with a familiar principle of the common law in reference to adverse possession. In order to ripen title in the occupant, "possession [said *Pearson*, C. J., in *Osborne v. Johnston*, 65 N. C. 26] must be adverse, uninterrupted, open, and unequivocal, so as to expose the party to an action. This is the test." *McLean v. Smith*, 106 N. C. 178, 11 S. E. 184. The general rule is that when one enters upon land under a deed, and occupies some portion of

it, his constructive possession extends to the boundary line of his deed, unless, by reason of the lappage of a better title on some part of it, the possession on such interference is deemed in law to be in the claimant under such title. *McLean v. Smith*, supra.

The company constructed its track in November, 1874, across the Simpson lot, but entirely upon the half of said lot which was afterwards, on July 7, 1875, conveyed to it by Simpson and wife in fee simple. The company did not attempt to enter upon the other half, though it was situate within 100 feet of the center of the track, until within two years before this proceeding was instituted, on the 16th of March, 1893. The plaintiff alleges that there was no attempt to take actual possession of the half of the lot which was conveyed by Simpson and wife to the plaintiff on the 23d of June, 1883, until within such period; and the answer, by evading a direct admission or denial, is deemed to have conceded the truth of the allegation. If the plaintiff had commenced this condemnation proceeding prior to any assertion of dominion by the defendant, the company or its predecessors might well have answered that they had accepted the conveyance from Simpson in lieu of condemnation, and that the plaintiff could not demand compensation for land outside of that covered by its boundaries,—certainly, until the company should have entered upon and used it for corporate purposes, if at all. We are not called upon to determine whether the plaintiff could have maintained an action for possession and damages for the wrongful withholding of the possession of the land conveyed to her by Simpson. 6 *Amer. & Eng. Enc. Law*, p. 603, and note 3, and p. 606, note 1. It lies, however, within 100 feet of the center of defendant's track; and, if she could have maintained such civil action for the trespass, we think she might nevertheless waive the tortious character of the entry, when actually made in the assertion of a claim by the defendant under its charter, and demand compensation in damages for the easement claimed. *Id.* p. 595, and note 6. The defendant cannot take advantage of its equivocal conduct in confining its occupation for 15 years to the limits of its deed from Simpson, so that it was not subjected to any liability for trespass beyond its bounds, and then claim the advantage of holding under the privilege granted in the charter up to the margin of the usual right of way, instead of to the outer lines of the deed. Even though it may not have been incumbent on the defendant, as a condition precedent to setting up a claim that he acquired an easement in the land from the state in the exercise of the right of eminent domain, to show that he had made an effort previously to purchase the privilege by private agreement, and had failed, yet if the plaintiff, taking the laboring oar upon herself, proposed to prove that another agree

ment was made, in lieu of instituting condemnation proceedings, in 1875, by which the defendant's predecessor accepted (probably for a smaller price) a more restricted territory in fee simple, instead of the easement in a larger boundary, we can conceive of no sufficient ground for objecting to the competency of the testimony. It was only in the absence of such agreement as to the right of way that the statute, upon the completion of the line over the land of an owner, was put in motion so as to raise a presumption of a grant of the easement within two years thereafter. The company, like an individual, can acquire a right as an incident to occupation, only where the possession is unequivocal. It was clearly competent to show that the agent of the company accepted said deed because, as he said, the company did not need as much as 100 feet on either side of the center of the track. We think that the presumption is, in all cases where a deed from a landowner to an area more limited than that allowed by its charter for the location of its line has been accepted by the company, that the conveyance was, within the contemplation of the charter, a contract entered into in lieu of the resort to condemnation proceedings. In this particular instance the defendant has no cause to complain, if the land is really needed for corporate purposes on account of the growth and development of its business, that the plaintiff has waived objection, and conceded, instead of contesting, its right of condemnation. 6 Amer. Eng. Enc. Law, p. 595, and note 6. The rights of the defendant are not impaired, and its liabilities are not affected, as a rule, by reason of the successive sales of the franchise. *Hendrick v. Railroad Co. and Beattie v. Railroad Co.*, supra. For the reasons given, we think that the court below erred in instructing the jury that the plaintiffs' claim was barred by the lapse of time, and a new trial must therefore be awarded. New trial.

FAGG v. SOUTHERN BLDG. & LOAN ASS'N.

(Supreme Court of North Carolina. Nov. 28, 1893.)

CONTRACTS—ACTION FOR BREACH—PLEADING—INSTRUCTIONS—EVIDENCE—APPEAL.

1. In an action against a loan association to recover, as damages for breach of contract, money paid to the association, the complaint is sufficient where it alleges that defendant's local agent promised verbally and by printed representations that a loan to plaintiff should be made by defendant if plaintiff would subscribe for stock in the association, pay \$260 in advance and \$20 for counsel fees, and furnish real estate security; that plaintiff complied with all such conditions of the association in applying for the loan; that defendant refused to make the loan, though it knew the loan was the only inducement for plaintiff to pay the money and to take the stock; and that plaintiff returned the stock, and demanded the return of the money paid, which was refused.

2. The complaint is sufficient without an allegation that the local agent had authority to make the contract for defendant, since it alleges "that defendant knew that the loan of the money was the only inducement to the payment of the money by plaintiff and to the taking of the stock."

3. An averment in an answer that defendant has no knowledge of the fourth paragraph of the complaint, and demands proof, is an insufficient denial of such paragraph.

4. Where the trial court made up the issues on the pleadings, and submitted them to the jury, without objection or the tender of other issues by defendant, the appellate court will presume that defendant was satisfied with the issues, and desired no others.

5. Defendant's exception that, "on all the evidence, plaintiff was not entitled to a verdict," cannot be considered on appeal where it was taken after verdict.

6. The first two issues submitted to the jury were respectively, "Did plaintiff enter into a contract with defendant for the sole purpose of borrowing money?" and "Did plaintiff become a member of defendant association?" The court charged the jury "that if, from the evidence, they found that plaintiff entered into a contract with defendant simply to borrow money, and did not become a member of the association, they would so find; otherwise, they would so find,—the burden being on plaintiff." *Held*, that the charge placed the burden of both issues on plaintiff, and was not objectionable.

Appeal from superior court, Forsyth county; Winston, Judge.

Action by J. O. Fagg against the Southern Building & Loan Association to recover, as damages for breach of contract, money paid to the association. Judgment entered on verdict for plaintiff. Defendant appeals. Affirmed.

The plaintiff alleges: (1) That defendant is a corporation duly organized and doing business in North Carolina. (2) That on or about the — day of —, 1891, the plaintiff, being in need of money, applied to the local agent of the defendant for a loan of \$5,000; that the said agent promised and agreed with the plaintiff, verbally and by printed representations furnished to the plaintiff by the company, that if the plaintiff would subscribe for 50 shares of stock in the defendant corporation, and pay in advance, the sum of \$260, and certain counsel fees, amounting to \$20, making in all \$280, and would furnish real-estate security, as required by the corporation, the company would loan to the plaintiff said \$5,000. (3) That plaintiff had no money to invest in stock in the company, but, relying on said representations and promise, paid the aforesaid sum, aggregating \$280, and applied for the loan of the money, complying with all conditions of the corporation, and offering real-estate security; but the defendant corporation, in violation of its contract, refused to make such loan to plaintiff, although the defendant knew that the loan of money was the only inducement to the payment of the money by plaintiff and the taking of the stock. (4) That, after the refusal of the defendant to furnish the money as promised, plaintiff returned the stock to the company, and demanded the return of his money,

which was refused. Plaintiff demands judgment for \$280, with interest until paid, etc. The defendant, answering the complaint, says that the second paragraph of the complaint is not true; that the third paragraph is not true; that the defendant has no knowledge of the fourth, and demands proof. As a second defense, the defendants say that they have never promised to loan money to the plaintiff through their literature or printed representations, except what appears in such printed matter, and that the local agent has no authority to make contracts for this company other than appears in the prospectus containing contract and by-laws of the company, a copy of which is hereto attached, and made a part of this answer, marked "A," and copy of stock application, marked "B;" that the company has loaned thousands of dollars in the city, but always upon approved security and applications satisfactory to the board of directors of the company. Defendants demand judgment that the complaint be dismissed, and they recover their costs, etc. The following issues were submitted to the jury: "(1) Did the plaintiff enter into a contract with the defendant company for the sole purpose of borrowing money? Yes. (2) Did the plaintiff become a member of the defendant association? No. (3) What sum, if any, did the plaintiff pay the defendant under and by virtue of such contract? Two hundred and sixty-five dollars. (4) Is the defendant indebted to the plaintiff, and, if so, in what sum? Yes; the sum of two hundred and sixty-five dollars, with 6% interest from date of payment." From verdict and judgment in favor of plaintiff, defendant appealed.

Watson & Buxton, for appellant. J. S. Grogan, for appellee.

MacRAE, J. The first exception is in the nature of a demurrer *ore tenus*, on the ground that the complaint does not state facts sufficient to constitute a cause of action, and this objection may be taken for the first time in this court. *Jackson v. Jackson*, 105 N. C. 433, 11 S. E. 173. In examining this question, we can only look at the complaint itself, from which it appears that the plaintiff seeks to recover back money alleged to have been paid by him to the defendant upon an alleged contract made by plaintiff with the local agent of defendant, to the effect that, upon the subscribing by plaintiff for 50 shares of stock in defendant corporation, and the payment by plaintiff of the sum named, and the furnishing of real-estate security, as required by the said corporation, the defendant would loan the plaintiff the sum of \$5,000. The complaint further alleges that plaintiff fully complied with his part of said contract, and that defendant failed and refused to loan the said sum of \$5,000 to plaintiff, and that thereupon the plaintiff returned the stock to defendant, and demanded the repayment to him of

the money so paid by him, and defendant refused to repay the same. Upon the foregoing facts, taken as true,—for they are admitted for the purposes of this exception,—it will appear that the plaintiff has stated a cause of action; for it is clear that upon this statement, if admitted, he would be entitled to recover the money paid by him as damages for the breach of contract by defendant.

It is not alleged, however, in the complaint, that the local agent had authority to make the contract for defendant. If it be contended that there is nothing to show that said agent had such authority, and therefore the defendant is not bound, still there is a cause of action stated, for the plaintiff would be entitled to relief, because it is alleged in the complaint "that the defendant knew that the loan of money was the only inducement to the payment of money by plaintiff and the taking of stock," the only meaning of which allegation is that the defendant knew of the inducement offered by its agent, and accepted the plaintiff's money with such knowledge. A bare statement of the proposition shows that the defendant would not be permitted at law or in equity to retain the money so paid by the plaintiff, and refuse to loan him the \$5,000 upon sufficient security. *Follette v. Association*, 110 N. C. 377, 14 S. E. 923; *Bergeron v. Banking Co.*, 111 N. C. 47, 15 S. E. 883. The case does not make out a voluntary payment, with a knowledge of all the facts, which could not be recovered back, but a payment in subscription to stock, upon a condition known to defendant when it accepted the payment. *Adams v. Reeves*, 68 N. C. 134. We are not incumbered upon this point with any questions which might arise if it appeared that this payment was made with notice to the plaintiff of any conditions of subscription which may appear in the prospectus or other notice of defendant, for we are now considering the case simply upon the complaint, and in this view we think it states a cause of action.

The second exception is that, upon all the evidence, the plaintiff was not entitled to a verdict. The answer denies the allegations of the second and third articles of the complaint. We do not think that the fourth article, alleging the return of the stock and demand for the return of the money, has been sufficiently denied by the answer; for it is simply a denial of knowledge, and not of information sufficient to form a belief. *Durden v. Simmons*, 84 N. C. 555; Code, § 243. For a second defense, the defendants, in their answer, deny that they have ever promised to loan money to plaintiff, "through their literature or printed representations, except what appears in their printed matter," and they further deny the authority of their local agent to make contracts for this company other than appears in the prospectus, etc. The effect of this

second defense is simply to deny the authority of their local agent to make the contract set out in the complaint. Upon these pleadings, which are copied in full, issues were made up by the court, and submitted to the jury. To these issues there was no objection on the part of defendant. There were no other issues tendered. We must presume, then, that defendant was satisfied with them, and desired no others. Clark's Code, p. 357, § 395. There were no objections to testimony, except the one objection stated in the third exception, to be considered hereafter, and no prayers for instructions. This exception, taken for the first time after verdict, cannot now be considered. The point ought to have been made in the court below, before the case was submitted to the jury. *Taylor v. Steamship Co.*, 88 N. C. 15.

The third exception was to the exclusion of the question asked the plaintiff as to the value of his real estate. It was urged by defendant's counsel that this question and its answer were relevant, because the plaintiff alleged in his complaint that he had offered defendant ample security for the loan, and that this was denied in the answer. It will appear that no issue upon this allegation and denial was tendered by defendant, and, upon the issues submitted without objection, this testimony was not relevant.

We find another exception in the case, though not in the assignment of errors. His honor, among other things, charged the jury "that if, from the evidence, they found that the plaintiff entered into a contract with defendant simply to borrow money, and did not become a member of the company, they would so find; otherwise, they would so find,—the burden being on the plaintiff." "To this the defendant excepts." The meaning of this part of the instruction was that, upon the first and second issues, the burden was on the plaintiff, and we see no valid ground of objection to this charge, for the burden was on the plaintiff, not only upon those, but upon all of the issues. There is no error of which the defendant can complain. Affirmed.

STATE v. WINCHESTER.

(Supreme Court of North Carolina. Dec. 12, 1893.)

CRIMINAL LAW—DIRECTION OF VERDICT—INVASION OF PROVINCE OF JURY—REVIEW ON APPEAL.

1. It is error in a criminal cause to direct the rendition of a verdict of guilty.

2. Error cannot be predicated on the trying together of pleas of former conviction and not guilty, where no exception was taken to such course.

Appeal from superior court, Union county; Armfield, Judge.

v.188.E.no.15—42

W. R. Winchester was convicted of crime, and appeals. Reversed.

R. B. Redwine, for appellant. The Attorney General and Armistead Jones, for the State.

CLARK, J. The case on appeal states: "At the close of the testimony his honor instructed the jury that upon the testimony of the justice of the peace, Irby, there had been no former conviction, and upon the testimony of the defendant he was guilty, and directed a verdict to be rendered accordingly." If the evidence justified it, (as to which we need express no opinion,) it would have been proper for the court to have instructed the jury that if they believed the evidence of Irby, witness for defendant, they should find that there was no former conviction; and if they believed the defendant's own testimony he was guilty of the offense charged. *State v. Vines*, 93 N. C. 493, 498. But in directing a verdict the judge exceeded his powers in a criminal action. The jury must pass upon the credibility of the testimony offered. The subject has been so recently discussed in *State v. Riley*, 18 S. E. 168, (at this term,) that we need not repeat what is there said. Regularly, the two pleas of former conviction and not guilty should be tried separately, since the plea of former conviction "implies an admission of the criminal act, and is inconsistent with an absolute denial." *State v. Pollard*, 83 N. C. 597; *State v. Respass*, 85 N. C. 534. But the practice of trying them together has become not unusual, and is often convenient. There being no exception on that ground, this court must assume that this course was pursued with the assent of the defendant. But in directing a verdict there was error.

STATE v. BURTON.

(Supreme Court of North Carolina. Dec. 12, 1893.)

BASTARDY—PUNISHMENT.

1. A father of a bastard child, who, in default of paying the fine and allowance to the mother, imposed by the court, has been committed to the county jail, as provided by Code, § 35, from which he has been discharged on taking the insolvent debtor's oath, as authorized by section 2967, cannot, at a subsequent term of court, be again sentenced to imprisonment, under section 38, which authorizes imprisonment for 12 months in the house of correction, in addition to the fine and allowance authorized by section 35.

2. The fact that the order for his first commitment in default of paying the fine and allowance was verbal, and that no record thereof was ever made, does not authorize his reimprisonment.

Appeal from superior court, Vance county; Shuford, Judge.

Proceeding by the state and Sally Henderson for the imprisonment of James M. Burton, who had been adjudged the father of

Sally's bastard child. From a judgment sentencing him to imprisonment, he appeals. Reversed.

Burton had been adjudged the father of Sally's bastard child at the February term, 1893, of the district court, and sentenced to pay a fine and an allowance to the mother. On failure to comply with the order of the court aforesaid, he was committed to the common jail of Vance county, whence he was regularly discharged, by order of the clerk, March 13, 1893, under the provisions of Code, §§ 2967-2972. At the next term of the said superior court, (May term, 1893,) the solicitor for the state refusing to move in the matter, W. B. Shaw, Esq., who appeared on the trial of the proceeding at February term, 1893, with the solicitor, at the instance of the prosecutrix, on the affidavit set out in the record, moved the court for a *capias* against the defendant, which motion was allowed. The defendant being brought into court, the said W. B. Shaw, assuming to act for the state, moved the court that he be imprisoned, under section 38 of the Code. The defendant, by his counsel, insisted that, the solicitor having refused to act in the matter, the court could not, on motion of another than the solicitor, make any order for his imprisonment under said section 38. Thereupon his honor, Judge Shuford, stated that he would act on the matter of his own motion. The defendant then insisted that, having been committed to prison at the February term, 1893, in default of payment and compliance with the order and judgment of the court then rendered, he is not subject to be committed to prison in default of paying the same; that it is not competent for the court, of its own motion, or on the motion of another than the solicitor, and without the motion of the solicitor prosecuting on behalf of the state, to arrest or punish this defendant; that having been once imprisoned, and discharged according to law, he cannot now be resented or reimprisoned for the same offense; that, there being no house of correction in the county of Vance, the said section 38 is inoperative; that section 38 of the Code applies only before the commitment of defendant in default of complying with the judgment of the court, and not after his discharge from imprisonment, under section 2967; and moved for his discharge. His honor was of opinion against the defendant on all these questions, and held that, the record of the court at February term, 1893, showing no order for the commitment of the defendant for failing to comply with said judgment, he is subject to be imprisoned under section 38 of the Code, and pronounced the judgment accordingly.

T. T. Hicks, for appellant. The Attorney General and Pittman & Shaw, for the State.

AVERY, J. Upon conviction at the February term the court had the power to

"sentence" the defendant either to prison, or, if the county authorities had established a house of correction, to hard labor therein, in addition to the judgment pronounced against him, which imposed the payment of the usual fine and allowance. This conclusion is inevitable if we construe the two sections (Code, §§ 35, 38)¹ relating to the judgment in bastardy cases together, and give effect to both, as a familiar rule of construction requires us to do. Instead of imposing the additional judgment of imprisonment in the county jail, however, the judge, on motion of the solicitor, ordered the sheriff to take the defendant into his custody for failure to comply with the first order, and so left him at the end of the term. During that term the sentence could have been modified, as its execution had not begun. 21 Amer. & Eng. Enc. Law, 1084. But no further steps were taken till the term held in May following. If there had been a house of correction in Vance county, the defendant would nevertheless have been entitled to his discharge upon filing his petition and taking the insolvent debtor's oath, if he had been ordered into custody till fine and costs should be paid. Code §§ 2968-2974; *State v. Williams*, 97 N. C. 414, 2 S. E. 370; *State v. McNeely*, 92 N. C. 829. But in our case the defendant, at the instance of the solicitor, "was placed in custody of the sheriff, by whom he was, on failure to comply with the order of the court, committed to the common jail of Vance county, whence he was regularly discharged by order of the clerk on March 13, 1893, under the provisions of Code, §§ 2967-2972."

We think that the order to the sheriff to take the defendant into his custody was by necessary implication an order to imprison upon failure to pay the fine and

¹ These sections are as follows: "Sec. 35. When the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the judge or justice not exceeding the sum of ten dollars, which shall go to the school fund of the county, and the court shall make an allowance to the woman not exceeding the sum of fifty dollars, to be paid in such instalments as the judge or justice shall see fit, and he shall give bond to indemnify the county as prescribed in section thirty-two; and in default of such payment he shall be committed to prison." "Sec. 38. In all cases arising under this chapter, when the putative father shall be charged with costs or the payment of money for the support of a bastard child, and such putative father shall, by law, be subject to be committed to prison in default of paying the same, it shall be competent for the court to sentence such putative father to the house of correction for such time, not exceeding twelve months, as the court may deem proper."

² Section 2967 provides as follows: "The following persons may also be discharged from imprisonment upon complying with this chapter: (1) Every putative father of a bastard committed for a failure to give bond, or to pay any sum of money ordered to be paid for its maintenance. (2) Every person committed for the fine and costs of any criminal prosecution."

costs. The court was presumed to act within the purview of its power, and had no authority to place the defendant in custody, except for the purpose of compelling such payment. The sheriff so construed the order, and we do not think that in acting upon it he exceeded his authority, or made himself amenable for damages for false imprisonment. An order that a defendant be placed in custody of the sheriff is construed, according to the practice prevailing in all the courts, as a commitment till fine and costs are paid, or, with the sanction of the court, secured. When such is the order, the prisoner may be lawfully discharged either upon the payment of fine and costs or upon taking the prescribed oath. *State v. Williams* and *State v. McNeely*, *supra*. When it is admitted, as in this case, that a verbal order was given to the sheriff to take the defendant into custody, after it had been adjudged that he pay fine and costs, and that the sheriff took and held him till, upon petition, he was discharged in accordance with the provisions of the statute, (Code, §§ 2967-2972,) unquestionably it was the right of the prisoner to demand that a record of the order placing him in custody be entered upon the minutes. *State v. Harrison*, 104 N. C. 728, 10 S. E. 131; *State v. Farrar*, 104 N. C. 702, 10 S. E. 159. The persons entitled to be so released are specifically mentioned, and among them is "every putative father of a bastard committed for a failure to give bond or to pay any sum of money ordered to be paid for its maintenance." Section 2967 (1.) If there is room to doubt whether the language quoted includes the fine as well as the allowance for the maintenance of the child, the omission in the first is supplied by the provision of the second subsection, which extends the right of discharge to those committed for the "fine and costs of any criminal proceeding." We must concede that a comparison of the cases cited by counsel does not lead to a very clear understanding of what was meant when a bastardy proceeding was declared a civil action, but partaking somewhat of the nature of a criminal action. It is, however, manifest that the defendant may be committed to prison in default in paying the fine as well as the allowance, since the statute (Code, §§ 35, 38) plainly so provides; and it has been expressly held that the judgment for a fine and costs imposed by a court is not deemed a debt within the meaning of article 1, § 16, of the constitution. *State v. Cannady*, 78 N. C. 539. In that case the conclusion of the court rested upon the position that the constitution did not prohibit the enactment of a law, subjecting a prosecutor to imprisonment on failure to pay a judgment for costs. We think that upon the same principle the legislature had the power by the express provisions of a statute to make it the duty of the court to commit the putative father

of a bastard on default in satisfying a judgment for fine, allowance, and costs.

Speaking for myself only, however, I must say that I think the act of 1879, by imposing a fine, made the putative father indictable for a criminal misdemeanor, and also liable to imprisonment for nonpayment of the allowance. The manifest intention of the legislature, as evinced in the enactment of sections 35 and 38 of the Code, was that the proceedings against the putative father of a bastard should be "prosecuted by the state," like a "public offense," with a view to insuring the payment of fine and costs, and an allowance appropriated to the support of the child in order to indemnify the county. But while a bastardy proceeding is not prosecuted "for the enforcement or protection of an individual right" or "the redress or prosecution of a wrong," (Code, §§ 126, 127,) it was held by this court in *State v. Pate*, Busb. 244, that the statute in force before 1879 did not make it a criminal action, because a person "could not be put to answer any criminal charge but by indictment, presentment, or impeachment." Const. art. 1, § 12. Though prosecuted in the name of the state, it was declared that the "object of the suit was not to punish the defendant for an act done to the injury of the public, but to indemnify the county against liability for the support of a bastard child." *State v. Pate*, *supra*. The statute from 1741 to 1879 contained substantially the same provision, using precisely the same language as to the consequences of a finding against the putative father, viz. that he should "stand charged with the maintenance of the same [the child] as the county court shall order, and give security," etc. Act 1741, c. 30, (1 Potter's Revisal, p. 144, § 10; Hayw. Man. p. 446; Act 1814, cc. 870, 871, (2 Potter's Revisal, p. 304;) 1 Rev. St. c. 12, § 4; Rev. Code, c. 12, § 4; Battle's Revisal, c. 9, § 4. It was because of the marked distinction between a statute of that kind and one that imposed fine or imprisonment as a punishment that Judge Daniel drew the marked distinction between the proceeding in bastardy and the trial of a criminal action by a justice of the peace. *State v. Carson*, 2 Dev. & B. 370. "Before we quit the case," said the learned judge, "perhaps it may not be improper to remark that there is some difference of construction by the courts in cases of orders of justices in bastardy and convictions of justices under penal statutes and for petty offenses. Orders of justices in bastardy cases are police regulations, having for their object solely an indemnity of the county from money liabilities. They do not partake of the nature of criminal offenses. Therefore every intendment will be made to support an order of justices in bastardy. Convictions before justices are generally for petty offenses which partake of a criminal nature. Generally, the offenses are created

and the jurisdiction to the justices is given by acts of the legislature. The court thus created, being an inferior one, and of a limited jurisdiction, proceeding not according to the course of the common law, it has been invariably the practice, in favor of liberty and law, for the superior courts of general superintending jurisdiction to hold these inferior courts to strict rules when they attempt to exercise a jurisdiction in any matter savoring of a criminal nature." When, however, the legislature passed the act of 1879, (chapter 92, § 2, Code, § 35,) providing that "when the issue of paternity shall be found against the putative father, or when he admits the paternity, he shall be fined by the justice not exceeding the sum of ten dollars, which shall go to the school fund of the county," like all other fines imposed on conviction in criminal prosecutions, it would seem that the obvious effect of the change in the law was to create a petty criminal misdemeanor, and to so limit the punishment as to make it cognizable before a justice of the peace. The constitution of 1868, and also the amended constitution of 1875, conferred this power on the legislature in plain terms, (article 1, § 13, and article 4, § 27;) while under the constitution of 1835 there was no exception to the rule that all criminal prosecutions must begin by indictment, presentment, or impeachment, (*State v. Pate*, supra.) The reasons given by Judge Pearson for declaring the old proceeding a civil one seem to have been fully met when we consider the effect of the later act construed in the light of the new provisions in the organic law. One of the objects of the law is to punish the offender by imposing a fine. The defendant can be lawfully convicted of a petty misdemeanor when the punishment cannot exceed a fine of \$50 or imprisonment for one month, without the intervention of a grand jury, on the warrant of a justice of the peace in the nature of an indictment. Unless, therefore, we were to concede that the imposition of a fine, to be appropriated to the same purpose as all fines imposed on conviction upon indictments, is not a punishment, we are driven to the conclusion that the legislature, in the exercise of its power, created another petty misdemeanor by the act of 1879, attaching as an additional consequence of conviction the old police regulation for the indemnity of the county against the cost of supporting the child. It may be well, therefore, to determine what is the legal effect of imposing a fine. Says Lord Coke (1 Co. Litt. 126b): "Here a fine signifieth a pecuniary punishment for an offense or a contempt committed against the king." "A fine is a pecuniary punishment for an offense or a contempt committed, imposed by the judgment of a court." 7 Amer. & Eng. Enc. Law, 991. "The ordinary punishment for misdemeanors is fine or imprisonment at the discretion of the court. * * * Where the statute commands an act of a

public nature, and is silent as to the punishment, the common law provides fine or imprisonment." 1 Bish. Crim. Law, § 940. The act, therefore, not only brings the warrant for bastardy within the definition given by the court in *Pate's Case*, but also within the statutory definition of "an action prosecuted by the state as a party, against a person charged with a public offense for the punishment thereof." Code, § 129. The parties to a warrant for bastardy are the state and the putative father, and if a fine of not exceeding \$10 is a punishment, then the statute creates a criminal offense, which is the subject of a criminal action. The word "criminal" means "punishable by law, human or divine." Cent. Dict. Since other corporal punishments than hanging were forbidden by the constitution of 1868, the legislature can impose as a penalty for crime only fine or imprisonment in the common jail or in the state prison, or any two or all three of these punishments. "In criminal law, a fine is a sum of money ordered to be paid by an offender as a punishment for an offense. A fine at common law is one of the punishments for misdemeanor, and it has been made a punishment for many offenses by modern statutes." 1 Rap. & L. Law Dict. There can be no question as to the power of the legislature to make the begetting of a bastard child a misdemeanor, and to so limit the punishment as to make it cognizable before a justice of the peace, or to create a special court with concurrent jurisdiction of such petty misdemeanors, or the exclusive right to try higher offenses. *State v. Powell*, 97 N. C. 417, 1 S. E. 482. It is true that while the question of the construction to be given to the act of 1879 had never been raised until this appeal was argued on appeal, this court has obiter conceded that the proceeding was still civil in its character, without adverting to the fact that the act of 1741 had imposed a fine. See *State v. Bryan*, 83 N. C. 611; *State v. Peeples*, 108 N. C. 768, 13 S. E. 8; *State v. Edwards*, 110 N. C. 511, 14 S. E. 741. In none of these cases was the attention of the court directed to the act of 1879, and the alteration in the organic law since the older cases of *State v. Carson* and *State v. Pate* were decided. It is true that in *State v. Crouse*, 86 N. C. 617, an exception was taken on the ground that the proceeding was a criminal one, but we search in vain for an intimation that the attention of the court was called to the fact that the act of 1879 imposed a fine. It is evident that the justice (Ashe) who delivered the opinion was not advertent to that change, since he does not notice it, and says, what is not correct, that the only change made in the old law was "to leave it entirely to the option of the woman, as a general rule, whether she would institute proceedings against the father." Did the legislature intend to leave the allowance unaffected when the amount was limited to \$50, and a fine

was substituted instead of the additional sum that might have been previously exacted for the support of the child? I think not. But, however that may be, we think that we cannot classify a warrant charging a defendant with bastardy as a civil action, or a special proceeding, since he is subject to a fine imposed as a punishment. It does not follow that the rule of evidence which gives artificial effect to the examination of the woman is altered. The legislature has the power to make cases of this nature an exception to the general rule, and to make the examination of the woman presumptive evidence, just as it has made the fact of escape by one lawfully committed and charged with a crime *prima facie* evidence on an indictment against the sheriff or jailer. Code, § 32; State v. Rogers, 79 N. C. 609; State v. Bennett, 75 N. C. 305.

I have examined very carefully the decisions of other states of the Union upon this subject, and, while most of them have construed statutes of similar import to our act of 1741 (kept in force till 1879) as police regulations, as distinguished from criminal laws on the one hand, and, on the other hand, as not within the inhibition of the constitutional provision in reference to imprisonment for debt, adopted in all of the states, and expressed in almost the same words, we have failed to find a single act elsewhere which imposes a fine in addition to the allowance exacted for the support of the bastard and the indemnity bond. See 2 Amer. & Eng. Enc. Law, pp. 144, 145. If the sentence to pay a fine and costs was imposed upon conviction of a criminal offense, and the defendant had already taken the prescribed oath, he was not liable to arrest for failure to pay the fine. So it follows that he is now neither liable to imprisonment on account of the nonpayment of the fine to the state, which was imposed as a punishment, nor for default in the payment of the allowance exacted of him for the indemnity of the county. In either of the double aspects of the case, and in both, whether the proceeding be criminal or civil in its nature, the ruling of the court below was erroneous. The judgment is reversed, and the defendant is entitled to be discharged.

CLARK, J. I assent to that part of the opinion which is the opinion of the court, but dissent from the views of Mr. Justice Avery as to the nature of the action. The getting a bastard child is bad in morals, but I do not think the legislature ever intended to make it either a crime or an indictable offense. The statute is, in substance, such as it has always been, and which has uniformly been held a purely fiscal arrangement, or a police regulation, to prevent the child becoming a charge upon the county. The addition by the act of 1879 (Code, § 35) of a fine of "ten dollars, which shall go to the school fund of the county," is not suf-

ficient to turn the matter into a crime. The imposition of the \$10 is in furtherance of the main design of a fiscal provision, and rather in the nature of a tax to be contributed towards educating the children of the county. This is shown by the fact that it is placed at a definite, fixed sum, and not "not to exceed" a certain sum, or "in the discretion of the court," as is usual in prescribing a punishment for criminal offenses; also by the fact that in the numerous cases which have come to this court since 1879 the court has never held or intimated that the addition of these words had changed the action, heretofore always held to be a civil proceeding, into a criminal one. Owing to its peculiar nature,—the enforcement of a police regulation for fiscal purposes,—this action has some anomalous features. These have been recently pointed out, and the authorities reviewed, in State v. Edwards, 110 N. C. 511, 14 S. E. 741. In that case it is expressly noted that a fine is imposed. The court was not inadvertent to it. But it held, as had uniformly always been held, ever since the act of 1879, that it was a civil proceeding. State v. Peebles, 108 N. C. 768, 13 S. E. 8; State v. Wilkie, 85 N. C. 513; State v. Bryan, 83 N. C. 611,—all of which were since the act of 1879. Indeed, in State v. Crouse, 86 N. C. 617, the point was expressly taken that the act of 1879 (now Code, § 35) made the action a criminal one, and hence that no appeal lay. The court held that it was still a civil proceeding, and that the woman could appeal. Ashe, J., says that "the only alteration of the law with regard to bastardy effected by the act of 1879, and all that we think was intended to be effected," was that it was to become optional with the woman to institute proceedings, except where the child was likely to become a charge upon the county. If the intent of the act of 1879 was to make this a criminal proceeding, it is singular, to say the least, that the Code of 1883 should retain the provision in section 32 that "the affiant, the woman, or the defendant," may appeal; or that by the same section the examination of the woman should not only be competent to be read as evidence, but is presumptive evidence.

BOARD OF EDUCATION OF BLADEN COUNTY v. BOARD OF COM'RS OF BLADEN COUNTY.

(Supreme Court of North Carolina. Dec. 12, 1893.)

CAPITATION TAX—DIVISION FOR POOR AND EDUCATION—PENSIONS FOR VETERANS—CONSTITUTIONAL LAW.

1. Necessitous Confederate veterans and their widows are a portion of the poor, within the meaning of Const. art. 5, § 2, which requires the proceeds of state and county capitation taxes to be applied to the purposes of education and the support of the poor, but which prohibits more than 25 per cent. thereof to be

appropriated to the latter purpose; and hence Laws 1891, c. 323, § 2, which imposes a capitation tax of 75 cents on every male person, and devotes 9 cents thereof (less than one-fourth) to the payment of pensions to indigent and disabled soldiers, is valid.

2. The 9 cents appropriated to the payment of pensions by the above act must be deducted by the county commissioners from the 25 per cent. of the total capitation tax appropriated by them to the support of the poor; and it is error for them to deduct 9 cents from each poll for pensions, and then devote one-fourth of the remainder to the support of the county poor, since this would leave less than three-fourths of the entire capitation tax for the purposes of education, in violation of the above constitutional provision.

3. County commissioners who, acting in good faith and in mistake of law, have directed a greater proportion than one-fourth of the capitation tax to be applied to the support of the poor, in violation of Const. art. 5, § 2, which appropriates three-fourths of such tax to the purposes of education, are not liable to the board of education for such misappropriation, either as individuals or as a corporation; and the only remedy of the board of education is by mandamus against the county treasurer, to compel the application of the unexpended portion of the school fund, so wrongfully diverted, to the purpose for which it was intended by the constitution.

Appeal from superior court, Bladen county; Winston, Judge.

Action by the board of education of Bladen county against the board of commissioners of Bladen county for the unauthorized diversion of taxes from educational purposes. From a judgment for plaintiffs, defendants appeal. Reversed.

The complaint is as follows: "The plaintiffs complain, and allege (1) that the plaintiffs are a corporation created by the general laws of North Carolina, with power to sue and be sued; (2) that the defendants are a corporation created by the laws of North Carolina, with power to sue and be sued; (3) that the defendants did not require enough of the poll taxes which were levied to be appropriated and applied to the school fund of Bladen county for the years 1890, 1891, and 1892, the total levies on each poll for all purposes being \$1.80, and of that amount only the sum of \$1.26 was appropriated and applied to the said school fund, which amount so applied was less three-fourths of the amount levied; (4) that out of the amounts levied upon polls and realized from that source there was about five hundred and forty dollars applied to purposes other than the school fund in the county for the years aforesaid, which amounts ought to have been applied by the defendants to the school fund of Bladen county. Wherefore the plaintiffs demand judgment (1) for the sum of five hundred and forty dollars, and cost of this action; (2) that a writ of mandamus issue from this honorable court, commanding the defendants to apply the aforesaid sum already levied to the school fund of Bladen county, in accordance with law and the prayer of the plaintiff; (3) for such other relief as the plaintiffs have right to demand." The

defendants, answering the complaint, say.

"(1) That the allegations contained in articles Nos. 1 and 2 are admitted. (2) That article 3 of the complaint is admitted, except that portion that alleges the defendants did not levy up to the constitutional limit in the year 1890, and that part of said complaint is denied. In further answer to said article No. 3, the defendants allege that, under the constitution, (article 5, § 2,) the defendants had the right to apply twenty-five per centum of the capitation tax to the support of the poor of the county. (3) That the allegations contained in article No. 4 are denied."

C. C. Lyon and Busbee & Busbee, for appellants.

AVERY, J. Under the provisions of section 2, c. 323, Laws 1891, a capitation tax of 75 cents was levied upon every male person not exempted as therein declared, to be devoted to the purposes of education and the support of the poor, as may be prescribed by law, not inconsistent with the apportionment established by section 2 of article 5 of the constitution of the state. This levy was made, as expressly stated, in contemplation of the statute (section 17, c. 198, Laws 1889) which devotes 9 cents of the proceeds arising from the tax on each poll, together with 3 cents of the 25 derived from the tax on every \$100 in value of taxable property, to the payment of pensions of indigent and disabled soldiers, provided for in the same act. The county of Bladen supplemented the state capitation tax so as to make the aggregate \$1.80 on every taxable poll, of which 9 cents on each head was paid over to the proper authorities of the state. Of the sum remaining to be appropriated under the orders of the defendants, \$1.26 arising from each poll was paid over to the plaintiffs, and 45 cents per capita to the support of the poor. The plaintiffs contend that three-fourths of the aggregate capitation tax, or \$1.35 of the \$1.80 derived from each poll, was devoted by the constitution, to "the purposes of education," and should have been paid over to them; while the defendants insist that one-fourth of the whole levy on polls or 45 cents of each poll tax was properly expended for the support of the indigent in the county of Bladen.

The questions raised by the appeal depend upon the construction of section 2, art. 5, of the constitution, which is as follows: "The proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent. thereof be appropriated to the latter purpose." The application of the proportion of the capitation tax specified in the constitution to the support of the poor must be made necessarily under the direction of the legislature, whose exclusive right it is, in

the exercise of the general police power, to determine and declare by whom and how the names of the indigent of the state who are entitled to assistance from the public, in order to their maintenance, shall be ascertained, and subject to the restrictions of the constitution from what fund and by whom allowances for their support shall be made. Counties are the creatures of the lawmaking department, and their powers may be enlarged, abridged, or withdrawn at the pleasure of the legislature, provided no right guaranteed by the organic law be infringed. *Lilly v. Taylor*, 88 N. C. 489; *Commissioners of Dare Co. v. Commissioners of Currituck Co.*, 95 N. C. 189. If the legislature were not clothed with power to alter, amend, or repeal section 2, art. 7, the general supervision of the poor of the county would still be exercised only as may be prescribed by law. Another clause of the constitution (section 5, art. 11) enjoins upon the legislature the duty of making beneficent provision for the poor, the unfortunate, and orphans. The law which provides pensions for different classes of persons who were disabled during the war, and for certain widows, (*Laws 1889, c. 198*.) was therefore enacted, in the discharge of a legal as well as a moral obligation. As the unfortunate, blind, deaf and dumb, and insane, are cared for in different institutions, adapted in all their appointments to the wants of each class, so provision is made for the wounded and disabled soldiers, by aiding in furnishing a home, food, clothing, and medical attention to some, and by giving pecuniary aid to others, who are in charge of their relatives. The act under which 9 cents of the whole levy of 75 cents on each poll is devoted, with 3 cents of the levy on every \$100 in value on property, to the payment of these yearly stipends, shows by its terms an intent to provide only for old soldiers who are poor as well as disabled, and for no widows except such as are indigent and unmarried. No person can become a beneficiary under the statute who owns, or has disposed of by gift to wife, child, children, or next of kin, or to any other person, since May 11, 1885, property worth more than \$500. Section 2. The whole number of poor pensioners is divided into four classes, with a view to increasing the allowance according to the extent of the disability resulting from wounds. The legislature clearly has the power to delegate authority to the county officials to provide and care for one class of the indigent or unfortunate inhabitants of the state, and to disburse a part of the fund devoted by the constitution to the support of the poor by appropriating it more directly to another class, whose wants, in the opinion of the lawmakers, can be best supplied through public agencies of a different kind. As the levy of nine cents did not exceed one-fourth of the total state levy on the poll, the general assembly unquestionably had the right to appropriate it to this particular class

of the indigent, and to provide by general or special legislation for the other poor, through the county commissioners of the various counties. In other words, a sum not exceeding one-fourth of the amount levied by the state upon the poll could, without violating the constitution, be appropriated, with a corresponding amount, upon the equation plan of the tax derived from property, to the support of indigent soldiers and poor widows of soldiers. But if there is no warrant in the organic law for the appropriation, except the authority given by section 2, art. 5, of the constitution, to expend 25 per cent. of the sum derived from the capitation tax for the support of the poor, it would follow that the amount of this fund applicable to the maintenance of other classes of indigent persons would be correspondingly diminished. The language of the constitution is plain and peremptory, and forbids the application of the fund arising from the tax on polls to any purposes other than to education and the support of the poor, or of any greater proportion for the maintenance of the poor than that prescribed in the instrument, until the levy reaches the limit of two dollars. So far this court, in construing the constitution, has given its affirmative sanction to a levy on the poll in excess of the limit of two dollars, made directly by legislative act, only where the tax is intended to suppress insurrection or repel invasion, or to meet payments due on the public debt of the state, or a debt created before the adoption of the constitution of 1868; while it has declared unconstitutional a levy by a county, even in pursuance of legislative authority, except for the payment of an ante-constitution debt, or by virtue of specific authority under section 6, art. 5, to levy a special tax. *Board of Education of Bladen Co. v. Board of Com'rs*, 111 N. C. 578, 16 S. E. 621; *Barksdale v. Commissioners*, 93 N. C. 472; *Railroad Co. v. Holden*, 63 N. C. 410. It is still an open question, however, whether the legislature has the power to exceed the usual limit in order to provide for the maintenance of public schools, as required by article 9, § 3, of the constitution. *Board of Education of Bladen Co. v. Board of Com'rs*, *supra*. We are of the opinion, therefore, that the legislature had no authority to impose a tax of nine cents on each poll, except as a levy for the maintenance of the poor, under article 5, § 2, but that no constitutional inhibition prohibited the appropriation of one-fourth of any state tax levied upon each head to the support of the poor of any or all classes. As the organic law, in unmistakable terms, devotes three-fourths of such levy to educational purposes, it follows that whatever portion of the capitation levy (not to exceed one-fourth) is directly appropriated by the legislature to any given class of the poor, to be disbursed by some agency other than the various boards of county commissioners, must be deducted by the county authorities

(if less than one-fourth) from the 25 per cent. of the capitation tax usually subject to appropriation by them for the support of the indigent, while three-fourths of the entire sum derived from that source must at all events be paid over to the educational board, who are constituted the custodians and disbursers of the school fund of the county.

We concur with the learned judge who tried the case below in the opinion that the legislature was warranted in making the levy of nine cents on the poll only upon the idea that necessitous veterans constituted a portion of the poor, within the contemplation of section 2, art. 5, of the constitution. But we think, in the absence of any express statute providing otherwise, the county authorities may ascertain the amount of the capitation tax that is subject to appropriation for the poor of the county by deducting the amount of the state levy for indigent soldiers from the one-fourth of the aggregate levy for state and county purposes, as they may then determine what proportion of the same fund is left to be devoted to educational purposes in the county by deducting from the three-fourths of the aggregate levy the amount devoted by the legislature to the state school fund, and paid over to the state treasurer. If it were a practical question, this would lead to some modification of the calculation adopted as the basis of the judgment rendered in the court below. But while there are urgent reasons for passing upon the question raised in this cause, especially as a guide to the auditor, who would otherwise be at a loss in giving the instructions which he is required to send out to the counties, the judgment of the court from which the defendants appeal, if treated as a final judgment, upon the idea that it leaves only a computation like that as to costs to be made, is nevertheless clearly erroneous. Judgment was demanded against the county commissioners of Bladen county for the sum of \$540, the alleged amount of the tax for the years 1890, 1891, and 1892, which ought to have been applied for the maintenance of the public schools of that county, but which was applied to other purposes. It seems to us that there are several insurmountable objections to the rendition of such a judgment, or of a judgment that the plaintiffs recover a sum to be ascertained by a calculation on the basis of a given rate on each taxable poll of the county.

If the repeal of chapter 199 of the Laws of 1889, by chapter 166 of the Laws of 1893, restored the the Acts of 1885 and the provisions of the Code in reference to education which are not inconsistent with the last-named act, or if this proceeding be governed in any respect by the act of 1889, in any view of the question, it was the duty of the county treasurer, as treasurer of the county board of education, to collect from the sheriff "the whole amount levied (less such sum as may be allowed on account of insolvents

for the current year) by both state and county for school purposes, (Code, § 2563,) and to receive and disburse all public school funds." True, section 2563 of the Code was so amended by the act of 1889 (section 28) as to provide that suit should be instituted "on relation" of the board of education of the county, instead of "on relation" of the county commissioners; but we fail to find any statute or any principle of law under which an action would lie against the county commissioners, either as individuals or as a corporation, for money belonging to the school fund, which was paid over by the treasurer on his general account, as treasurer of the county, for the support of the poor of the county. If they had in good faith mistaken the law, and ordered an improper division of the capitation tax between the county and the educational board, it is familiar learning that they would not thereby have incurred personal liability to the other board, because they would have been acting in a judicial capacity. *Thomas v. Wilton*, 40 Ohio St. 516; *Boseker v. Board of Com'rs*, 88 Ind. 267; *People v. Stocking*, 50 Barb. 573; *Hill v. Charlotte*, 72 N. C. 55. On the other hand, the county is not liable for a misapplication of a fund of which county commissioners direct the disbursement, under the general power delegated to them by section 753 of the Code, in good faith, but under a misapprehension of the law. *Long v. Commissioners*, 76 N. C. 273. If the plaintiff board is entitled to recover judgment against the defendant board, which has the general oversight of county government, it would follow that the courts would be required, if it should become necessary, to enforce the levy of a sufficient tax upon the property of the county to replace the amount belonging to the school fund, which has already been wrongfully, but honestly, expended for the support of the poor. The taxpayers of a county are under no legal obligation to submit to additional burdens, in order to repay sums belonging to one fund that may have been in good faith mingled with another fund, and diverted from the purpose for which it was intended. If, however, it had appeared that a part of the school fund had been transferred to the general fund of the county, and was still held by the county treasurer, subject to the orders of the defendant board, the plaintiffs would have been entitled to recover so much of the fund as was still unexpended, and to demand a writ of mandamus to compel the payment of such specific sum in order to its application to the purpose for which it was intended. But it would seem that all of the money collected for educational purposes should have been paid over by the sheriff to the county treasurer, in his capacity as treasurer of the board of education, and held by him subject to the orders of said board. Code, §§ 2554, 2563. The defendant board, as such, had no power over that fund, (unless it was its duty

to prosecute a suit to compel its payment to him as a part of the county school fund,) and the treasurer was not bound to transfer it, on the order of the county commissioners, to the fund held by the county for general purposes; so that the misapplication of the of the fund was made by the treasurer of the board of education, and he is not a party to this action. He was required by law (Code, §§ 2558, 2559) to make the most minute reports of his receipts from all sources, and his expenditures for all purposes, to the plaintiff board. As silence on the subject might lead to the bringing of almost innumerable actions against county treasurers, we deem it proper to say further that, in our opinion, if the plaintiff board had brought the action against the treasurer in his capacity as the custodian and disbursing of its own funds, or upon his official bond, it would not have been entitled to recover. *Liles v. Rogers*, 18 S. E. 104, (at this term.) For the reasons given, the judgment is reversed.

PARKS et al. v. ADAMS.

(Supreme Court of North Carolina. Dec. 12, 1893.)

ATTACHMENT AGAINST NONRESIDENT—VALIDITY—ORDER OF CONDEMNATION—WHO MAY ATTACK.

1. Where money due defendant is attached in the hands of the debtor, another person who claims the fund under an assignment from defendant, and asks the court for leave to contest the ownership with plaintiffs, which leave is refused, cannot, unless he excepts to such refusal, contest in the appellate court a subsequent judgment for plaintiffs.

2. An affidavit on which a warrant of attachment against a nonresident was issued was not defective because it did not allege that defendant "had property in this state." *Branch v. Frank*, 81 N. C. 180, followed.

3. Defendant cannot complain of a judgment condemning a fund attached to the payment of a debt due by him on the ground that he had transferred the fund before the attachment to another person.

4. A nonresident defendant, funds belonging to whom have been attached, cannot complain, after a judgment against him, of the order condemning such funds to the satisfaction of the debt.

Appeal from superior court, McDowell county; Boykin, Judge.

Action by Parks & Nichols against S. R. Adams. A warrant of attachment was issued, and a levy made on money in the hands of J. G. Neal, trustee. From a judgment condemning such fund to the payment of plaintiff's claim, said Adams appeals. Affirmed.

The warrant of attachment was issued in aid of the principal relief sought by the plaintiff, and a motion was made by the defendant before the clerk to vacate the same. One W. S. Dodd claimed the fund attached, and at the hearing of the said motion leave was granted by the clerk to the plaintiff and the defendant to file affidavits raising an issue of title to the fund. Before the jury

were impaneled, the plaintiff moved the court to strike out the affidavit raising the issue of title to the fund, for that the defendant had not filed the bond provided for in section 331 of the Code, and the plaintiff's counsel stated in open court that he had given the claimant Dodd's attorney full notice that he should require him to file the bond before any issue as to the title should be submitted to the jury; and this was not denied. The attorney for the claimant insisted that the filing of the affidavit by the plaintiff was an implied waiver of the bond. His honor offered the claimant the privilege of filing the bond, which he refused to do, and thereupon his honor refused to allow the claimant, Dodd, to be made a party without bond for the purpose of trying a collateral issue of title. No exception was taken to the ruling of his honor. Verdict for the plaintiff. Defendant's counsel then insisted upon his appeal from the clerk's order refusing to dissolve the attachment, and asked that the judge should then hear the appeal. The court refused to vacate the warrant of attachment, and rendered judgment for the plaintiff. The defendant excepted to so much of the judgment as provides that the money in the hands of J. G. Neal, trustee, belonging to S. R. Adams, be, and the same is hereby, condemned to be paid in satisfaction of the said debt, interest, and cost. Appeal by defendant and William S. Dodd.

P. J. Sinclair, for plaintiffs. Justice & Justice, for defendant.

BURWELL, J. An examination of this record shows very conclusively, we think, that neither of the appellants, Adams nor Dodd, have any cause to complain of the judgment they ask us to review. The defendant, a nonresident, appeared in the action, and filed an answer, denying the alleged indebtedness to the plaintiffs. The issue thus raised was tried, the court having acquired by his appearance and the filing of his answer jurisdiction of the parties and of the subject-matter. A verdict was rendered, and a judgment was entered in favor of the plaintiffs against the defendant for the sum found by the jury to be due from him to them, and to none of this does the defendant object. It may be noted here that this is not one of those cases in which the jurisdiction of the court is dependent upon the fact that property of the nonresident defendant has been seized under process issuing in the action. In those cases, if it appear that the defendant's property has not in fact been levied on and taken, the very foundation of the court's jurisdiction has failed, and any judgment in the cause is, of course, a nullity. The contest here is not about the main action between the plaintiffs and the defendant, but solely about the regularity and effect of the ancillary proceeding of attachment, which the plaintiffs called to their aid.

The record states that there was an "appeal by defendant and William S. Dodd." The latter had asserted that the debt or fund alleged to be due to the defendant by one Neal, trustee, on which the plaintiffs claimed that they had acquired a lien by virtue of the levy of their warrant of attachment, was really due to him because of an assignment of it to him by the defendant; and he had asked the court to allow him in this action to contest with the plaintiffs for the ownership of this money or debt. The court refused to allow him so to do. He took no exception to that ruling. Thereafter he was out of the case. His rights, if he has any, to this fund are not affected by the judgment, and he has no standing as a party to the cause, and none as an appellant here. It may have behooved the debtor, Neal, trustee, in whose hands was the attached fund or debt, to have it well settled, in the face of the conflicting claims of the plaintiffs and of Dodd, to whom he should pay the money. But he, for good reasons, no doubt, neither asked for the protection of such a judicial determination nor does he appeal from the judgment which we are here called upon to review. Thus the defendant Adams is left to be the sole appellant in this cause. He alone objects to the judgment, and to the ruling of his honor. He insists that the affidavit upon which the warrant of attachment was issued was defective, in that it did not allege that the defendant "had property in this state." The case of *Windley v. Bradway*, 77 N. C. 333, sustains him in this, but the inadvertence of the court in its ruling there is corrected in *Branch v. Frank*, 81 N. C. 180, where the provisions of the Code in this regard are fully and correctly set out. The point, therefore, was not well taken. The judgment, after declaring that the plaintiffs recover of the defendant Adams the amount found due by the verdict, provides "that the money in the hands of J. G. Neal, trustee, belonging to said S. R. Adams, be, and the same is hereby, condemned to be paid in satisfaction of said debt, interest, and costs of this action to be taxed by the clerk;" and the exception is to this proviso alone, and comes, as we have said, from the defendant Adams alone. Neal, trustee, is content. Now, if this exception of the defendant is founded upon the hypothesis that this fund or debt, because of his transfer of it to Dodd, does not belong to him, (the defendant,) and did not belong to him when the warrant was legally levied upon it, then we have, as it seems to us, an exception on the nonresident defendant's part, because another man's property is to be applied to the satisfaction of his indebtedness to plaintiffs. The rights of the defendant's transferee, who is no party to this judgment, and is not bound thereby, may well be left, as they must be, to his own care. And if the exception is founded upon the hypothesis that this fund or debt does still belong to him in

spite of his alleged transfer to Dodd, (which the defendant insists was made by him bona fide, and before the attachment of plaintiffs' lien,) then it would seem that after a verdict in plaintiffs' favor, establishing their right to recover, the court having jurisdiction by appearance of the defendant, it did not lie in his mouth to raise objections to the manner in which the officer who was charged with the execution of the warrant of attachment had performed his duty. He owes the plaintiffs. Upon this theory, Neal, trustee, owes him. The latter does not complain of the order which directs him to apply what he owes to or holds for the defendant to the satisfaction of plaintiffs' judgment. It is for him, not the defendant, to be careful that the sheriff's receipt for this fund shall be a valid acquittance to him from all claimants, including the defendant; and as to him the provision of Code, § 489, furnishes an easily secured and safe protection, independent of any reliance upon the attachment proceedings. We purposely omit to express any opinion as to the effect of the alleged levies of the warrants of attachment to create liens in plaintiffs' favor on the debt or fund, for those are matters that may affect the rights of the defendant's transferee, Dodd, and they do not in any way concern the rights of the defendant. It would serve no good purpose to discuss them here. Affirmed.

LADD v. BYRD et al.

(Supreme Court of North Carolina. Dec. 12, 1893.)

HOMESTEAD — REVERSIONARY INTEREST—ATTAINMENT OF MAJORITY BY HOMESTEADER'S CHILDREN—ESTOPPEL.

1. Where, in an action by a judgment creditor to recover his reversionary interest in the homestead of the deceased judgment debtor, it appears that the debtor had children, and it is not shown that they had attained their majority at the institution of the action, a nonsuit was properly entered.

2. A judgment creditor, who does not appeal to the United States supreme court from an erroneous decision of a state court that the homestead provisions of the state constitution operated retroactively, is estopped from denying the validity of the allotment of a homestead made in accordance with the state decision, though the United States supreme court in a similar case has overruled the state court.

Appeal from superior court, Wilkes county; Boykin, Judge.

Ejectment by Aaron Ladd against L. C. Byrd and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

A. E. Holton and Watson & Buxton, for appellant.

AVERY, J. Prior to the passage of the act of 1870, when the reversionary interest could still be sold under execution, the judgment creditor might, at his option, recognize the claim of the debtor to a homestead by

exposing to sale only such reversionary interest, without affecting the validity of the sale, or in any way impairing the right of the purchaser to the possession of the land on the expiration of the prescribed period of exemption. *Long v. Walker*, 105 N. C. 108, 10 S. E. 858; *Wyche v. Wyche*, 85 N. C. 96; *Barrett v. Richardson*, 76 N. C. 423. When made expressly "subject to the homestead" it was held that the sale was valid, and "passed the reversionary interest only." In such cases it is clear that those holding under and enjoying the right of exemption, and their assignees, are in privity with a purchaser whose right to the possession is postponed by the clemency of the execution creditor; and their possession in no event becomes adverse to his claim till his right of entry and of action accrues on the termination of the exemption. *Corpening v. Kincaid*, 82 N. C. 202; *Lowdermilk v. Corpening*, 92 N. C. 333. The same principle prevails as that which governs in the case of life tenants and remainder-men or reversioners; the statute does not run until the new claimant can maintain an action for the possession, and fails to bring it. *Melvin v. Waddell*, 75 N. C. 361; *Staton v. Mullis*, 92 N. C. 623; *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991. But in the case at bar it seems that the present plaintiff, Ladd, recovered a judgment against one Adams on an old debt, and at a sale under execution thereon on the 2d day of August, 1868, made without allotting a homestead to the debtor, became the purchaser, and took the plaintiff's deed for the land. When, however, the plaintiff attempted to enforce his right by an action for possession, it was decided that Adams, the debtor under whom the present defendants claim as heirs at law, was entitled to a homestead in the land, (*Ladd v. Adams*, 66 N. C. 164,) and the plaintiff was forced to submit to judgment of nonsuit in accordance with the view which then received the sanction of this court, that the homestead provisions of the constitution operated retroactively. Notwithstanding the fact that the decision of the supreme court of the United States, subsequently rendered, led to the overruling of that doctrine, Adams, having had his homestead previously allotted so as to embrace the whole tract of land in controversy, continued to occupy it till his death, in 1889, and since his death the defendants have held possession, claiming as heirs at law of Adams. We think that the judgment in the former action is conclusive upon both parties to the extent only that the plaintiff (having failed to raise the federal question by appeal to the supreme court of the United States) was precluded from demanding the possession till the falling in of the exemption, while the defendant, and those claiming under him, were estopped from denying, as against the plaintiff and those claiming under him, that they occupied the land in dispute as a

homestead, and not in the assertion of a title adverse to that of the plaintiff, so long as the homestead right subsisted. The creditor, though he acquired a good title under the sale, has recognized, by his inaction, the validity of the allotment of the homestead; and is in no worse plight than if he had not proceeded to sell until Adams died in 1889. If the sale had not been made until that time, a good title would have passed, as has been expressly held by this court. *Cobb v. Haliburton*, 92 N. C. 652. It would therefore be strangely inconsistent with the doctrine laid down in the cases cited that the creditor, who sold subject to the homestead when not bound to do so, or who calmly awaited without action the termination of the exemption and thereby recognized its validity, was not barred when the right expired, if we should hold that another creditor, who did not sleep upon his rights, but was compelled to acquiesce in the ruling of the highest court in the state, is either concluded by the adjudication that the defendant was entitled to his homestead, or is barred by the lapse of time during the occupancy under the claim of exemption. The judgment of nonsuit was affirmed solely upon the ground that the homestead was valid, not because the reversionary interest could not be subjected for the debt. The sale was valid, and unquestionably a good title passed to plaintiff by virtue of the sheriff's deed. *Long v. Walker*, supra. Actions for possession are conclusive as to title only where an issue involving the title is raised and passed upon by the jury. *Allen v. Salinger*, 103 N. C. 14, 8 S. E. 913. Therefore the judgment in the former proceeding binds both parties as to the validity of the allotment of the homestead to Adams, and no further. *Cobb v. Haliburton*, supra. Although the ruling of this court in *Ladd v. Adams*, supra, is admitted now to have been erroneous, those who claim under and in privity with Adams will not be heard, after his enjoyment of the benefits of the exemption to which the court declared him entitled up to the time of his death, to claim all of the advantages of an adverse holding during an occupancy which was protected by the courts as lawful only upon the idea that it was not adverse to the claims of creditors. But it did not appear as a fact whether the homesteader, Adams, left surviving him any minor children, or whether he left a widow. The action for possession cannot be maintained while one of the children of Adams is still a minor. *Cobb v. Haliburton*, supra. The homestead right, having been shown to exist, is presumed to continue, and the burden was upon the plaintiff to show that it had terminated. The burden is always upon the remainder-man, whose estate is expectant upon the determination of a life estate, to show that his right of action had accrued by the termination of the particular estate when suit was

brought. *Lewis v. Mobley*, 4 Dev. & B. 323. The plaintiff must show title good against the world; and after it appeared that Adams was entitled to a homestead, and had it allotted to him, and the plaintiff acquiesced in the adjudication in his favor, and it appeared that there were children of Adams surviving him, it became thereupon incumbent upon the plaintiff to prove that the exemption had terminated, or the attainment of the age of 21 by the youngest of such children. Holman, a witness, married Martha, a daughter of Jesse Adams, (we know not when, but since the death of Adams, the homesteader, in 1889, said Holman and his wife have been in possession.) Another witness had testified that in 1869 Adams and his wife and daughter were living with him on the land. It does not appear whether her name was Martha, or whether she was a daughter by the same or a different marriage. There is no testimony tending to show her to be the same person as Martha, who married Holman, and first appears upon the scene as an occupant of the land since 1889. If it had appeared that Martha was the only surviving child at the death of Adams, we could not even then have jumped to the conclusion that she was the same daughter who was with her mother in 1869, nor could we conclude because she was married in 1889 that she had necessarily attained her majority (on the 7th of February, 1890) when this action was brought. The general rule is that a party whose right depends upon the death of another must either show by direct proof that such person is dead, or raise the presumption that he is dead by proving that he has not been heard of in seven years. 1 Greenl. Ev. § 41. We think in the same way that, while the burden is on a plaintiff who sues, as remainderman, to offer evidence that will at least raise a presumption of the death of the life tenant, so one who sues for the reversionary interest in a homestead must, when it appears that the homesteader has a child or children, offer testimony, not only to prove that the homesteader is dead, but that the exemption has terminated by reason of the age of the child. Besides the evidence in relation to Martha, the judge who tried the case below seemed to rest his ruling in part upon the ground that "there was no evidence whether the children of said Adams are yet minors." From this statement we might reasonably infer that there was evidence of the existence of other children besides Martha, though the testimony as to her was sufficient to shift the burden of proof to the plaintiff. We see no force in the suggestion of inconvenience likely to arise as to families moving out of the state, when we recollect that any person not heard of for seven years is presumed to be dead. There can be no great hardship in holding a plaintiff to the duty of complying with that rule. While, therefore, the

court erred if we are to understand his honor as holding that the possession of the defendants was adverse to the plaintiff, it was not error to instruct the jury that the plaintiff could not recover, because the action appeared to have been prematurely brought. The judgment is affirmed.

PRITCHARD v. BAILEY.

(Supreme Court of North Carolina. Dec. 19, 1893.)

DEED—CONSTRUCTION — RESTRAINT OF POWER OF ALIENATION.

1. Though a deed to a person and her heirs and assigns forever provides that the land is "not to be sold during her life, then to belong to her heirs," she takes a fee simple, the later provision being void, as repugnant to the estate granted.

2. The provision is void for the further reason that it imposes an unreasonable restraint on the power of alienation, and is against public policy.

3. Where husband and wife join in a deed of trust in fee of the wife's land to secure their joint indebtedness, the trustee takes a fee simple, though the deed recites that the wife's joinder is only for the purpose of releasing her dower and homestead, the draughtsman having neglected to strike this clause from the printed form; since, as there is no dower or homestead right if such clause is to control, there is nothing upon which the deed can operate.

Appeal from superior court, Buncombe county; J. F. Graves, Judge.

Action by J. C. Pritchard against J. M. Bailey for purchase money due for land sold by plaintiff as trustee under a deed of trust from S. D. Chambers and Sarah M. Chambers, his wife. From a judgment for plaintiff, defendant appeals. Affirmed.

The land in question, before execution of the deed of trust, had been conveyed by one Daniel Payne to said Sarah M. Chambers by a deed providing as follows: "To have and to hold the aforesaid tract, and all the privileges and appurtenances thereto belonging, to the said Sarah M. Chambers and heirs and assigns, forever, to her only use and behoof, not to be sold during the life of said Sarah M. Chambers; then to belong to her heirs."

Chas. A. Webb, for appellee.

SHEPHERD, C. J. The deed from Daniel Payne to Sarah M. Chambers, executed in 1882, conferred upon her an estate in fee simple; and under the doctrine declared in *Hardy v. Galloway*, 111 N. C. 519, 15 S. E. 890, and the authorities therein cited, the provision that she should not sell the property during her life was repugnant to the grant, and in contravention of the principle of public policy which forbids the imposition of unreasonable restrictions upon the right of alienation. The property, not having been conveyed in trust, but directly to

Mrs. Chambers, she acquired the legal title; and, as she had the legal capacity to convey with the consent of her husband, the only question remaining to be considered is whether the deed from herself and husband did actually convey to the trustee a fee-simple estate in the land in controversy. The indebtedness secured in said trust was, so far as we are informed, the joint indebtedness of herself and husband, and the recital shows that the sole object of the conveyance was to secure the payment of the same. The conveyance is in fee, with a warranty that the parties of the first part are seised in fee; and the trustee is directed, in case of default, to sell the land at public auction, and convey title to the purchaser, the surplus, after paying the indebtedness and expenses, to be paid to the parties of the first part. The husband having no title to the property, it is manifest that not only the whole purpose of the deed, but also its operative words, will be entirely defeated if the joinder of Mrs. Chambers was simply for the purpose of releasing the right of dower and homestead in the land. It is a cardinal rule in the interpretation of writings that they shall, if possible, be so interpreted "ut res magis valeat quam pereat," so that they shall have some effect rather than none, and that such a meaning shall be given to them as may carry out and most fully effectuate the intention of the parties. Broom, Leg. Max. 413. Every part of the instrument must be considered in arriving at the intention, and it should be kept in mind that where the language is susceptible of two constructions the one less favorable to the grantor is to be adopted. It is also a well-settled principle that, unless a contrary intent is manifest, "a deed must be construed in all its parts with respect to the actual, rightful state of the property at the time at which the deed is executed." 2 Devl. Deeds, 848-851. Applying these rules to the case before us, we are entirely satisfied that Mrs. Chambers intended to convey her interest in the said land. It was her property, and the printed words, (which it is agreed the draughtsman neglected to strike out of the form,) to the effect that she joined in the deed for the purpose of releasing her dower and homestead, when she could by no possibility have had any such interests, are wholly inconsistent with her intention, as indicated by the entire scope and meaning of the instrument. As we have said, she alone had the title, and she joined in the deed as a conveying party for the declared purpose of securing the indebtedness. There was no dower or homestead interest to be released, and, if the printed words are to control, there is nothing upon which the deed can operate. We think his honor was correct in holding that the true intent and meaning of the deed was that Mrs. Chambers conveyed the property in fee to the trustee. Affirmed.

CRINKLEY et al. v. EGERTON et al.

(Supreme Court of North Carolina. Dec. 12, 1893.)

LANDLORD AND TENANT—WHAT CONSTITUTES RELATION—REVIEW—LIEN FOR RENT.

1. A contract for a term of years, at a stipulated rental per year, providing that "all crops that may be made on the said tract of land are bound for said rent," is a lease, even though it contains a provision that, upon the payment of a certain amount of rent, the lease was to terminate, and the lessor was to make the lessee a deed in fee of the land.

2. Under such lease, the landlord retained the statutory lien for rent, superior to agricultural liens for advances. Shepherd, C. J., and Burwell, J., dissenting.

3. Where no exception was taken that a lease, under which plaintiff claimed title to certain crops by virtue of a landlord's lien, was not recorded, an objection to the want of recordation will not avail on appeal.

Appeal from superior court, Warren county; W. A. Hoke, Judge.

Action by A. and W. B. Crinkley against B. I. Egerton and another for the proceeds of certain crops. From a judgment for plaintiffs for only part of the relief demanded by them, they appeal. Affirmed.

The plaintiffs claim the proceeds of certain crops, and the only question involved is the construction of a contract, a copy of which is as follows: "Contract made December 30, 1887, by and between B. I. Egerton, of Macon, Warren county, N. C., of the first part, and Major Williams, (a colored man,) of Warren county, N. C., of the second part, witnesseth, that said B. I. Egerton has leased to the said Major Williams, for a term of ten years, (beginning from this day,) his tract of land lying in Warren county, N. C., known as the 'William and John Powell Tract,' adjoining the lands of S. P. Arrington, Mrs. Emma Egerton's heirs, and others, and containing sixty-six acres; the said Major Williams to pay the said B. I. Egerton, on or before November 1 of each year, beginning November 1, 1888, and continuing to the termination of the lease, three bales cotton, (lint,) to weigh each 400 pounds, making a total of 1,200 pounds lint cotton, to be paid as rent for each of the ten years. The said B. I. Egerton agrees to and with the said Major Williams, and as an inducement for the said Williams to pay the rent promptly each year as it matures, that whenever he has been paid as much as six hundred dollars, (\$600,) with interest on the same from this day at eight per cent., as rent on the said tract of land, that this lease is to terminate, and that he will make to the said Major Williams a good and sufficient deed in fee simple to the said tract of sixty-six acres of land; but the said Major Williams shall lose the above option if he fails to pay the said B. I. Egerton the rent of 1,200 pounds lint cotton each year. In order to ascertain when the said \$600 and interest has been paid, the said B. I. Egerton

is to keep a correct account of all rents paid to him by the said Williams. This paper writing is to be considered as a rent bond, and all crops that may be made on the said tract of land are bound for the said rent of 1,200 pounds lint cotton, as in cases of other agreements for rent between landlords and tenants. In witness whereof, the said B. I. Egerton and Major Williams have hereunto affixed their seals, this December 30, 1887. [Signed] B. I. Egerton. [Seal.] [Signed] Major X Williams. [Seal.] Witness: [Signed] W. G. Egerton." The plaintiffs contended that the above instrument created the relation of vendor and vendee between the defendant and Williams, but the court held that it created the relation of landlord and tenant between them, and the plaintiffs excepted, and appealed from the judgment rendered.

T. T. Hicks, for appellants. Batchelor & Devereux, for appellees.

CLARK, J. The instrument is in all respects a valid lease of land for 10 years at a stipulated rent of 1,200 pounds of lint cotton per year, but upon condition that on payment of rent to the value of \$600 and interest, and as an inducement to the prompt and punctual payment of the rent, the lessor will thereupon make a conveyance in fee to the lessee of the land. There is nothing in morals or in law which prohibits or restricts the power of contracting so as to render this valid as a lease until, upon performance of the condition, it shall become a sale; and, being a valid lease, the landlord retains his statutory lien on the crop for the rents. There is naught which shows an intention of the parties to release it. On the contrary, there is an explicit agreement that "all crops that may be made on said tract of land are bound for said rent of 1,200 pounds lint cotton, as in other agreements between landlord and tenant." The intent to retain the landlord's lien was a moving inducement to this form of contract, which the parties had a legal right to enter into. It is true that in *Manufacturing Co. v. Lucas*, 112 N. C. 377, 17 S. E. 174, the court held that, as between the parties, if the lessor attempted, after sundry payments made, to declare them forfeited, and to retake possession of the property, the court would in equity, in such case, hold the contract a mortgage, and direct an accounting and sale as on a foreclosure; and so it would here, as to this land, should the landlord attempt to resume possession of it. But it was not held in *Manufacturing Co. v. Lucas*, supra, that the lessor could not elect to let the lease remain in force, and collect the installments of rent by suit. Indeed, it approves *Foreman v. Drake*, 98 N. C. 311, 3 S. E. 842, which had held a contract, somewhat like the present, a contract of hiring, and not a conditional sale. Nor here is there anything to prohibit

the lessor electing to permit the lease to remain in force, and collect his installments out of the crops by virtue of his landlord's lien. In both cases it is only when the lessor elects to put an end to the contract of lease, and resumes possession of the property, that a court of equity will hold him to an account and settlement, as upon a proceeding to foreclose a mortgage. Of course, an assignee of the lessee, either by purchase from him or by purchase at execution sale, would have the same right as the lessee to call for an accounting. A person may so use his own property as not to injure or infringe upon the rights of others, which society undertakes to protect. Upon this principle, one has the right and the power to dispose of his property, when and how he may elect, if the law, for sufficient reason, has not declared the contract illegal, immoral, or contrary to public policy, and therefore void. Neither does any express provision of a statute, nor any reason founded upon public policy, prohibit the fair surrender of a contract of a purchase by a vendee, and a voluntary change of his position to that of lessee, without even a surrender of the possession. *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924. Why should the converse of this proposition be hedged about with any restrictions except those which are plainly intended to prevent inequitable oppression, such as may ensue where the lessee is not allowed to retain possession until the time for the performance of the condition arrives? This view is in consonance with the real intent of the parties and especially reasonable, since, mortgages on crops of future years being invalid, (*Loftin v. Hines*, 107 N. C. 360, 12 S. E. 197, the owner of land would not sell it on credit if he must part with all liens upon the crop. This lien, being only for rent, does not come under the evil of a mortgage for the whole crop of future years, which is denounced by *Loftin v. Hines*, supra. This case also differs from *Manufacturing Co. v. Lucas*, supra, in that there were, in that case, no rents or crops issuing out of the leased property upon which the lessor possessed a lien by virtue of the statute. While the court, with some hesitation, held, in *Loftin v. Hines*, that a mortgage upon the crops of future years was invalid for the reason there given, there is nothing in that decision which restricts the freedom of contracts, so that a vendor of land who takes a mortgage on the land to secure the price may not stipulate that, until the mortgage is paid, the relation of the parties shall be landlord and tenant, to the extent that the landlord shall have his lien for the rent to be applied on the debt. This is because the mortgagee of the land, having the right of possession, may stipulate that the mortgagor may keep possession only on rendering rent. There is nothing oppressive in this when the rent is applied on the debt. This gives only a landlord's lien for

rent, and not a mortgage on the whole crop, which is forbidden in *Loflin v. Hines*, in return for yielding possession. Such contracts are very common, and serve a most useful purpose. The court, in the absence of oppression or grave reasons of public policy, cannot interfere with the freedom of all persons to make their own contracts. *State v. Moore*, 18 S. E. 342, (at this term.) The cases of *McCombs v. Wallace*, 66 N. C. 481; *Parker v. Allen*, 84 N. C. 466; *Hughes v. Mason*, 84 N. C. 472; and *Killebrew v. Hines*, 104 N. C. 182, 10 S. E. 159, 251,—relied upon by plaintiffs, are the reverse of this, and have no application. Those cases were contracts of bargain and sale of land, with a provision that, in case of a failure by vendee, for a specified time, to comply with the terms of sale, the contract should be void, and the vendee should pay rent or a forfeit. The court, of course, held these to be contracts of sale, and, as to the first three cases, held that, there being a dispute as to the forfeiture, the superior court had jurisdiction. There being an equity, the justice of the peace could not administer it, and summary ejectment would not lie. As to the last case, it was held that the mortgagor could not, upon default made, oust the lien upon the crop given to another by mortgagee for advances while that relation existed. There was no stipulation in that case, as there is in this, reserving a landlord's lien for rent *ab initio*, and to elect to assert it after default made was unjust to the party who had made advances. These were cases of sales with a power to resume possession upon default made. Such have always been decreed mortgages; but until the vendor elects to move, they are deeds of bargain and sale, and the bargainor has no lien upon the crop. While in them it was held that, there being an equity in the lessor, the justice of the peace could not summarily eject under Code, § 1768, it was not held that the parties could not, by their contract, reserve the landlord's lien for rent under section 1754. *Taylor v. Taylor*, 112 N. C. 27, is equally inapplicable. It merely holds that when the relation of the parties is simply that of vendor and vendee or mortgagor and mortgagee, there is no landlord's lien for rent under section 1754, because there is "no agreement" reserving rent or creating the relation of landlord and tenant. In the present case we have the relation of lessor and lessee established by the express contract of the parties. They had a right to so contract. Until the lessor attempts to retake possession, that relation continues. The lessor, by virtue of the nature of his agreement and its express terms, retains the statutory lien upon the crops. The record does not show whether or not the contract between Egerton and Williams was shown to have been recorded. There being no exception, it is presumed to have been in evidence. Even if registration were not shown, in the absence of exception, the presumption of fact is to

be taken most favorable to the appellee. Such exception could not be taken for the first time in this court, and, in fact, was not made either here or below. His honor correctly charged the jury that the instrument created the relation of landlord and tenant between Egerton and Williams, and that by virtue thereof Egerton had a lien on the crop for rent and advances out of the crop of 1891 superior to the agricultural liens held by the plaintiffs. Code, § 1754.¹ No error.

BURWELL, J., (dissenting.) It is conceded that the crop which the plaintiffs seek to recover of the defendant was grown by one Williams upon land of which he was in possession. The plaintiffs claimed the property by virtue of duly-registered mortgages thereon made to them by Williams for advancements of supplies. The validity of plaintiffs' liens was admitted, but defendant alleged that his statutory lien for rent (Code, § 1754) was superior to those of the plaintiffs, because Williams was his tenant. To prove that Williams was his tenant, and also the amount due for rent, he introduced the contract between himself and Williams, under which the latter held the land when the crop was grown, and when plaintiffs' mortgages or liens were made. He did not show that it was registered at all. It seems to be decided by the court that that contract created between the defendant Egerton and Williams the relation of vendor and vendee, or, at any rate, that it vested in Williams an equity or right to call for a title when he had fulfilled his part of that contract. The rule of interpretation laid down with so much emphasis in the late case of *Manufacturing Co. v. Lucas*, 112 N. C. 377, 17 S. E. 174, makes any other conclusion impossible, if that decision is to stand as an authority to guide us. Hence the relation of Egerton to Williams was not only that of landlord and tenant, but also that of vendor and vendee.

In *McCombs v. Wallace*, 66 N. C. 481; *McMillan v. Love*, 72 N. C. 18; *Parker v. Allen*, 84 N. C. 466; and *Hughes v. Mason*, Id. 472.—it was decided that section 1766 of the Code has no application to cases where the relation of vendor and vendee exists, although for some purposes the latter may also be a tenant in contemplation of law. Those decisions are founded upon the idea that, if the tenant has an equity in the land, that section has no application,—that he is not a tenant, and his vendor is not a landlord, within the meaning of that section. Now, in *Taylor v. Taylor*, 112 N. C. 27, 16 S. E. 924, we decided

¹ Code, § 1754, provides that "when lands shall be rented or leased by agreement for agricultural purposes, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor until the rents for said lands shall be paid * * * and that this lien shall be preferred to all other liens."

that whenever the relation of the so-called "landlord and tenant" was such, by the terms of their contract, that, under the rule laid down in the cases cited above, (which we there referred to,) section 1766 had no application to any controversy about the possession, neither could section 1754 apply to any controversy about the rent. In other words, we distinctly affirm in *Taylor v. Taylor*, supra, that, if such a relation existed as would prevent the recovery of the land under section 1766, the owner or "landlord" or "vender," call him what we may, could have no statutory lien for so-called "rent" under section 1754. Upon careful consideration of these authorities, (*Taylor v. Taylor*, *Manufacturing Co. v. Lucas*, and *McCombs v. Wallace*, supra,) I cannot see how it is possible to escape the conclusion that the defendant has no statutory lien, under section 1754, on the crop in controversy. He neither asserted, nor attempted to prove, any other right to hold it. If it be contended that, though the defendant had no right to take and hold the crop by virtue of a lien under section 1754, the contract itself gave him a right to so take and hold it, the reply is that, if he proposed to establish a right arising out of that instrument which would be better than plaintiffs' title, it was incumbent on him to prove, not only the existence of this contract, but that it was registered before plaintiff's mortgages. Between *Egerton* and *Williams*, the so-called "lease" was valid without registration, but, considered as a lien on the crops of successive years in favor of the former, it could have no validity against the plaintiffs, who also claimed under *Williams*, unless it was registered before plaintiffs' mortgages. It was the duty of the defendant to prove that the contract was registered, if he wished to assert title under it as a lien or mortgage. The interjection of the relation of landlord and tenant, with its statutory lien and peculiar legal remedies, into the relation of vendor and vendee, is such a blending of inconsistent principles that it is open to the objection of Lord Brougham as being "against the science of the law," and will, I greatly fear, lead to much confusion and uncertainty, both in the law as well as its administration. I think it better to adhere to well-defined principles.

SHEPHERD, C. J. I concur in the dissenting opinion of Mr. Justice BURWELL.

WILLIAMS et al. v. JUSTICE et al.
(Supreme Court of North Carolina. Dec. 19, 1893.)

REFERENCE TO ARBITRATOR—ADMITTING NEW PARTIES.

Where an arbitrator, to whom a cause has been submitted under a rule of court, admits new parties at the request of one of the defendants, and against the objection of the others, his award should be set aside.

Appeal from superior court, Haywood county; J. F. Graves, Judge.

Action by G. W. Williams and others against J. R. Justice and others. The cause was by consent referred to an arbitrator, who made an award in favor of plaintiffs. The court set the award aside, and plaintiffs appeal. Affirmed.

W. L. Norwood and J. M. Moody, for appellants. G. S. Ferguson and Geo. H. Smathers, for appellees.

PER CURIAM. While an arbitrator in a submission, under a rule of court, has a limited power to make amendments, (*Morse*, Arb. 207,) it does not extend to the making of new parties; and when such are made the award will be set aside, unless it appears that all of the parties consented. There are several defendants, and it appears that their attorney objected to the making of new parties. This, of course, must be taken as the objection of all of the defendants, and it is not insisted that more than one of them consented. As to this defendant, Chapman, he asked the court, in his answer, to hold that there was no cause of action stated in the complaint against him, and prayed that if the court held otherwise the Hyatts should be made parties plaintiff. The arbitrator, over the objection of all of the defendants, made the new parties upon the ground that the said defendant Chapman had asked for such an order; but this was not binding on the other defendants, and it must follow that his honor was correct in his ruling. Affirmed.

BURWELL, J., did not sit on the hearing of this case.

HOWELL et al. v. JONES et al.
(Supreme Court of North Carolina. Dec. 19, 1893.)

BAIL—QUALIFICATION—SHERIFF'S LIABILITY.

1. Under Code, § 306, requiring bail for one arrested in a civil action to be residents and freeholders within the state, plaintiff may properly refuse a bond which does not show these facts on its face.

2. Under Code, § 305, providing that when plaintiff objects to bail for defendant taken by the sheriff, the latter shall notify him when and where the bail will justify, such notice must be in writing; otherwise, though plaintiff were near by, and knew of the justification, and the sheriff acted in good faith, the sheriff is liable as special bail, under section 313, as for failure to take or justify bail.

Appeal from superior court, Stanly county; Robert W. Winston, Judge.

Action by Howell & Hardister against W. C. Jones and others, wherein an order of arrest was issued against P. S. Jones, one of the defendants. Motion by plaintiffs to hold I. W. Snuggs, sheriff of Stanly county, liable as special bail, under Code, § 313, for failure to justify bail for said P. S. Jones. Motion denied. Plaintiffs appeal. Reversed.

Brown & Jerome, for appellants. Robins & Long, for appellees.

BURWELL, J. We do not think that the facts found by his honor justify the conclusion that the defendant sheriff is not liable to plaintiffs as special bail, according to the provisions of section 313 of the Code. The defendant was not to be discharged from arrest until he had given bail, or deposited the amount mentioned in the order. Code, § 298. No one but "a resident and freeholder within the state" is qualified to act as such bail. The sheriff should not have accepted an undertaking that did not show on its face that the surety thereon had those qualifications, or, if he did so, he should have required that the surety's justification should have established those facts. It was most reasonable that plaintiffs should except to such an undertaking. When notified by plaintiffs that they excepted to the undertaking given by defendant, it was his duty to give notice to plaintiffs as required in section 306. The evident intent of the statute is that it shall be a written notice, in which shall be mentioned the time when and place where the bail will justify. It is not found that any such notice, oral or written, was given to plaintiffs. The fact that one of the plaintiffs was near the place where the alleged justification took place, and knew what was doing there, cannot, we think, exonerate the sheriff from liability. This second omission of duty prescribed for him by the law confirmed his liability to plaintiffs as special bail. He failed to carry out the plain mandates of the Code, made for his guidance and the protection of plaintiffs' rights, and the "good faith" with which he acted cannot shield him from liability. We confine ourselves to the consideration of the facts found by his honor. It was unnecessary to send up in the record the various affidavits offered by the parties, since we cannot examine them to ascertain other facts that might tend to the sheriff's exoneration. Error.

NORFOLK & W. R. CO. v. ADAMS et al.¹
(Supreme Court of Appeals of Virginia. Jan. 11, 1894.)

CARRIERS — VALIDITY OF REGULATIONS — CHARGE FOR DETENTION OF CARS.

Code, §§ 1202, 1203, allow railroad companies to make a certain charge for the shipment of produce and other articles; and "for the weighing, storage, and delivery of articles at any depot or warehouse of the company, a charge may also be made, not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated;" but forbid a railroad company "to charge or receive any fee or commission other than the regular transportation fees, storage, and other charges authorized by law for manifesting, receiving, or

shipping any goods or other articles for transportation on such railroad." *Held*, that said statutes do not forbid a charge of \$1 per day for the detention of a car more than 72 hours after notice to the consignee of its arrival. Lacy and Hinton, JJ., dissenting.

Error to circuit court, Roanoke county.

Action by Adams, Clement & Co. against the Norfolk & Western Railroad Company to recover back certain sums of money paid by said plaintiffs to said railroad company as charges for the detention of freight cars consigned to said plaintiffs beyond 72 hours after notice of arrival, that being the limit within which the cars were allowed to be unloaded without additional charges attaching. It was a rule of the railroad company, with which the plaintiffs were familiar, to make a charge of \$1 per car per day for detention of cars beyond 72 hours, and the shipments in question were made with the agreement that said rule should be enforced. The plaintiffs, however, contended that said rule was in violation of the statutes of Virginia regulating the charges of carriers of passengers and freight. The two sections relied on are as follows, Code Va. 1887: "Sec. 1202. Rates of Toll on Railroads. On a railroad on which different rates are not prescribed by law, the following rates of toll may be charged for transportation, to wit: Of a person and his baggage within one hundred and fifty pounds, not exceeding six cents per mile; of produce and other articles, except gypsum, lime, guano and other specific manures not exceeding eight cents per ton per mile; and gypsum, lime, guano and other specific manures, not exceeding four cents per ton of twenty-two hundred and forty pounds per mile; and for the transportation of any person, or of any produce or other articles for a distance less than ten miles, a charge may be made at the foregoing rates as for ten miles. * * * For the weighing, storage and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated. Sec. 1203. What Charges are Prohibited. It shall not be lawful for any railroad company, or its agent, to charge or receive any fee or commissions other than the regular transportation fees, storage, and other charges authorized by law, for manifesting, receiving, or shipping any goods or other articles for transportation on such railroad. * * * A verdict was rendered and judgment entered for the full amount claimed by the plaintiffs, from which the defendant obtained a writ of error. Reversed.

Kirkpatrick & Blackford and Watts, Robertson & Robertson, for plaintiff in error. Pugh & Moffett, for defendants in error.

FAUNTLEROY, J. The petition of the Norfolk & Western Railroad Company complains of a judgment of the circuit court of

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

Roanoke county, rendered therein at the April term, 1893, in favor of Adams, Clement & Co. against the said Norfolk & Western Railroad Company for the sum of \$488, with interest thereon from September 1, 1891, until paid, in which suit the said Adams, Clement & Co. are plaintiffs and the petitioner is defendant. The suit is an action of assumpsit against the Norfolk & Western Railroad Company to recover back certain sums of money alleged to have been illegally exacted from and paid by the said Adams, Clement & Co. to the said Norfolk & Western Railroad Company, and a verdict was rendered and a judgment entered for the full amount of the plaintiff's claim. The case is here upon a writ of error obtained by the defendant company.

The Norfolk & Western Railroad is a common carrier, owning and operating a line of railroad in the state of Virginia, and the town of Salem is upon the said line. The plaintiffs are lumber dealers, doing business at the said town of Salem; and between February 16 and August 31, 1891, they received a large number of shipments of lumber in car load, lots, consigned to them from points on the line of the said Norfolk & Western Railroad, and from points in the state of Virginia, and other points in other states. These shipments were made with the understanding and agreement that the lumber was to be unloaded by the consignee at Salem depot upon the arrival of the shipments at that point. The railroads of Virginia and of other states, for their own protection as well as for the protection and benefit of the public, have a car service set of rules, designed and enforced to secure the prompt movement of freight cars; and under the rules of this car service association the Norfolk & Western Railroad Company have a charge of one dollar per car per day for the use of their cars and their side or switch tracks for every day that the cars remain unloaded after notice of their arrival to the consignee and the lapse of three days. Under the abuses that prevailed previous to the establishment of this rule, serious loss and inconvenience were caused both to the shipping public and the railroad company by the unreasonable and protracted delay of consignees in unloading the cars; the railroad company being unable thereby to furnish cars when called upon by shippers of freight, and their side tracks being incumbered, and the movement of freight impeded, causing heavy expense, and a demand for more track room to accommodate idle cars standing unloaded upon their tracks, and the company being unable, therefore, when called upon, to furnish cars for the shipping public. The railroad company, as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless,

and an incumbrance. If A. be allowed to hold a car unloaded at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B. it is evident that both the railroad company and the shipping public will suffer injury. The plaintiffs in this suit had notice of the existence and operation of these rules, and they had paid the charges for the detention of cars long before the commencement of the account sued upon; and they knew and agreed when the shipments were made that such a charge would be made, unless they unloaded their cars in compliance with the rule of the company which gave to them 72 hours in which to unload their freight after notice of the arrival of the cars which they had stipulated to unload. It is well settled in this state and in other states that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it, either as passengers or as shippers. See *Railroad Co. v. Wysor*, 82 Va. 250; *Railroad Co. v. Harman's Admr.*, 84 Va. 553, 8 S. E. 251. That this rule is reasonable and proper, and that the railroad company can make such a charge, has been decided in a number of states; the question never having arisen before in this state. See *Miller v. Banking Co.*, reported in (Ga.) 15 S. E. 316; *Miller v. Mansfield*, 112 Mass. 260; *Railroad Co. v. Cooke*, 50 Amer. & Eng. Ry. Cas. 89, note; *Kentucky Wagon Manufg Co. v. Louisville & N. R. Co.*, 50 Amer. & Eng. Ry. Cas. 90, note; *Beach*, Ry. Law, § 924, and cases there cited; *Jones, Liens*, § 284, and cases cited; 4 *Lawson, Rights, Rem. & Pr.* p. 3146, §§ 1831, 1832; *Wood*, Ry. Law, pp. 1592, 1593, 1600; 2 *Wat. Corp.* pp. 245, 246; 2 *Amer. & Eng. Enc. Law*, pp. 878-881, and notes; *Redf. R. R.* (6th Ed.) pp. 67-83. In addition to this long line of authorities holding the right of a railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various states. In Texas, the railroad commissioner, Judge Reagan, after full investigation, made an order fixing \$3 per day per car as a reasonable charge for delay in unloading after 48 hours' notice. The railroad commissioner of Illinois, and those of other states, after full investigations, have decided in favor of the right and reasonableness of such a charge; and when it is considered that these railroad commissioners are appointed for the express purpose of regulating railroads in the interest of the public, the weight of their decisions as to the reasonableness of such charge is apparent. It is contended, however, that the sections of the Code of Virginia of 1887, 1202 and 1203, make such a charge illegal; and the judge of the trial court took the view of the plaintiff, and in-

structed the jury that, under the law of Virginia, such charge is unlawful, whether it be reasonable or not. We think that the trial court erred in so holding, and in so instructing the jury. The charge made by the railroad company for the detention of its cars, and the occupation of its tracks after due notice, and the allowance of three days to the consignees to unload the cars and disincumber the track, is not within the purview, purpose, or prescription of the statute, and is not of the character of weighing, storage, and delivery of articles of freight contemplated by the makers of the statute. The charge is not for transportation, storage, or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by schedule; but it is for the use and occupation of the cars, and the obstruction of their tracks by the consignee, for weeks and months after the contract for transporting and delivering the freight had been fulfilled and ended. It is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed. After arrival at the place of consignment, and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee, according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for hire, and can make reasonable rules and regulations and charges for such service as bailee, as it may see fit. Such charges are not carrier charges in the meaning, intentment, or prescription of the statute. Under the head of "Carriers," the American & English Encyclopædia of Law, (page 880, vol. 2:) "A carrier fulfilling the duties of a warehouseman is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases; and the consignor, [consignee,] with notice thereof, will be bound. Whether such terms are or are not reasonable is an irrelevant inquiry." In a note to this section is the following: "We can see no reason why a railroad company, as a common carrier, cannot stipulate, by a contract express or implied, that their liability as carrier shall terminate with delivery at a particular point, and they will assume no liability at all in such case as warehousemen. If the consignee is fully advised at the time of the shipment that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of

his business." Hutchinson on Carriers (section 378) says: "The custody and protection of the goods in his new character as warehouseman is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he continues liable for their safe-keeping as the hired bailee of the owner."

The record in this case shows that at the time of the shipments of this lumber the plaintiffs knew that there was a depot at Salem for the ordinary business of the company, but not for the accommodation of car loads of lumber; and that, if they did not unload the cars, according to the contemplation of the contract, within seventy-two hours (exclusive of Sunday and holidays) after one day for placing the cars and notice, they would have to pay one dollar per car, per day, thereafter; not for transportation and delivery, but for the detention of cars, and use and occupation of the tracks of the railroad company. The statute provides solely for the transportation, storage, and delivery of freight to the carrier, to be shipped by it, and delivered at the other end of the journey to the consignee; but it makes no provision or regulation for the hiring of cars to be loaded and unloaded by the customer, according to such contract as the carrier and the customer may make, express or implied. "A railroad company is not required by law to keep a warehouse or depot at every station along its route or line, and it may stipulate, either expressly or by implication, that it will assume no liability as warehouseman at a flag station where it has no depot or agent; and when the consignee is fully advised, at the time of the shipment, that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent at the place, the liability as common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman." It is shown in evidence that this rule and charge of one dollar a day for the unreasonable, and even long-continued, detention of the car, and obstruction of the tracks and business of the railroad, is not made for compensation to the company, but for the benefit of the public, and a stimulus to the consignee to unload the car, and disincumber the track and the business of the road. The evidence in the record is that the car is much more valuable to the company than the charge of one dollar per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months, (as the record shows was done in this case, in some instances,) without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer. In view of the authorities and the facts of this case, we are of opinion the money paid by the plaintiffs to the defendant company was properly charged by the said company,

and was due to it by the plaintiffs, Adams, Clement & Co., and that they had no right to recover it back; and that the circuit court of Roanoke county erred in the law as applicable to the facts of the case, and erred in refusing to set aside the verdict of the jury; that the judgment complained of is erroneous, and the same is reversed and annulled; and this court, proceeding to enter such judgment as the circuit court ought to have entered upon the pleadings, will dismiss the plaintiffs' suit. Reversed.

LACY and HINTON, JJ., dissenting.

STATE v. WAY.

(Supreme Court of South Carolina. Jan. 2, 1894.)

HOMICIDE—NEW TRIAL AFTER APPEAL—LEAVE OF APPELLATE COURT.

A conviction of murder having been affirmed on appeal, and the case remanded, with an order to fix a day for execution, defendant moved for a new trial on the ground of newly-discovered evidence. The court declined to hear the motion for want of jurisdiction without leave of the appellate court, and, from this ruling, defendant appealed. *Held* that, though the appellate court may have lost jurisdiction of the case by the remittitur, it regained jurisdiction by the second appeal, so as to enable it to suspend the appeal, and grant to the trial court leave to hear the motion.

Appeal from general sessions circuit court of Orangeburg county; J. J. Norton, Judge.

Indictment of Jefferson M. Way for murder. After defendant's conviction was affirmed, (17 S. E. 39,) he moved for a new trial on the ground of newly-discovered evidence. From an order dismissing the motion, defendant appealed, and now moves to suspend the appeal, and for leave to renew the motion for new trial in the trial court. Motion granted.

Glaze & Herbert, Raysor & Summers, and S. P. Mayfield, for appellant. W. St. J. Jervey, for the State.

McIVER, C. J. The defendant, after having been tried and convicted of the murder of Elliott W. Whetstone, at the May term of the court of general sessions for Orangeburg county in the year 1892, duly appealed to this court. His appeal was heard during the November term for 1892 of this court, and on the 23d of February, 1893, the judgment of this court was rendered, affirming the judgment of the circuit court, and remanding the case to the circuit court for the purpose of having a new day assigned for the execution of the sentence originally imposed. 17 S. E. 39. Prior to the May term of the court of sessions for Orangeburg county in the year 1893, the defendant gave notice, based on accompanying affidavits, of a motion to that court for a new trial upon the ground of subsequently-discovered evidence. For some reason not stated, the hearing of

this motion was postponed until the next succeeding term,—September, 1893,—and a new day, to wit, 17th of November, 1893, was assigned for the execution of the original sentence. When the motion for a new trial came up before his honor, Judge Norton, at the September term, 1893, he declined to hear the motion, upon the ground "that the circuit court has no jurisdiction to hear a motion for a new trial on the ground of after-discovered evidence, after an appeal to the supreme court and an affirmance of the judgment appealed from, and the case has been remanded for the purpose of assigning a new day for the execution of the sentence, and such new day has been assigned by the circuit court;" referring to the recent case of *State v. Turner*, heard by the same judge, in which he had given his grounds for the conclusion adopted by him, saying that he was unable to distinguish this case from that of *Turner*. From this judgment the defendant appeals, upon the several grounds set out in the record, which really make the single question whether the circuit judge erred in declining to take jurisdiction of the motion.

Pending this appeal, a motion has been made to this court to suspend this appeal for the purpose of enabling the appellant to apply to the circuit court for a new trial upon the ground of after-discovered evidence; and this is the only matter which we propose now to decide, though it will be necessary to discuss, incidentally, the question whether the circuit judge erred, in declining to take jurisdiction of the motion heard by him at September term, 1893. If this case cannot be distinguished from *Turner's Case*, then it is clear that there was no error on the part of the circuit judge. It will be observed that the case of *State v. Turner* has been several times before this court. 36 S. C. 534, 608, 15 S. E. 602, and 16 S. E. 687; *Id.*, 17 S. E. 752, 885. From a careful examination of the several phases of that case, we are unable to discover any material difference between that case and the one now under consideration, so far as the question which we are now called upon to determine is concerned. The only difference between that case and the one now before us is that in the former the motion for a new trial upon the ground of after-discovered evidence was submitted to the circuit court, by leave of this court, (for which purpose the appeal from a similar order to that appealed from here was suspended,) before a new day was assigned by the circuit court for the execution of the original sentence; while here, though the motion was submitted before the new day was actually assigned, it was not actually heard (the hearing having been postponed to the next succeeding term) until after the new day was assigned. This is an immaterial difference, and cannot affect the question of jurisdiction. As was held in *State v. Merriman*, 34 S. C. 576, 13 S. E. 328, the circuit court, in assigning a new day.

is merely carrying out the mandate of the supreme court, and its action in that respect is not appealable, as there can be no error of law in assigning one day rather than another. It seems that counsel, by their argument of this appeal, seek to assail the correctness of the action of this court in *Turner's Case*, rather than to show that this case is distinguishable from that case; but the important fact that there may be two appeals in the same case has been overlooked. While it may be true that after this court has determined an appeal, and its judgment has been duly remitted to the circuit court for the purpose of having its judgment carried into effect, this court thereby loses its jurisdiction, and cannot, therefore, grant any order in the cause, yet it is equally true that this court may again acquire jurisdiction by another appeal. This is exactly what was done, both in *Turner's Case* and in the present case. When the original appeals were determined by this court, and its judgments duly remitted to the circuit court, this court thereby lost its jurisdiction, and the circuit court thereby regained its jurisdiction only for the purpose of carrying out the mandates of the supreme court. But if the circuit court is then called upon to take any other action in the premises, and either refuses or undertakes to exercise such jurisdiction, its action is reviewable by appeal; and, when such appeal is perfected, this court again acquires jurisdiction of the matter appealed from, and, having thus regained jurisdiction, may make such order, within its jurisdictional limits, as may be deemed proper. But as the supreme court has not been invested with power to determine questions of fact, except in a class of cases to which the present case does not belong, and as the determination of a motion for a new trial upon the ground of after-discovered evidence necessarily involves the determination of questions of fact, though questions of law, also, may sometimes be involved, it is very obvious that this court has no power to decide such a motion; and, as the circuit court cannot exercise any jurisdiction in a case while an appeal is pending, the practice has been adopted, from the necessity of the case, of suspending the appeal for the purpose of enabling the moving party to apply to the circuit court—a tribunal which is invested with the power to determine questions of fact—for a new trial upon the ground of after-discovered evidence, provided a proper showing is made to this court for that purpose. The only inquiry for this court is whether the appellant has made a *prima facie* showing, leaving it entirely for the circuit court to determine whether the showing made is sufficient, uninfluenced by the fact that this court has determined that a *prima facie* showing has been made here, for such *prima facie* showing may be rebutted or overthrown by the showing be-

fore the circuit court. Hence, that court, in considering the motion for a new trial, should regard the matter as *res integra*, and without being in any way influenced by the fact that this court has granted permission for the motion to be made to the circuit court. The only inquiry, therefore, is whether such a showing has been made here as will warrant this court in permitting the appellant to move the circuit court for a new trial upon the ground of after-discovered evidence, and, in the mean time, suspending the appeal until the result of such motion in the circuit court has been certified to this court. Without going into any discussion of the facts stated in the affidavits submitted, which perhaps would be improper, as tending to prejudice the one party or the other, it is sufficient for us to say that we think the required showing has been made here. It is therefore ordered that the appellant have leave to apply to the circuit court for a new trial upon the ground of after-discovered evidence, and that the result of such motion be certified to this court by the circuit judge before whom the motion is made, and, for this purpose, that the present appeal be suspended until the coming in of such certificate.

McGOWAN and POPE, JJ., concur.

AMERICAN FREEHOLD LAND MORTGAGE CO., Limited, v. MOODY et al.

(Supreme Court of South Carolina. Nov. 29, 1893.)

MORTGAGE—FORECLOSURE—DISTRIBUTING PROCEEDS.

1. When a second mortgagee is made a foreclosure defendant, a decree directing the sheriff, out of the proceeds of sale, to pay "the costs of this action," authorizes payment of the costs of the second mortgagee.

2. In foreclosure of a first mortgage against junior judgment liens followed by a second mortgage, plaintiff claimed homestead against the judgments, and the court directed the sheriff to pay, first, the costs, next, plaintiff's mortgage, and "out of the remainder, exclusive of costs and expenses," the second mortgage, "but not to exceed in all, to both mortgages, the sum of \$1,000, which is regarded as the homestead." *Held*, that the costs were not chargeable against the homestead, but against the whole proceeds of sale.

3. The balance of the proceeds after paying costs being less than \$1,000, and the second mortgage not fully paid, the judgment creditors could not object that an item of costs smaller than such deficiency was wrongly allowed.

Appeal from common pleas circuit court of Lancaster county; J. J. Norton, Judge.

In the matter of the American Freehold Land Mortgage Company, Limited, against C. J. L. Moody and others, being a foreclosure of mortgage. Rule on John P. Hunter, sheriff, in behalf of certain judgment creditors of defendant Moody, to pay over to said creditors certain proceeds of the foreclosure

sale. Rule made absolute, and Hunter appeals. Reversed.

Jones & Williams, for appellant. Wylie & Wylie and R. E. & R. B. Allison, for respondents.

McIVER, C. J. In this case the plaintiff brought its action to foreclose a mortgage of real estate executed to it by the defendant Moody, making as parties defendant the judgment creditors of said Moody, as well as Heath, Springs & Co., who held a second mortgage on the same land, junior to the plaintiff's mortgage as well as to the said judgments. The case was heard by his honor, Judge Kershaw, who rendered a decree adjudging that the defendant Moody was entitled to a homestead; that the mortgaged premises be sold by the sheriff, and the proceeds of such sale be applied as specifically directed in the decree, which will be more particularly adverted to hereinafter. In pursuance of this decree the premises were sold by the sheriff on the 7th of December, 1891, for the sum of \$1,135. On the 16th of March, 1892, the costs of the case were taxed by the clerk, as follows:

Plaintiff's costs, including expenses of sale.....	\$81 50
Costs of Atty. for defendants Heath, Springs & Co.....	80 00
Costs of Atty. for defendant Moody.....	30 00
	<hr/>
	\$141 50

And on the same day the proceeds of sale—\$1,135—were applied by the sheriff as follows:

To costs as above	\$141 50
Plaintiff's mortgage.....	785 94
Heath, Springs & Co.....	257 56
	<hr/>
	\$1,185 00

The "case" does not show that any written notice of the taxation of the costs as above was ever given, nor was there any evidence upon that subject given; but it was stated by one of the counsel for appellant that the written statement of the costs as taxed was submitted to one of the attorneys for the judgment creditors, who made no objection thereto, though the gentleman thus referred to said he had no recollection of any such statement being shown him. Subsequently, to wit, on the 15th of April, 1892, a written notice was given to the sheriff by the attorneys for the judgment creditors, or some of them, that the proceeds of the sale should be disbursed in the manner therein specified; and in pursuance of such notice a rule was taken out requiring him to show cause why the sum of \$135—the amount of the proceeds of sale in excess of the homestead—should not be paid over to the judgment creditors. To this rule the sheriff answered that, before any notice was given to him requiring a different application, he had applied such proceeds in the manner directed by the decree of Judge Kershaw. The rule, and answer thereto, came before his honor,

Judge Norton, who rendered his decree, adjudging, substantially, that the sheriff had misapplied so much of the proceeds of the sale as exceeded the homestead exemption, to wit, the sum of \$135, and that he was liable therefor to the judgment creditors in the order of their priorities. From this judgment, Sheriff Hunter, as well as Heath, Springs & Co., appeal on the several grounds set out in the record; for although the name of Sheriff Hunter is not embraced in the notice of appeal as originally served, yet it is embraced in the exceptions subsequently served, and no motion to dismiss the appeal of Hunter has ever been made. Inasmuch as the decree of Judge Kershaw was never excepted to or appealed from, it must be regarded, whether right or wrong, as the law of this case, at least so far as the parties hereto are concerned. Whether it would have been binding on the sheriff, who was not a party to the original case, need not be considered, as he does not now attack that decree. So, too, whether the sheriff would be justified in paying out the costs, as they are found taxed in the record, by the proper officer, which had not been excepted to and reformed, in an ordinary case of a sale made by him under an execution, need not now be considered, as the only question here is whether the sheriff has properly applied the proceeds of a sale made by him under the order of the court directing how such proceeds should be applied.

The sole question, therefore, is as to the proper construction of Judge Kershaw's decree. It must be admitted that the language of that decree is not as plain as it might have been. Indeed, one portion of the decree appears to be somewhat inconsistent with a subsequent portion, for, after adjudging that Moody was entitled to a homestead, the judge uses this language: "The mortgages are to be first paid out of the homestead, and then the judgments are entitled out of the remainder of the property, in the order of their priority, if anything remains after exhausting the homestead exemption in favor of the mortgages." But, when he comes to that part of the decree in which the sheriff is directed how to apply the proceeds of the sale,—the part to which the sheriff would most naturally and properly look for guidance,—his language is: "That out of the proceeds of the sale the sheriff pay, first, the costs of this action and the expenses of said sale, and, next, that he pay to the plaintiff or their attorneys the amount due them on their mortgage debt, as hereinafter stated, with the interest thereon." It will be observed that "the costs of this action" are to be first paid, not out of the homestead, but "out of the proceeds of the sale," to wit, \$1,135, and next the plaintiff's mortgage debt. Now, what is meant by the words, "the costs of this action?" Do they mean only the costs of the American Freehold Mortgage Company, or do they embrace

also the costs of Heath, Springs & Co.? It is true that the latter are not named as plaintiffs; but it is well settled that, in a proceeding like this, on the equity side of the court, the manner in which the parties are arrayed on the record, whether as plaintiffs or as defendants, is a matter of no moment. When Heath, Springs & Co., as holding the junior mortgage, were brought in as parties,—nominally as defendants,—the object was to have both mortgages foreclosed. They were then substantially plaintiffs, though nominally defendants, and their costs should be considered as a part of "the costs of the action," the object of which was to foreclose both mortgages, as was done. It will further be observed that Judge Kershaw does not use the words, "the plaintiff's costs in this action," but his language is, "the costs of this action," which may be well construed as embracing something more than the nominal plaintiff's costs. According to this construction, the sheriff was directed to make this application of the proceeds of sale,—\$1,135:

	81.50
First to the costs of this action	30.00
111.50	
Next to plaintiff's mortgage debt.....	735.94
	<hr/>
	847.44
	<hr/>

Leaving a balance—less than the homestead\$287.58
To be applied to the debt of Heath, Springs & Co.....\$287.58

There being nothing in the decree warranting the payment of the costs of the defendant Moody, there was clearly a misapplication to his costs; but of this only the appellants, Heath, Springs & Co. could complain, and they make no such complaint.

The next paragraph in the decree is in the following words: "That out of the remainder of the said proceeds of sale, exclusive of costs and expenses, he pay to the defendants Heath, Springs & Co. the amount of their mortgage debt, as hereinbefore stated, with the interest thereon, but not to exceed in all, to both mortgages, the sum of one thousand dollars, which is regarded as the homestead of the defendant Moody, and applicable to the payment of said mortgage debts in the order of their priority." It must be confessed that it is somewhat difficult to understand exactly what was meant by the language used, especially the expression, "exclusive of costs and expenses." But, construing this paragraph in connection with the one just previously quoted, the meaning would be the same as that which has been found to be the proper construction of the next preceding paragraph, and that this last-quoted paragraph was inserted simply for the purpose of emphasizing the intention, previously indicated, that no more than the balance which would remain of the \$1,000 after satisfying the first

mortgage should be applied to the mortgage debt in favor of Heath, Springs & Co. until judgments were satisfied; for it will be remembered that Judge Kershaw made his decree before he knew, or could possibly have known, what would be the amount of the proceeds of the sale. If the land had brought double the sum which it did bring at the sale subsequently made, it would have been very important to have made some distinct provision that in no event should Heath, Springs & Co. receive anything more than would remain of the \$1,000 after the first mortgage was satisfied, until all the judgments senior to the mortgage of Heath, Springs & Co. had been satisfied; and this, no doubt, looking to such a contingency, was the true intent of the paragraph now under consideration. In the judgment appealed from, Judge Norton clearly misconceives the decree of Judge Kershaw when he says: "Under the two-fund doctrine, as adopted by Judge Kershaw, plaintiff was bound, being able to do so, to make its debt and costs out of the homestead, in exoneration of the property of the defendant in excess of the homestead." As has been shown, Judge Kershaw did not adopt any such view of the two-fund doctrine. Indeed, he made no allusion to any such doctrine, though it may be that he had it in mind in drawing his decree. But he certainly did not adopt any such view of that doctrine as is attributed to him by Judge Norton, for he not only did not hold that the senior mortgagee was bound to make its debt and costs out of the homestead in exoneration of the property of the defendant in excess of the homestead, but, on the contrary, expressly held that the costs of this action should first be paid out of the proceeds of the sale,—not of the homestead alone, but the whole property,—and, next, the mortgage debt due to plaintiff. This was exactly in conformity to the two-fund doctrine, whereas the view erroneously attributed to Judge Kershaw would not have been in conformity to that doctrine, for, while it recognizes the equity of the judgment creditors, it ignores a like equity of Heath, Springs & Co.

The question raised here by the appellant, as to the propriety of a proceeding by rule on the sheriff, while perhaps admitting of grave doubt, under the cases of State v. Sheriff of Charleston Dist., 1 Const. S. C. 145; Dawkins v. Pearson, 2 Bailey, 619; Cooper v. Scott, 2 McMul. 150; Cannady v. Odum, 2 Rich. Law, 527; Brown v. Furze, Id. 530; and Hooks v. Byrd, 10 Rich. Law, 120,—cannot now be considered, as no such question was presented to or decided by the circuit court. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court with instructions to discharge the rule on the sheriff.

McGOWAN and POPE, JJ., concur.

RAPLEY et al. v. KLUGH.

(Supreme Court of South Carolina. Nov. 27, 1893.)

EJECTMENT—ORAL SALE—EVIDENCE—INSTRUCTIONS.

1. An alienee, by executor's sale of land of a deceased person, is not deceased's "assignee," within the protection of Code, § 400, against testimony of an adverse party as to the latter's transactions with deceased.

2. In ejectment by a wife, defendant cannot object to evidence that plaintiff's husband, who had bargained and paid for the land, had orally assigned to her the contract of purchase, the husband and his creditors acquiescing.

3. In ejectment by a wife on a contract of purchase made by her husband with one deceased, receipts for payments from deceased and his executor to the husband, and one to the wife, not showing that they related to the same land or the land in dispute, are admissible as subject to parol explanation.

4. A deed of land known as the "W. Homestead," 200 acres, more or less; bounded by the lands of certain persons named, "and of others,"—may be explained by the grantor so as to identify the land, and show the names of the "others," adjoining owners.

5. A "sketch of a plat" not marked with course and distances, made by a nonexpert grantor, and annexed to his deed, is admissible with the deed, as an illustration merely.

6. When a surveyor has, as an expert, fully explained a plat, and all that he saw or could find in regard to the lines therein, a question whether there were any marks to show that any persons, other than those he had mentioned, got any of the land, is leading and irrelevant, and calls for witness' opinion as to facts.

7. A receipt "in part payment of land sold" to S., "adjoining R.," and another to S.'s wife, "in part payment of land sold her husband," coupled with possession delivered to S. and his wife, take the oral contract of sale out of the statute.

8. A contract to convey land on payment of the price gives the vendee at once the right to specific performance, defeasible only by his failure to pay; and a grantee of the vendor's executor, with notice, cannot claim such land as included in his deed, merely because, when his deed was executed, said contract had not been fully performed.

9. A charge that the possession of plaintiff under an oral contract of sale was notice of her claim to the vendor's subsequent grantee is not erroneous for failure, in the absence of request, to add that such possession must be open, actual, notorious, and unequivocal.

10. When the president of a company is charged with notice as to a claim to certain land, which may or may not be included in the terms of a deed to the company, and the company resolves to sell, without warranty, its lands embraced in such deed, to its president and its secretary, (defendant,) there present recording the resolution, as individuals, and so conveys, it is proper to refuse to charge that notice to said company was not notice to a stockholder, and to charge that, if defendant were present when the resolution was passed, he was put upon notice.

11. In such case the court's affirmance of a charge that notice to the president was not notice to defendant, with the condition that it was notice to such president as an individual merely, could not be complained of by defendant.

12. The court, after charging defendant's point that plaintiff must prove the location of his claim plainly enough to enable the court to have it located and its judgment executed,

does not err in adding that the question of sufficient location is for the jury.

13. The supreme court will not reverse for an instruction contravening a rule that exemplary damages must be pleaded, when the verdict makes it plain that no such damages were allowed.

Appeal from common pleas circuit court, Abbeville county; James F. Izlar, Judge.

Action by Rachel Rapley against James C. Klugh for possession of land, and damages. Judgment for plaintiff. Defendant appeals. Pending appeal, on the death of complainant her heirs were substituted. Affirmed.

Plaintiff's receipts for alleged payments on the land claimed were as follows: "(a) Received from Samson Rapley six dollars in part payment for land sold him, adjoining Robin Guy. R. H. Wardlaw. 23 January, 1886." "(b) Received, 7 October, from Rachel Rapley, eighteen dollars 75 cents, in part payment for land sold to her husband, Samson Rapley; it being the amount of her account for washing my clothes from 1 July, 1885, to 1 October, 1886. For any previous payment made, I gave him a receipt. Robt. H. Wardlaw." "(c) Received of Rachel Rapley twenty dollars, in part payment of land purchased from the late Robt. H. Wardlaw, at the rate of \$40 per acre. W. C. Wardlaw, Exct. Estate R. H. Wardlaw. Nov. 27, 1889." "(d) Received of Samson Rapley twenty-five dollars, the balance due upon tract of land, 2 acres, bought from estate of Robt. H. Wardlaw. W. C. Wardlaw, Exctr. Est. R. H. Wardlaw. Nov. 10, 1890."

Beach & Caron, for appellant. De Bruhl & Bradley, for respondents.

POPE, J. This was an action instituted by Rachel Rapley in the court of common pleas for Abbeville county against James C. Klugh, as defendant, for the recovery of 2 acres of land situated in said county, and \$150 damages. The action came on to be heard before his honor Judge Izlar and a jury at the January, 1893, term of such court, and resulted in a verdict for the plaintiff for the land in dispute, and \$100 damages. After the entry of judgment,—which was preceded by a motion for a new trial, that was denied,—the defendant appealed upon the following grounds: "(1) Because his honor the presiding judge erred in allowing the plaintiff, against the objections of the defendant, to testify to transactions between herself and Robert H. Wardlaw, deceased, to wit: That she and her husband purchased land from Mr. Wardlaw; that they got from him papers about the land, and receipts for money; and that she paid him part of the purchase money, and worked for him to make payments on said land. (2) Because his honor the presiding judge erred in permitting the plaintiff, against the defendant's objection, to testify that her husband, Samson Rapley, allowed the title to said land made to her; the written transfer of the con-

tract to purchase being the best evidence. (3) Because his honor erred in admitting, against defendant's objection, proof by the plaintiff and her husband of a verbal assignment of the contract to purchase said land, and in holding that said assignment need not be in writing. (4) Because his honor erred in admitting in evidence, against defendant's objection, the receipts for money paid on said land, the same not having been properly proved. (5) Because his honor the presiding judge erred in admitting in evidence, against defendant's objection, the receipts referred to; said receipts being to different parties, and there being no evidence that they related to the same land, or to the land in dispute. (6) Because his honor the presiding judge erred in admitting, against defendant's objection, the testimony of W. C. Wardlaw, in answer to plaintiff's fourth interrogatory, that "the Wardlaw home tract, in the town of Abbeville, was sold to A. L. Gillespie;" the deed being the best evidence. (7) Because his honor the presiding judge erred in admitting, against the defendant's objection, the testimony of W. C. Wardlaw, given in answer to plaintiff's fifth interrogatory, that the tract of land sold to A. L. Gillespie did not embrace all of the homestead of R. N. Wardlaw, and that several persons, naming them, had previously bought portions of it; said testimony tending to vary the terms of the Gillespie deed, and the deeds to portions sold off being the best evidence. (8) Because his honor erred in overruling defendant's objection to plaintiff's sixth interrogatory propounded to W. C. Wardlaw, because it is leading, and because the deed is the best evidence. (9) Because his honor erred in overruling defendant's objection to plaintiff's seventh interrogatory propounded to W. C. Wardlaw, because it was an effort to vary the terms of the deed to Gillespie, and because the testimony sought to be introduced was irrelevant. (10) Because his honor erred in overruling defendant's objection to plaintiff's eighth interrogatory to W. C. Wardlaw, because the testimony sought was irrelevant. (11) Because his honor the presiding judge erred in allowing the witness Samson Rapley to testify, against the objection of defendant, to transactions between the plaintiff and Robert H. Wardlaw, deceased, to wit, that Mr. Wardlaw put the plaintiff in possession of the land; the alleged contract to purchase having been made between himself and Mr. Wardlaw, and he having had an interest. (12) Because his honor erred in allowing the plaintiff, against the objection of the defendant, to put in evidence, and explain to the jury, the alleged 'sketch of a plat' attached to the deed of W. C. Wardlaw, executor, to Rachel Rapley, without proof of the same, and in holding that the defendant had not the right to object. (13) Because his honor erred in sustaining the plaintiff's objection to the following question, asked R. J. Robinson: 'Were there any marks there to show that

any persons, other than those you have mentioned,—Grey and others,—ever got any of this land?' (14) Because his honor the presiding judge erred in overruling defendant's motion for a nonsuit—First. Because the alleged assignment or transfer to the plaintiff of the contract between Samson Rapley and Robert H. Wardlaw for the purchase of the said land was not in writing, and was within the statute of frauds; second, because the rights of the plaintiff, as between her and the defendant, are fixed by the contract between Samson Rapley and Robert H. Wardlaw for the purchase of said land, as it stood at the time of defendant's purchase; third, because the alleged contract between Samson Rapley and Robert H. Wardlaw for the purchase of said land, and part performance thereof, was not sufficient to sustain an action for specific performance, and plaintiff's equity cannot prevail; fourth, because there was no evidence of the location of the said land under the alleged contract to purchase. (15) Because his honor erred in charging the jury as follows: 'I say that the main question is, were the two acres in dispute included in the Gillespie conveyance and purchase? He purchased 200 acres, more or less, bounded by certain named persons, and "others." If these two acres were not in the Gillespie purchase, then it was not conveyed to the defendant, * * * and the plaintiff would be entitled to prevail in this action,'—and in failing to charge that the Gillespie conveyance and purchase included all the land covered by the descriptions in the deeds, and plat accompanying the same. (16) Because his honor the presiding judge erred in charging the jury that if 'the plaintiff, or her husband for her,' was 'in possession of these two acres at the time the defendant, and those under whom he claims, purchased, * * * the defendant could not occupy the position of purchaser for valuable consideration without notice,' and in failing to charge that such possession must be actual, open, notorious, and unequivocal at the time the defendant purchased. (17) Because his honor the presiding judge erred in refusing to charge the defendant's third and fourth requests to charge, which are as follows: 'Third. That notice to the Abbeville Land, Loan, and Improvement Company of plaintiff's claim, through its president, J. Allen Smith, was not notice to an individual stockholder who purchased from said company without receiving notice himself. Fourth. That if this defendant purchased from the land, loan, and improvement company without notice of the plaintiff's claim, and paid the purchase money, and took title, he will be protected in his purchase, although the said land, loan, and improvement company, in which he is a stockholder, had notice of the claim of the plaintiff.' (18) Because his honor erred in charging the jury: 'If the testimony satisfies you that Mr. J. Allen Smith, the president of the land, loan, and improve-

ment company, had notice of the claim of Rachel Rapley and her husband, and that Mr. Klugh was secretary of the company, and was present at that meeting when the resolution was passed that they would convey this land to Mr. Klugh and Mr. J. Allen Smith without warranty, that would be sufficient to put him upon notice, and was sufficient to charge him with notice.' (19) Because his honor the presiding judge should have charged the jury as requested in defendant's sixth request to charge, which is as follows: 'That notice to J. Allen Smith of plaintiff's claim, before he and this defendant purchased said land, was not notice to this defendant; and, if he purchased without notice, the plaintiff cannot recover.' (20) Because his honor the presiding judge should have charged the jury as requested in defendant's seventh request to charge, which is as follows: 'That the plaintiff must, by testimony, make the location of the land claimed sufficiently plain to enable the court to have the same located, and its judgment carried out, should there be a judgment for the plaintiff; and, if this is not done, the plaintiff cannot recover.' (21) Because his honor erred in charging the jury 'that the question of location is a question of fact for you, and you must determine whether or not this land in dispute has been sufficiently located to enable the plaintiff to recover in this action,' and then failing to instruct them what constitutes sufficient location. (22) Because his honor erred, when referring to the descriptions of the Wardlaw land contained in the deeds, in charging the jury as follows: 'The descriptions show that it was bounded by so and so, and others. That is an important matter for you to consider, when you come to consider the whole case,'—and then failing to charge the jury in what respect it was important, and what was the effect of it. (23) Because his honor erred in charging the jury as follows: 'If you conclude that she was willfully and wrongfully turned out of her land, then, if you conclude to do so, you can give her such damages as you think she is entitled to, but not unless she was turned out of her land wantonly, willfully, and maliciously, and recklessly;' whereas he should have charged that exemplary or punitive damages could not be recovered in an action of this kind. (24) Because, his honor having charged the jury that they could not give exemplary damages unless the plaintiff was turned out of her land wantonly, willfully, and maliciously, and recklessly, he should have granted defendant's motion for a new trial; there being no evidence that she was dispossessed in such manner, and the damages found being largely in excess of the actual damages proved."

At the hearing before us, it having been suggested that Rachel Rapley had died since this appeal had been taken, an order was issued by this court, with the consent of all parties to the appeal, by which Lee Rap-

ley and Adolphus Rapley, as the devisees under the will of Rachel Rapley, deceased, and W. E. Bell, as the executor of her will, were substituted for the said Rachel Rapley, as parties in her stead; such order stipulating that the same should be without prejudice to any written agreement heretofore made between counsel in this cause, and that all such agreements in writing should be confirmed.

The grounds of appeal are numerous,—some 24 exceptions. We will first examine the first and eleventh exceptions; involving, as they do, the construction of section 400 of the Code of this state. The questions now presented were raised in the examination of Samson Rapley, who was the husband of the plaintiff, Rachel Rapley, and also who had made the contract with Robert H. Wardlaw for the purchase of the two acres of land now in controversy. Mr. Wardlaw, in his lifetime, executed no deed, but received two payments in part of the purchase money, which payments were evidenced by his receipts therefor in writing, and put the said Samson Rapley in possession of the land. The plaintiff desired this testimony. Also, the plaintiff, Rachel Rapley, desired to testify in regard to communications and transactions with the said Robert H. Wardlaw. Defendant promptly interposed his objection to such testimony on the ground that it was obnoxious to the section of our Code (400) now being considered. Section 399 of the Code provides: "No person offered as a witness shall be excluded by reason of his interest in the event of the action;" and thereby a general rule was established. But, as said by Chief Justice Moses in *Guery v. Kinsler*, 3 S. C. 423, section 400, "was to guard against a mischief which, but for its enactment, would have been the consequence of the section (399) which precedes it. * * * While the living, of sane mind, were able to answer for themselves, there was no one to protect the estate of the dead, the insane, or the lunatic from the effect of testimony derived from their alleged declarations without fear of direct contradiction." Section 400, which is in restriction of the general rules, reads as follows: "* * * Provided however that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding nor any person who previous to such examination has had such an interest, however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of any thing in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person, at the time of such examination, deceased, insane or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir at law, next-of-kin, assignee, legatee, devisee or survivor of such deceased

person, or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination, in such action or proceeding, can in any manner affect the interest of such witness, or the interest previously owned or represented by him. * * * Many cases may be found in our Reports where this court has construed this last section. In every case it has been held to be in restriction of the general right to testify, and at the same time this court has recognized its inability to extend it beyond the classes expressly denied the right to testify. As was said in *Guery v. Kinsler*, supra: "When, however, an exception is made by words of description, including only persons referred to as occupying particular relations, it would be transcending our authority, and usurping the functions of another department, to include others who, though they may be within the mischief, have not been so recognized and protected by the enactment." It becomes necessary, therefore, when the competency of a witness is to be determined by the provisions of section 400 of the Code, that it shall appear that the witness objected to shall be shown to belong to one of the interdicted classes named in this statute. The only possible class which these witnesses can be referred to therein is that of "assignees." Is it true that the defendant to the action is in any sense an "assignee" of Robert H. Wardlaw, deceased? Klugh, the defendant, did not purchase and receive his title from Robert H. Wardlaw. His title is derived from J. Allen Smith, who was the alienee of the Abbeville Building, Loan & Investment Company. This corporation purchased from one Gillespie, and he, in turn, purchased from William C. Wardlaw, as executor, etc., of Robert H. Wardlaw. Under the decisions of this court in the cases of *Jones v. Plunkett*, 9 S. C. 392, and *Cantey v. Whitaker*, 17 S. C. 527, it could not be held that the defendant here was entitled to be classed as an "assignee," within this provision of the Code. In the case last cited, Mr. Justice McGowan said: "But whilst, as it seems to us, the plaintiff, as alienee, is within the mischief intended to be remedied by the exception, she is not within the express terms. She is the third or fourth alienee of the land from the deceased person, but she is neither 'executor, administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor,' according to the terms of the exception which enumerated those intended to be excepted; and this court, whose only duty it is to declare the law, cannot amend it so that its terms will embrace a case which we may suppose to be within the principle upon which the law was founded, but not within its express terms." The cases of *Standridge v. Powell*, 11 S. C. 549; *Robinson v. Robinson*, 20 S. C. 567; *Monts v. Koon*, 21 S. C. 110, 112; and *Moffatt v. Hardin*, 22 S. C. 25,—cited in appellant's argument,—

have each been examined by us, and it is found that no principle upheld in any of those cases refers to or antagonizes the position here taken by us. These exceptions must be overruled.

We will next consider exceptions 2 and 3. The appellant lays stress upon the decision of this court of *Mims v. Chandler*, 21 S. C. 494, where it was held that, the contract of purchase having been made by Mims, the husband, he was entitled, in the action for specific performance of such contract, to have the title made to himself, rather than to allow Chandler, of his own motion, to elect to make such title to the wife of Mims. The court was clearly right in its decision in that case. So, in the present case, we would hold if there were a contest between Dr. W. C. Wardlaw, as the executor of Robert H. Wardlaw, deceased, and Samson Rapley, when Dr. Wardlaw claimed the right to convey the lot of land to Rachel, rather than Samson. But we are confronted with no such state of facts. It is Samson who, after having completed his contract by paying every dollar of the purchase money, requires such deed made to his helpmeet,—his wife; and we hear no complaint of Samson, or his heirs at law or his creditors, at what Samson has himself caused to be done. We know of no law which forbids a purchaser, under a parol contract to purchase, with possession being delivered to him of the land in question, and after he has paid to the utmost farthing the purchase money, having the deed made to his wife, if the rights of his creditors are not contravened thereby. The decisions quoted by the appellant: *Blackwell v. Ryan*, 21 S. C. 121; *Watson v. Child*, 9 Rich. Eq. 129; *Roberts v. Smith*, 21 S. C. 461; *Massey v. McIlwain*, 2 Hill, Eq. 421; *Adickes v. Lowry*, 12 S. C. 97,—do not in any manner impinge upon the view here expressed. These exceptions are overruled.

Exceptions 4 and 5 relate to the admission in testimony of two receipts given by Robert H. Wardlaw to Samson Rapley and his wife, Rachel, for money paid by them on the parol contract of purchase of the land now in controversy. This court, in the case of *Moffatt v. Hardin*, 22 S. C. 9, held: "A receipt is not one of those solemn papers in writing as to which parol evidence is not admissible, but is always capable of explanation." These parties, Samson Rapley and Rachel, his wife, presented, when they were testifying under oath, two receipts which they said were given to them by Mr. Robert H. Wardlaw, and two given by his son, Dr. William C., as his executor. They testified that the parties themselves gave them these receipts when they paid the money. There was no error here.

Now let us examine exceptions 6, 7, 8, 9, 10; relating, as they do, to appellant's objections to the answers made by Dr. Wardlaw to plaintiff's interrogatories—4th, 5th, 6th, 7th,

and 8th interrogatories. Dr. Wardlaw had made a deed to A. L. Gillespie for what was known as the "Robert H. Wardlaw Homestead," containing 200 acres, "more or less;" bounded by lands of certain named individuals, and "of others," whose names were not given. The purpose of these interrogatories was to obtain from this witness the names in his deed, but whose names were not then of the other persons who were referred to given. This witness had a perfect right in this testimony to fully identify the land sold as the "Robert H. Wardlaw Homestead." Not only so, but he could give the names of the "others" whose lands were bounded by the lands he conveyed. The only restriction upon his testimony in regard to these matters was that he could not contradict or vary the terms of his contract with A. L. Gillespie, which contract was expressed in the deed of conveyance from Wardlaw to Gillespie. As was said in *Barkley v. Tarrant* 20 S. C. 578: "There is no doubt of the general rule that 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written agreement.' This is a most salutary rule, necessary to prevent frauds and perjuries, and to protect the real intention of parties; but, if applied without discrimination, it may be found to promote the very things it was intended to prevent. The rule has special reference to the words used in the instrument, and the intention of the parties; as, for example, in the familiar case of a latent ambiguity. Mr. Greenleaf says: 'It is thus apparent that the rule excludes only parol evidence of the language of the parties contradicting, varying or adding to that which is contained in the written instrument; and this because they have themselves committed to writing all which they deemed necessary to give full expression to their meaning, and because of the mischiefs which would result if verbal testimony were in such cases received. But where the agreement in writing is expressed in short and incomplete terms, parol evidence is admissible to explain that which is per se unintelligible, such explanation not being inconsistent with the written terms.' 1 Greenl. Ev. § 282." The deed of Dr. Wardlaw to Mr. Gillespie was expressed in incomplete terms,—the "Robert H. Wardlaw Homestead," lands "of others" as boundaries; hence, under the wise rule just enunciated, this witness could testify on these points. Let the exceptions be overruled. But, before leaving this branch of the case, it is only just to ourselves to say that these principles of law are not inconsistent with those held in the cases of *Senterfit v. Reynolds*, 3 Rich. Law, 129, 130; *Lee v. Fowler*, 19 S. C. 608; *Cathcart v. Chandler*, 5 Strob. 19; *Stucky v. Clyburn*, Cheves, 186; and 1 Greenl. Ev. § 86,—cited by the appellants.

The twelfth exception has reference to what was known as a "sketch of a plat" which was attached to the deed of convey-

ance from Dr. William O. Wardlaw, as executor of R. H. Wardlaw, deceased, to Rachel Rapley. Such "sketch of a plat" was not made by any surveyor. It was a diagram of the premises prepared by Dr. Wardlaw, and by him attached to the deed before its delivery. The deed was introduced in evidence without objection, and, when defendant (appellant) objected to any reference to such diagram, the judge ruled that he could not object to it; that it was a part of the deed. Inasmuch as it was used at the trial as an illustration, and not as binding any one,—for it had no courses or distances on it,—we suppose the circuit judge viewed it very much as any diagram made by an ordinary witness, (we mean by "ordinary witness" one who was not an expert, as a surveyor would be,) while on the stand, would indicate his impressions of the form of a house, direction of a road, or, it may be, the way a piece of land appeared to the witness as to its direction from any given place or road, etc. With this view, we cannot see that any harm could have resulted to any one from its consideration. Let the exception be overruled.

The thirteenth exception complains that the circuit judge erred in not allowing Mr. R. J. Robinson, who is a surveyor, to answer a question in this form, propounded by appellant: "Were there any marks there to show that any persons, other than those you have mentioned,—Grey and others,—got any of this land?" The form of this question is objectionable because it was leading. Independently, however, of this objection, it was irrelevant; for it was no part of the issues here presented. Besides, this witness had fully explained the McCord plat, and all that he saw or could find in connection with the lines therein designated; so that, after all, his opinion as to facts was sought by the question, and we are, under all these circumstances, inclined to regard the course of the judge as proper. The exception is overruled.

We now come to consider the fourteenth exception; covering, as it does, the alleged error of the circuit judge in refusing the motion for a nonsuit, in its several phases. (a) The alleged contract between Samson Rapley and Robert H. Wardlaw was not in writing, and was within the statute of frauds. We cannot agree with the appellant that, because there was no written contract between these parties, therefore the statute of frauds would apply. To a certain extent there was an acknowledgment by Mr. Wardlaw in writing of this contract; for he specifies in the receipts he gave, and which he signed, that there was such a contract. Besides all this, he received a considerable part of the purchase money, and at the same time placed the bargainor in possession. We apprehend, if he had lived and refused to perform his contract, Rapley could have forced him to do so. This is a fair test of the applicability of the statute of frauds. We think Rapley showed more than

did the plaintiff in *Mims v. Chandler*, supra, where specific performance was adjudged. (b) Appellant insists that he, having purchased before the contract was actually carried into effect, is entitled to hold his rights as against Rapley, (Samson,) and that at that time Samson Rapley could not have had specific performance of his contract. We hold that Rapley had this right of specific performance throughout his contract, subject to be defeated if he failed to pay the entire purchase money. If, after 1886, Mr. Robert H. Wardlaw, and before defendant purchased, no longer had the power to alienate this land, so as to defeat the rights therein that he (Mr. Wardlaw) had created in Samson Rapley, certainly after his death the executor of Mr. Wardlaw had no such power; and, if this be true, the appellant is helpless, so far as this matter is concerned, for he only has the executor's deed. However, before leaving the consideration of this question of nonsuit, it would have been difficult to defend the circuit judge if he had granted this motion, if there was testimony on the material issues raised by the pleadings. This exception is overruled in all its phases, for (c) and (d) were answered in what was said of (a).

The fifteenth exception complains of the judge's charge as to the Gillespie deed, and then complains of what he ought to have charged, and did not. So far as the latter complaint is concerned, it is the appellant's fault if the judge ought to have charged, and did not so charge, as he alleges, for the appellant never requested any such charge; and we have, over and over, held that, if an appellant omits a request to charge, it is his misfortune, and not the fault of the judge. Now, what did the judge charge that is complained of? Here is that part of his charge: "So, Mr. Foreman and gentlemen, I say that the main question is, were the two acres in dispute included in the Gillespie conveyance and purchase? He purchased 200 acres, 'more or less,' bounded by certain named persons, 'and others.' If these two acres were not in the Gillespie purchase, then they were not conveyed to the defendant, for he only purchased the land conveyed to Gillespie, and by him conveyed to the Abbeville Land, Loan & Investment Company, and the plaintiff would be entitled to prevail in this action. But if it was included, then the defendant would be entitled to prevail, unless the testimony satisfies you that at the time of his purchase he had notice of the plaintiff's claim." This charge of the judge most admirably presents the issues in this action to the jury. It is in exact accord with the admitted and uncontroverted facts of the pleadings and the testimony. The exception is overruled.

Let us now attend to the question embraced in the sixteenth exception. This relates to the judge's charge. Before quoting the language referred to, it may be of mo-

ment to state that defendant sought to protect himself, not only by denying that plaintiff had title, but, in case he should fail, then he set up the defense of purchaser for a full and valuable consideration, without notice of plaintiff's rights. Therefore, the judge, without any request for such a charge, felt it his duty, as it was, to explain that issue to the jury, and he did so in these words: "So, the question is, was the plaintiff, or her husband for her, in possession of these two acres at the time the defendant, and those under and through whom he claims, purchased? If so, then the law would charge them with constructive notice of the plaintiff's claim, and the defendant could not occupy the position of purchaser for valuable consideration without notice." This seems to us a fair presentation of the law. Appellant complains that he ought to have enlarged his charge somewhat by stating that such occupation was open, actual, notorious, and unequivocal. It is his (appellant's) fault if the judge did no more; for he made no request, either then or at the close of the charge, as the judge distinctly invited counsel to do. The exception must be overruled.

In the seventeenth and eighteenth exceptions the appellant raises the question whether the judge did not err in refusing to charge his third and fourth requests: "Third. That notice to the Abbeville Land, Loan, and Improvement Company of plaintiff's claim, through its president, J. Allen Smith, was not notice to an individual stockholder who purchased from such company without receiving notice himself. Fourth. That if this defendant purchased from the land, loan, and improvement company without notice of the plaintiff's claim, and paid the purchase money, and took title, he will be protected in his purchase, although the said land, loan, and improvement company, in which he is a stockholder, had notice of the claim of plaintiff." The judge charged: "Well, under certain circumstances I would charge you that these propositions might be true; but if the testimony satisfies you that Mr. J. Allen Smith, the president of the land, loan, and improvement company, had notice of the claim of Rachel Rapley and her husband, and that Mr. Klugh was secretary of the company, and was present at that meeting when the resolution was passed that they would convey this land to Mr. Klugh and Mr. J. Allen Smith, without warranty, that would be sufficient to put him upon notice, and it was sufficient to charge him with notice." This presents a delicate question, and one that has enlisted very great consideration by the courts of the country. The judge, under the issues, did not feel called upon to charge in the form the appellant presented his requests; conceiving, very justly, that, if he charged upon the requests in the exact form in which they were framed, he would be charging upon an abstract question of law in no wise connected with the issues made

squarely in this case, and this no judge is required to do. Hence, he framed his charge to apply to the issues involved here, and we are now prepared to pass upon their consonance with the law. In the separate opinion of the present chief justice of this court in the case of *Bank v. Anderson*, 28 S. C. 150, 5 S. E. 343, he points out very clearly the injustice of imputing to a bank the knowledge possessed by one of its mere stockholders. It is true, the question there involved was the discount by a bank of a negotiable instrument before maturity, in the ordinary course of its business. In such a case it would be unquestionably a great wrong, and prove a serious blow to the business interests of the country, to hold otherwise. That case does not, however,—as it ought not to have done, for such question was not there involved,—pretend to touch the question of the effect of such knowledge by a stockholder of a bank when a meeting is called to pass upon a question, and he is present and takes part in the solution of that question. So much for a stockholder, under the hypothetical case. All corporations act by agencies. Among these agencies are the officers. We apprehend the law makes a distinction between the mere stockholders and the officers of a corporation. The responsibility of the latter is, and ought to be, more stringent. So we see in the later case of *Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165, where there was an effort to bring home to the bank a knowledge of one Robbins' insolvency through the knowledge thereof imputed to the solicitor of the bank, this distinction is recognized; for in this case the general rule was recognized that notice to the agent is notice to the principal. The bank was exonerated from the responsibility of the knowledge of its agent,—solicitor and director,—because such knowledge of its agent was not acquired while engaged in business for the bank, but was acquired while acting as the solicitor of Robbins himself; thus creating an exception to the general rule. And this exception was sustained by one of the highest authorities in this country, which is fully set forth in that opinion. We have, therefore, to begin with, this as a general rule: that all the knowledge of an agent is imputed to his principal; and of course there are exceptions to this as to all general rules. A recent writer, as set forth in the note to the case of *Bank v. Chase*, 39 Amer. Rep. 331, has thus set forth the exceptions: "(1) What the agent has forgotten entirely, or may have forgotten during the agency; (2) what he could not tell his principal, e. g. professional confidences; (3) facts which the previous conduct of the agent makes it certain he will conceal." In the case at bar it was admitted that Mr. J. Allen Smith was the president of the corporation, the land, loan, and improvement company, and that the defendant, (appellant,) Mr. Klugh, was its secretary. It was charged that Mr. Smith knew

of Rapley's claim to and actual possession of these two acres while he was negotiating, in behalf of his corporation, with Mr. Gillespie, for the purchase of the "R. H. Wardlaw Homestead;" and testimony was introduced on this issue. It was proved that by a resolution of the corporation, the land, loan, and improvement company, after its purchase from Gillespie, the sale of such lands to said Smith and Klugh were directed to be made without warranty of title; and that Mr. Klugh was present as secretary at that meeting of the corporation, and recorded such resolution on its minutes; and, further, that said corporation did actually convey said lands to them in pursuance of such resolution. Wherefore, when the judge made his charge quoted above, he addressed himself to an enunciation of the law applying to the state of facts bearing on these issues; and, after reflection, we are not dissatisfied with his conclusion. The exceptions are therefore overruled.

Nor are we dissatisfied with the action of the judge as complained of in the nineteenth exception. The appellant had requested him to charge, in his sixth request, "that notice to J. Allen Smith of the plaintiff's claim, before he and this defendant purchased said land, was not notice to this defendant; and, if he purchased without notice, the plaintiff cannot recover;" to which the judge replied: "That is, if it was just the individual notice to J. Allen Smith, I charge you that." From these words, as quoted, the judge pointed out a difference in notice to J. Allen Smith as an individual and as president of the corporation. It seems to us that, under the principles of law announced in the branch of this opinion just preceding that now under consideration, this charge of the judge was, if anything, too favorable to the defendant, (appellant.)

Exceptions 20 and 21 relate to the judge's refusal to charge defendant's seventh request, which was "that the plaintiff must, by testimony, make the location of the land claimed sufficiently plain to enable the court to have the same located, and its judgment carried out, should there be a judgment for the plaintiff, and, if this is not done, the plaintiff cannot recover." The response of the judge was in these words: "As a general proposition of law, that is true; but the question of location is a question of fact for you, and you must determine whether or not this land in dispute has been sufficiently located to enable the plaintiff to recover in this action. If it has, why, the court will certainly carry out its judgment, if you find that state of facts." Thus it appears that the judge was careful not to invade the province of the jury in their duty, under the law, without any expression of opinion thereon by the judge, to find what facts were established by the preponderance of the testimony. We are unable to find any error here. The exception is overruled.

Under the foregoing views, exception 22 must be overruled.

Lastly, we will consider the twenty-third and twenty-fourth exceptions, which relate to so much of the judge's charge as refers to exemplary damages. The judge charged: "Now, as to the question of damages, in case you come to the conclusion that the plaintiff is entitled to recover, she is entitled to recover damages from the defendant for the withholding the possession of these lands; and you are to take into consideration the value of the timber cut upon the land, and also the use of the land for the time the party was kept out of it; and you will take into consideration, also, whether or not the cutting of the timber off of this land has damaged the plaintiff. You will give her such damages as will compensate her for being deprived of her land in its cultivation; and if you conclude that she was willfully and wrongfully turned out of her land, then, if you conclude to do so, you can give her such damages as you think she is entitled to, but not unless she was turned out of her land wantonly, willfully, and maliciously, and recklessly." (Italics ours.) This court held, in *Bonham v. Bishop*, 23 S. C. 105: "A verdict is the compound result of the legal instructions given to the jury by the court, and of their findings of fact applied to the legal principles laid down for their guidance; and if there is error in the instructions, then there is necessarily error in the judgment." We are still satisfied with this enunciation of the law, but we apprehend that, if it is apparent from the case here presented that a slight error by the judge in his charge has in no way contributed to the verdict of the jury, in the interest of the proper administration of justice in our courts such a slight error of the judge should not be allowed to vitiate the judgment by having an order entered for a new trial. This court owes it as a contribution to the public welfare that is so largely conserved by having justice administered in our courts with reasonable speed, and, when conclusions are reached by judgments therein, that light, slight, and unimportant errors which may have been committed during the trial of a cause shall be esteemed as cured by the verdict. The Code of this state inculcates this doctrine, and the wisdom derived from long experience sanctions it. We are aware that in the cases of *Spellman v. Railroad Co.*, 35 S. C. 475, 14 S. E. 947; *Samuels v. Railroad Co.*, 35 S. C. 493, 14 S. E. 943; and *Cobb v. Railroad Co.*, 37 S. C. 194, 15 S. E. 878,—this court has endeavored to lay down a general rule to govern cases of exemplary damages, by requiring that the complaint must contain allegations to support such exemplary damages. We still maintain the doctrines there set forth; but in the case at bar it is so manifest that the charge

of the judge, a portion of which—accidentally, no doubt—contravened in a measure these doctrines, has really produced no mischief, that we are unable to give our consent, for this slight omission by the judge, to an order for a new trial. In the case of *Woody v. Dean*, 24 S. C. 503, this court held: "An erroneous instruction to the jury, which could have made no possible difference in their verdict, is not ground for a new trial." In the case at bar it was undisputed that defendant had taken possession of the land in question for three years; had cleared up one acre of timbered land lying within the limits of the town of Abbeville; had sawed up, and used for his own purposes, much of said timber; that for firewood the timber was worth \$1.50 a cord. The verdict only allowed \$100 damages. We do not feel justified in granting a new trial for this slight error in the judge's charge, with the conclusion forced upon our minds that it in no wise contributed to the verdict rendered; and the exceptions must therefore be overruled.

Besides all this, we are not satisfied that the allegations of the complaint, properly construed, are insufficient to warrant the testimony as to the manner in which the plaintiff was ejected. Moreover, the testimony as to exemplary damages not being objected to when it was offered, the complaint, even if defective, might have been amended so as to correspond with the proof. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

CAMPBELL v. PATTON et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

ACTION ON NOTE—PLEADING—ANSWER—SUFFICIENCY.

In an action on a note, by the indorsee against the payee and joint makers, where the complaint does not allege that plaintiff purchased the note before maturity, an answer of one of the joint makers, alleging that he was induced to sign the note by fraudulent conspiracy of his comaker and the payee, constitutes a good defense, since plaintiff's failure to aver a purchase before maturity relieved such joint maker of the necessity of alleging notice.

Appeal from superior court, Buncombe county; R. F. Armfield, Judge.

Action by James M. Campbell against P. F. Patton and others to recover on a note. There was judgment for plaintiff, and defendant Patton appeals. Reversed.

Action tried at August term, 1893, of Buncombe superior court, before Armfield, J. The allegations of the complaint are as follows: "(1) That on the 10th day of July, 1890, the defendants P. F. Patton and Natt Atkinson executed their three promissory notes in writing, for the sum of two

thousand and five hundred dollars each, payable, respectively, one, two, and three years, with interest from date at the rate of eight per centum per annum, payable semiannually, to the defendant C. E. Graham, and made payable to his order. (2) That before the commencement of this action the defendant C. E. Graham indorsed said notes, for full value, to the plaintiff. (3) That all of said notes are past due, and no part thereof has been paid, except the interest to January 10, 1893." The answer of the defendant Patton is as follows: "(1) That the allegations set forth in the first paragraph of the complaint he admits to be true. (2) That the allegations contained in paragraph 2 thereof are not of his own knowledge, nor has he information sufficient to form a belief in the truth thereof, and he therefore denies the same to be true. (3) That the allegations contained in the third paragraph thereof he admits to be true. For a further defense this defendant says: (1) That on or about the 10th day of July, 1890, or just prior thereto, the defendant Natt Atkinson approached this defendant, and represented to him that if he, this defendant, would join him, the said Atkinson, in purchasing a certain piece of land situated in the western portion of the city of Asheville, belonging to the defendant C. E. Graham, for the price of \$9,000, he, the said Atkinson, could sell the same for a much greater sum, and led this defendant to believe that he had at that time arranged for selling the said land at a greatly advanced price, much in excess of the said sum of \$9,000. (2) That induced by the representations so made by the said Atkinson, and having then great confidence in the said Atkinson, this defendant consented to join the said Atkinson in the purchase of the said land for the said sum of \$9,000, and the notes which are the subject of this action were given for the balance of the purchase money for the said land. (3) That this defendant is informed and believes that at the time the said representations were so made to him by the said Atkinson as aforesaid, to the effect that the said Atkinson had already arranged to sell the said land, as is set forth in the first paragraph of this further defense, the said Atkinson had not obtained a purchaser for said land, nor had he arranged to sell the same as was represented by him, but that the said Atkinson was acting as the agent of the said C. E. Graham, the owner of the said land, and that they combined to cheat and defraud this defendant by inducing him to purchase said land at a price far in excess of its true value, to wit, five thousand dollars. (4) That, by the false and fraudulent representations and inducements of the said Atkinson and Graham made to this defendant as aforesaid, this defendant was induced to purchase said land, and to execute said notes. (5) That he is willing, ready, and

able to cancel the deed made to him, so far as any interest was conveyed to him, and reconvey all interest that he may have acquired by reason of said sale to him. Wherefore, the defendant P. F. Patton prays judgment that the said notes be delivered up and canceled, that the plaintiff take nothing by his suit, that he recover his costs, and for such other and further relief as, under the circumstances of this case, the court may deem just." This answer was adjudged to be frivolous, and, the other defendants having failed to plead, judgment was granted against all the defendants according to the prayer of the complaint, and the defendant Patton appealed.

Thos. A. Jones, for appellant. M. E. Carter and Busbee & Busbee, for appellee.

BURWELL, J. The answer of the defendant Patton avers that he was induced to sign the negotiable promissory notes sued on in this action by a fraudulent conspiracy between the payee, C. E. Graham, and his codefendant, Natt Atkinson. The allegations of fraud are not as definite and particular as the rules of pleading would probably require them to be made, but the answer certainly contains enough to relieve it from the charge of being frivolous. It seems intended to raise a serious question, and, when that appears, the courts will not readily decide such an answer to be frivolous. *Erwin v. Lowery*, 64 N. C. 321. If it was filed in good faith, and is not clearly impertinent, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury. Courts do not encourage the practice of moving for judgment upon the answer as being frivolous. *Womble v. Fraps*, 77 N. C. 198. But if we consider the motion for judgment in this action for that cause as intended to raise the issue of law that the matters therein alleged, if true, could not affect the plaintiff's right to recover, there was error in granting it, for what is therein alleged, if proved, would be a good defense to the notes, if they were held by Graham, the payee; and, if proved to the satisfaction of the jury on the trial of this cause, those facts so established will impose upon the plaintiff, who is the indorsee of Graham, the burden of establishing the fact that he is a bona fide purchaser for value, and without notice of the alleged fraud in the inception of the notes. *Daniel*, Neg. Inst. § 166; *Cover v. Myers*, 75 Md. 406, 23 Atl. 850, 32 Amer. St. Rep. 394, and note; *Bank v. Burgwyn*, 108 N. C. 63, 12 S. E. 952. If it had been averred in the complaint that the plaintiff had purchased the notes for value and before maturity, and that allegation had been admitted, or not properly denied, then it would have been incumbent on the defendant to allege and prove, not only a defense good against the payee

and indorser, Graham, but also that the plaintiff indorsee had notice of that defense when he purchased them. The plaintiff, in his complaint, (paragraph 2,) does not allege that he purchased the notes before maturity, but only "before the commencement of this action." His failure to aver a purchase before maturity relieved the defendant of the necessity of making the allegation of notice, but if, on the trial, the pleadings being unchanged, the plaintiff satisfies the jury that he did purchase the notes for value before maturity, the burden of proof will again shift, and it will be incumbent on the defendant to prove that the plaintiff had notice of his defense. *Bank v. Burgwyn*, 110 N. C. 267, 14 S. E. 623. The second paragraph of the answer, while not strictly according to the requirements of the Code, (section 243,) seems to us a sufficient denial of the allegations of the second paragraph of the complaint. That denial was itself sufficient to make an issue. Error.

McADEN v. NUTT et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

Appeal from superior court, Mecklenburg county; R. F. Armfield, Judge.

Action by John H. McAden, executor, against R. T. Nutt and another. Judgment having been rendered for plaintiff, and execution issued thereon, defendants moved for an injunction to restrain further proceedings thereunder, and to have satisfaction of the judgment entered of record. The motion was denied, and defendants appeal. Affirmed.

Walker & Cansler, for appellants. R. L. Haymore and A. E. Holton, for appellee.

PER CURIAM. We are unable to discover any error in the rulings of the court. The case is too plain to admit of discussion. Affirmed.

In re MEYERS' ESTATE.

(Supreme Court of North Carolina. Dec. 19, 1893.)

ADMINISTRATION—RIGHT OF HUSBAND—COADMINISTRATOR.

1. The right to administer a deceased wife's estate being given a husband by Code, § 1376, in case she dies intestate, and by section 2166 in case she leaves a will without naming an executor, his right to letters of administration is not affected by the pendency of a contest over a will which named no executor.

2. A husband who has the right to administer his wife's estate may have another appointed coadministrator with him.

Appeal from superior court, Buncombe county; R. F. Armfield, Judge.

Morris Meyers and Charles A. Webb were v.188.E.no.16—44

appointed by the clerk of court administrators of Sarah Ellick Meyers, the deceased wife of Morris Meyers. On application of legatees, the clerk revoked the letters of administration, and, the court affirming the order of revocation, Meyers and Webb appeal. Reversed.

Chas. A. Webb, for appellants. Jas. H. Merriman, for appellees.

BURWELL, J. A husband has a right to administer the estate of his deceased wife, both in the event of her death intestate, (Code, § 1376,) and also in the event that she leaves a will, but names no one as executor, (Code, § 2166.) The script which has been propounded as the will of Mrs. Sarah Ellick Meyers does not appoint any one to execute it. Therefore, if it be found, upon the trial of the issue *devisavit vel non*, that it is the will, that cannot have the effect of depriving her husband of the right to administer the estate. Hence, while it is true that there is a contest pending, there is no controversy in regard to the right of administration. Nor can there be one. The statutory provisions are plain. *Little v. Berry*, 94 N. C. 433. It has been decided by this court that one who has the prior right to administration may transfer that right by appointment. *Little v. Berry*, supra. If the husband could have lawfully transferred his right to administer his wife's estate to another, he may certainly cause another to be associated with him in the administration. If it was proper to appoint the husband, it was proper to appoint the husband and his chosen associate, Webb, to be coadministrator. From what has been said, it follows that the husband's right to letters of administration, and the clerk's power and duty to appoint him and his chosen associate to be coadministrator, were not at all affected by the filing and probating, in common form, of the script which purported to be the will of Mrs. Meyers, for, as has been noted, that instrument named no one to administer the estate under its provisions. *Suttle v. Turner*, 8 Jones, (N. C.) 403, is overruled in *Little v. Berry*, supra. The duties and responsibilities of these administrators are not in any degree changed by the fact that a will has been, or may be, probated, that will guide them in their distribution of the assets that remain after payment of debts and charges of administration. They must take notice of that. The clerk has power to issue orders touching the administration, and they must obey. If they are guilty of misconduct, they may be removed. But they should not have been ousted by the clerk for the reasons set out in the petition upon which his order of removal was founded. His honor should have directed the clerk to revoke his order of removal. It is so ordered. Error.

LYMAN et al. v. RAMSEUR et al.
(Supreme Court of North Carolina. Dec. 19, 1893.)

APPEAL—RECORD—CONFIRMING JUDICIAL SALE.

1. Where there is no case settled by the judge, and it does not appear that appellant's case or appellee's counter case were ever served, the court can only look at the face of the record proper.

2. A judgment confirming a commissioner's sale, and directing the purchaser, by a certain date, to pay into the clerk's office \$3,000, to be applied, etc., and that on the purchaser's payment to the commissioner of the amount of his bid, to wit, \$3,000, the latter shall make him a deed, is not ambiguous or inconsistent, as directing the \$3,000 to be paid twice.

Appeal from superior court, Buncombe county; Graves, Judge.

Action by Julia E. Lyman and another against H. M. Ramseur and another. Motion by plaintiffs to confirm a sale of lands made by D. C. Waddell, commissioner, to William M. Cocke, Jr. Sale confirmed, and judgment rendered requiring said Cocke to pay into the office of the clerk of the superior court \$3,000, to be applied as by judgment directed, and that upon Cocke's payment to D. C. Waddell, commissioner, of the sum bid by him at the sale, to wit, \$3,000, said commissioner should execute and deliver to said Cocke a deed for the land. Ramseur and Cocke except and appeal. Affirmed.

Thos. A. Jones, for appellants. F. I. Osborne and Batchelor & Devereux, for appellees.

CLARK, J. There is no case settled by the judge. There is before us simply the "case on appeal" prepared by appellants, and the "counter case" of the appellees. If it appeared that these had been served, or that service had been accepted, within the time allowed by statute, the appellees' counter case would be held the case on appeal, since the appellants acquiesced in the same by not referring it to the judge to settle the case. *Owens v. Phelps*, 92 N. C. 231; *Jones v. Call*, 93 N. C. 170. But it does not appear from the record that either case on appeal was served in time, and hence the court must disregard both, unless such service in time is admitted. *Cummings v. Huffman*, 18 S. E. 170, (at this term.) As this is not admitted, the judgment below must be affirmed, unless there is error upon the face of the record proper, and the argument here was restricted to that point. Clark's Code, (2d Ed.) 580, and cases there cited. The only error upon the face of the record which is suggested on the argument, or which appears to us by inspection, is that there is a possible ambiguity or inconsistency in directing the \$3,000 purchase money to be paid into the clerk's office, and also directing that, upon the payment of said sum by the purchaser to the commissioner, he shall execute to the purchaser a good and suffi-

cient conveyance. It seems to us that the exception is hypercritical. There is but one \$3,000 that is claimed. That was directed to be paid by the date mentioned in the judgment, and thereupon the commissioner was directed to convey the title. No error.

STATE v. AIKEN.

(Supreme Court of North Carolina. Dec. 19, 1893.)

CONTEMPT—JURISDICTION OF MAYOR TO PUNISH DEFAULTING WITNESS.

Under Code, § 3818, providing that the mayor of an incorporated town is hereby constituted an inferior court, with the jurisdiction of a justice in all criminal matters arising under the laws of the state or under the ordinances of such town, and that the rules regulating proceedings before a justice shall apply to proceedings before such mayor, a mayor has jurisdiction to punish a defaulting witness in a criminal case for contempt. In re Deaton, 11 S. E. 244, 105 N. C. 59, followed.

Appeal from superior court, Transylvania county; Armfield, Judge.

James P. Aiken was fined eight dollars for contempt in disobeying the subpoena of the mayor of the town of Brevard, and appealed to the superior court. The proceeding was dismissed, and the state appeals. Reversed.

The Attorney General, for the State.

CLARK, J. The defendant—or, more properly, the respondent—was a defaulting witness in a criminal proceeding before the mayor of Brevard against one Dock Rhodes for violation of a town ordinance. A notice issued to show cause why he should not be fined for contempt in disobeying the subpoena of the court. The respondent appeared, but the court adjudged that he had not shown good cause, and fined him eight dollars. Upon appeal to the superior court, his honor dismissed the proceeding, upon the ground that the mayor had no authority to impose the fine. In this there was error. In re Deaton, 105 N. C. 59, 11 S. E. 244, in which (on page 65, 105 N. C., and page 245, 11 S. E.) the express point is decided. The power given justices of the peace by Code, § 651, is extended to mayors by Code, § 3818.¹ But in fact the power to punish for contempt is inherent in all courts, and essential to their existence. The courts of our cities and towns would become nullities if they did not possess the power of procuring the attendance of witnesses under suitable penalties for contempt upon willful disobedience of the subpoena of the court. The

¹ Code, § 3818, provides that the mayor of an incorporated town is hereby constituted an inferior court with the jurisdiction of a justice in all criminal matters arising under the laws of the state or under the ordinances of such city or town, and that the rules regulating proceedings before a justice shall apply to proceedings before such mayor.

fine imposed (eight dollars) was not excessive, and was probably fixed from analogy to the penalty against a defaulting witness, and in favor of the party at whose instance he is summoned, which is allowed by a court of a justice of the peace in a civil action. Code, § 847. In the present case the fine is simply for contempt, and to be disposed of as other fines and penalties. It is a matter of no special importance, but from analogy to cases in which prosecutors are taxed with costs this proceeding should properly be entitled "State v. Rhodes. Appeal by Aiken, Defaulting Witness." The judgment dismissing the proceeding is set aside, and the cause remanded, that the facts may be found by the judge, for the findings of fact by the mayor are not conclusive. In re Deaton, *supra*. If the facts found justify it, the judge will impose sentence for the contempt. Error.

FERGUSON v. WRIGHT et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

EXECUTION SALE — ALLOTMENT OF HOMESTEAD — DOMICILE—HEARSAY EVIDENCE — PRESUMPTIONS — ADVERSE POSSESSION—COLOR OF TITLE—DEED FROM TENANTS IN COMMON.

1. The sale on execution of the interest in land of one entitled to a homestead, without allotment of homestead, when he had no homestead already allotted in other land, is void.

2. On an issue as to residence, testimony that it was generally reputed in a person's family, and in the neighborhood in which he had lived, that he had become a resident of another state, is inadmissible, being hearsay.

3. The presumption is that one's domicile remains unchanged.

4. It will be presumed that the obligation to satisfy which a sale of land was made, without allotment of homestead, was incurred after the enactment of the constitutional provision for the homestead exemption.

5. All but one of the tenants in common of land which had descended to them gave a deed purporting to convey the entire interest in the land. Prior thereto, one of the grantors had received a conveyance of all the interest in the land acquired by the grantee in a sheriff's deed given pursuant to an execution sale of the remaining cotenant's interest, which was void, for the reason that homestead was not allotted him. *Held*, that the grantee of the tenants in common could acquire adverse title to the cotenant only by possession for the period necessary, where there is no color of title.

Appeal from superior court, Cherokee county; J. F. Graves, Judge.

Action by Mary E. A. Ferguson, as heir of Samuel C. Ferguson, against Samuel C. Wright and others, to be let into possession as a tenant in common with defendants in certain land. Judgment for plaintiff. Defendants appeal. Affirmed.

G. S. Ferguson, for appellants. Edmund B. Norvell and C. M. Busbee, for appellee.

AVERY, J. If Samuel C. Ferguson was a resident of the state of North Carolina on the 4th of October, 1869, when his land

was sold upon a justice's judgment rendered on the 11th of August, 1869, and docketed in the superior court on the 14th of October, 1869, he was entitled to a homestead; and, unless he had a homestead already allotted to him in other lands, the sale of his interest in the land in controversy, under such execution, was null and void. It was conceded that no other land had been allotted to him. He resided in North Carolina in 1866, and the summons was served on him in the case wherein judgment was rendered, and execution and sale followed, in the summer of 1869. We find positive and direct testimony tending to show these facts, and nothing more bearing upon the question of his domicile, though it was stated in general terms that there was additional testimony offered for the defendants.

The court, upon objection, properly excluded the testimony offered that Samuel C. Ferguson was generally reputed in his family, or in the neighborhood in which he lived, in 1866, to have removed to, and become a resident of the state of Georgia, where he died, in August, 1870. Evidence as to the residence of a person falls within the general rule that hearsay testimony is inadmissible, and no sufficient reason can be adduced for making it an exception, like testimony as to pedigree. The other evidence upon the same question seems to have been fairly submitted to the jury. It being conceded that Ferguson resided in Cherokee county in 1866, the presumption was that he continued to make this state his home, and the jury were left to determine whether the evidence was sufficient to rebut it, since, in the absence of such proof, the law assumed that his domicile remained unchanged. 5 Amer. & Eng. Enc. Law, p. 971; Lawson, Pres. Ev. p. 172, rule 30. The defendants offered no testimony tending to show that the judgment was recovered upon a debt created prior to 1868, and, as we must assume that the sale was made to satisfy an obligation incurred after the ratification of the constitution, and without allotting a homestead, it was void. Long v. Walker, 105 N. C. 90, 10 S. E. 858; Loyd v. Loyd, 18 S. E. 200, (at this term.) Whether the defendants, or those under whom they claim, entered upon the land in 1869 or 1870, is not material. If the execution sale of Samuel's one undivided eighth was invalid, the deed to Brittain, under which they claimed, passed only the seven-eighths of the land which had descended on the death of Robert Ferguson to his other children. The defendants had not been in possession 20 years when this action was brought, in 1889, and therefore the presumption had not arisen that the plaintiff, as a cotenant, had been evicted. Caldwell v. Neely, 81 N. C. 114; Ward v. Farmer, 92 N. C. 93. The cases of McCulloh v. Daniel, 102 N. C. 531, 9 S. E. 413, and Amis v. Stephens, 111 N. C. 172, 16 S. E. 17, which were relied on by defendants' counsel to sustain his position, were

carefully distinguished by the court in both opinions from those already cited in support of the view of the question which we have taken. The distinction was that in the one case the occupant entered and held under title derived mediately or immediately through conveyances from a portion of the tenants in common, to whom the land had passed by descent or purchase; while in the other he had bought at sheriff's sale a claim purporting to be adverse to all of such tenants, and had entered and held adversely for more than seven years.

The deed of Thomas M. Ferguson and others to Brittain, though it purported to convey all of the interest in the land, had only the effect of putting Brittain in the relation to Samuel Ferguson previously occupied by his grantors. Thomas C. Ferguson, after procuring a conveyance from King for such interest as had passed to him by the sheriff's void deed, joined the heirs of Robert Ferguson in conveying to Brittain. As to the individual interest of Samuel Ferguson, Thomas Ferguson and Brittain stood in the same relation to him as had been sustained by King. The occupation and undisturbed enjoyment of the rents and profits by Brittain, or those claiming under him, for a less time than 20 years, though under a deed purporting to convey the entire estate, did not bar the action of the heirs of Samuel Ferguson, if the sale by the sheriff was void. *Breden v. McLaurin*, 98 N. C. 307, 4 S. E. 136; *Hicks v. Bullock*, 93 N. C. 164, 1 S. E. 629. But a case more directly in point is *Page v. Branch*, 97 N. C. 100, 1 S. E. 625, where Justice Davis, delivering the opinion of the court, laid down the principle that one tenant in common cannot make the possession adverse to his cotenant by conveying the entire estate, because his bargainee only acquires such estate as the bargainor can convey. We see no reason why the registration of the deeds from the sheriff to King, and from the latter to Thomas Ferguson, should give any additional force or effect to the subsequent conveyance to Brittain. There is no principle which we can invoke that would give to the registration at that date the effect of an ouster. For the reasons stated, we conclude that there was no error.

STATE v. ALSTON.

(Supreme Court of North Carolina. Dec. 19, 1893.)

BURGLARY—EVIDENCE—INSTRUCTIONS.

1. A court cannot charge that, because all the evidence was that the family was in a house at the time defendant entered, he should be found guilty of burglary in the first degree, as it was for the jury to pass on the credibility of the evidence as to the presence of the family.

2. Defendant in a criminal case cannot complain of the error in a charge that permits of his being convicted of a less degree than the evidence warrants.

Appeal from superior court, Franklin county; Hoke, Judge.

Dock Alston was convicted of burglary in the second degree, and appeals. Affirmed.

N. Y. Gulley, for appellant. The Attorney General, for the State.

CLARK, J. The defendant was indicted for burglary. The court charged the jury that, "although all the evidence was that the family were present in the house" at the time it was alleged to have been entered, they might find the prisoner guilty of burglary in the first degree, or they might find him guilty of burglary in the second degree. The jury returned a verdict of guilty of burglary in the second degree, and the prisoner assigns the above instruction as error. The court should have charged the jury that if they believed from the evidence that the family were present in the house at the time of the felonious entry, as charged, they should convict the defendant of burglary in the first degree. Under such circumstances the jury are not vested with the discretionary power to convict of burglary in the second degree. The power to commute punishment does not reside with the jury. This very point was passed upon and decided in *State v. Fleming*, 107 N. C. 905, on page 909, 12 S. E. 131, on page 132. But there was no prayer by defendant for such instruction. The court could not have charged, as this exception implies, that because "all the evidence was that the family was in the house at the time of the felonious entry," etc., the jury should find the defendant guilty of burglary in the first degree. It is only when the jury believe that to be the fact that they could return such verdict. The jury must pass upon the credibility of the evidence, and although all the evidence was that the family were then present, still if the jury did not believe that part of the evidence, but believed only the evidence tending to show that the prisoner entered the dwelling in the nighttime, with the felonious intent, as charged, a verdict of guilty of burglary in the second degree was proper. There is nothing which indicates how the jury found as to the truth of the evidence of the presence of the family. There was no exception as to the charge in other respects. Besides, the appellant, in any case, civil or criminal, cannot complain of any error which is not injurious to him. *State v. Frank*, 50 N. C. 384; *Ray v. Lipscomb*, 48 N. C. 185; *Hobbs v. Outlaw*, 51 N. C. 174; *Moore v. Parker*, 91 N. C. 275; *State v. Dick*, 60 N. C. 440. If there was error here, the effect was to cause a verdict for a lesser offense to be found against the appellant than should have been rendered. It does not lie in the prisoner's mouth to complain that he is to be sent to the penitentiary for seven years,—the sentence imposed in this case,—when the evi-

dence might have justified a verdict and sentence against him for the capital offense charged in the indictment. No error.

KELLY v. WILLIAMS et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

A devise of land to the daughter of testator in trust for her separate use during life or maidenhood, with an executory devise over to her brothers and sisters, should she die without issue, vests a fee simple in the daughter upon her marrying and having issue.

Appeal from superior court, Yadkin county; E. T. Boykin, Judge.

Action by W. L. Kelly, administrator of the estate of Martha J. Fulp, deceased, against N. G. Williams and others. From a judgment for plaintiff, defendants appeal. Affirmed.

A jury trial having been waived, his honor found the following facts: "(1) That Tyre Glenn died in Yadkin county in the year 1875, seised and possessed of the lands described in the petition, leaving a last will and testament, which was duly proven and recorded * * * in the office of the clerk of superior court of Yadkin county; * * * and the lands described in the petition, under proper proceedings between the devisors, were allotted to the plaintiff's intestate in the year 1882. (2) That the plaintiff's intestate intermarried with Peter Fulp in the year 1884, and had issue, one child, Mittie Fulp. (3) That Peter Fulp died in March, 1891, and Martha J. Fulp, the plaintiff's intestate, died in September, 1891, and Mittie Fulp, her only child, died without issue in March, 1892, all intestate. (4) That the plaintiff, W. L. Kelly, was on the 27th day of November, 1891, duly appointed and qualified as the administrator of the estate of Martha J. Fulp; that the personal estate is insufficient to pay the debts and costs of administration. (5) That the plaintiff's intestate is the person referred to in the will of Tyre Glenn, deceased, as Martha J. Glenn; that Thomas Glenn, the trustee, died in the year 1876. (6) That the defendants Mary Duskin and Glenn Duskin are the children and only heirs at law of Harriet E. Duskin, who died intestate; that N. Glenn Williams and Mary B. Daniels are the children and only heirs at law of Lou Williams, who died intestate; that Bynum Glenn, Nettle Glenn, Thos. Glenn, and Ashton Glenn are the children and only heirs at law of W. B. Glenn, who died intestate." The case turned upon the construction of the third clause of the will, which is as follows: "Item 3rd. After my death, and the payment of all my just debts, I give, will, and bequeath and devise to my daughters, Martha J. Glenn, Harriet E. Duskin, Bertha Glenn, Fanny Glenn, and Lilly Glenn, and to my sons, Wm. B. Glenn,

Thos. Glenn, and Tyre Glenn, all my real estate not herein disposed of to Fanny and Lilly, to be equally divided between them, to have and to hold the same to them and their heirs forever; and the lots given to Fanny and Lilly, as before mentioned, to be estimated at a fair valuation in equalizing the shares, so as to make all of the above-named children equal in my real estate: provided, however, that that portion of my real and personal estate that falls to Martha J. Glenn I give, will, bequeath, and devise to my son Thos. Glenn in trust, to be held, controlled, and managed by him as in his judgment he may deem best, for the sole and separate use and behoof of my daughter Martha J. Glenn, so long as she remains unmarried, or so long as she may live; and, if she should die without issue, then her share to be equally divided between all my children." The court held that Martha J. Glenn took a fee-simple estate upon her marriage and birth of issue, and rendered judgment for the plaintiff, from which the infant defendants, by J. H. James, their guardian ad litem, appealed.

A. E. Holton, for appellee.

SHEPHERD, C. J. We are of the opinion that the ruling of his honor was correct. The proper construction of the will of Tyre Glenn, in respect to this controversy, is as follows: It devises a fee to Martha J. Glenn, with a proviso that it shall be held in trust during her life or maidenhood, for her separate use, with an executory devise over to her brothers and sisters, should she die without issue. As soon as she married and had issue, the fee became absolute. *Sadler v. Willson*, 5 Ired. Eq. 296; *Davis v. Parker*, 69 N. C. 271.

Affirmed.

NEWBERN GASLIGHT CO. v. LEWIS MERCER CONST. CO. et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

ATTACHMENT—WHEN ALLOWED—ACTION FOR NEGLIGENCE.

Under Code Civil Proc. § 347, subsec. 3, which provided that an attachment might issue in an action for damages for "any other injury to personal property in consequence of negligence, fraud, or other wrongful act," a gas company is entitled to an attachment in an action for damages caused by the wrongful breaking by defendant of its gas pipes, which extend from its own land and works, under the streets throughout a city, and the escape of its gas.

Appeal from superior court, Craven county; Bryan, Judge.

Action by the Newbern Gaslight Company against the Lewis Mercer Construction Company and the Newbern Sewerage Company for damages caused by the wrongful breaking of plaintiff's gas pipes by defendant

Lewis Mercer Construction Company. Plaintiff obtained a writ of attachment against such construction company, which was by the clerk ordered to be vacated. From a judgment of the judge reversing the order of the clerk, and refusing to dismiss the attachment, defendants appeal. Affirmed.

It is agreed that the facts are that plaintiff, a corporation, is engaged in the business of manufacturing and selling, in the city of Newbern, illuminating gas, and that it furnishes said gas to the citizens of said city for pay for the same; that it owns a lot of land in fee simple in said city of Newbern, and that its machinery and works used for the purpose of manufacturing and storing said gas are situated on said lot of land; that the said gas is conveyed to plaintiff's patrons by means of iron pipes laid from and attached to its said works on said lot of land, through the streets of said city, said pipes being laid in the soil of said streets about two feet from the surface, and so laid in said streets by grant of an easement to plaintiff from said city, to continue for 99 years from the 9th day of May, 1859, as set forth in the deed from the commissioners of Newbern to the Newbern Gaslight Company, filed in the record; that the said defendant the Lewis Mercer Construction Company is a foreign corporation, and has property in this state; that said defendant, in putting down a system of sewers in the said city of Newbern, did, prior to the commencement of this action, negligently and wrongfully break and injure the said pipes of plaintiff, and by reason of so breaking the said pipes did wrongfully and negligently injure and destroy the gas of the plaintiff by escape through the pipes broken as aforesaid, which damage plaintiff alleged was in the sum of \$2,000, as set forth in plaintiff's affidavits, and that this action is instituted to recover said damages from the said defendant; that said pipes can be disconnected from the said lot of land owned by plaintiff in fee as aforesaid without in any manner injuring said lot of land.

Owen H. Gulon, for appellants. M. De W. Stevenson, for appellee.

PER CURIAM. Upon a careful investigation we are of the opinion that, under the peculiar circumstances of this case, the ruling of his honor, refusing to dismiss the attachment, should be sustained. In view of the recent amendment to section 347 of the Code of Civil Procedure¹ extending the right of attachment to cases where the injury is to real as well as personal property, we do not think an elaborate discussion of the law as it previously existed can serve any useful purpose. Affirmed.

¹ Code Civil Proc. § 347, subsec. 3, provided for issuing an attachment in an action for damages for "any other injury to personal property in consequence of negligence, fraud, or other wrongful act."

McLEAN v. BREECE et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

LUNATIC—PAYMENTS BY GUARDIAN—SETTLEMENT—WAIVER OF PLEADING—JURISDICTION—AMENDMENT OF PROCESS.

1. A guardian of a lunatic, who, in good faith, pays just debts, without prejudicing the ward's estate, will be allowed credit therefor.

2. Plaintiff cannot object to the entry of a final judgment on the ground that there are no pleadings in the cause, where it has theretofore been referred, and judgment entered in it, without objection.

3. The jurisdiction given a clerk of court by Code, § 1619, over settlements between guardian and ward, includes settlements between the guardian and the ward's personal representatives.

4. Where an action begun before a tribunal not having jurisdiction is appealed to a court having jurisdiction, the process may there be amended, or it may be amended on further appeal to the supreme court, when a presumption, from long pendency of the action, that the amendment has been made, does not obtain.

Appeal from superior court, Cumberland county; Spier Whitaker, Judge.

Action by John P. McLean, guardian, against Mrs. James Breece and others, to compel a settlement of plaintiff's accounts. From a judgment for plaintiff, allowing only part of his claims, plaintiff appeals. Modified.

N. W. Ray, for appellant. J. W. Hinsdale and C. W. Broadfoot, for appellees.

CLARK, J. When this cause was here before, (109 N. C. 564, 13 S. E. 910,) the court said, in reference to "vouchers numbered, respectively, in the account stated by the referee, Nos. 2, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17," and those for "sundry trips to Raleigh on account of ward," that "the referee must be required to inquire more particularly as to the nature and purpose of, and the necessity for, the expenditures and disbursements embraced by them." This the referee proceeded to do. On the coming in of the report, the court allowed defendants' exceptions to vouchers 11, 12, 13, 14, 15, 16, and 17, and ordered a reference to reform the account. As no appeal lay from such interlocutory order, (Wallace v. Douglas, 105 N. C. 42, 10 S. E. 1043,) the plaintiff properly caused his exceptions to the ruling to be noted in the record. It is now brought up for review on the appeal from the final judgment. The referee found from the evidence that these vouchers (11 to 17, inclusive) were debts against the estate when the guardian (plaintiff) took charge, that he paid them in good faith, and that they were correct and just claims against James Breece. The defendants excepted because those disbursements were not "for the support and maintenance of the lunatic or of his family, nor for necessary expenses of the ward or his wife and child, nor for their benefit, nor authorized by law or any previous order of

court." In sustaining this exception to the vouchers mentioned, (11 to 17,) there was error. This court had already ruled in this case (109 N. C., on page 567, 13 S. E. 910) that "when he, [the guardian,] in good faith, pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respect." To same purport is *Adams v. Thomas*, 83 N. C. 521. It does not appear that the ward's estate, or the maintenance of himself and family, suffered any prejudice by the payment of these just debts incurred by him anterior to his lunacy. It is true, both that the courts will not order payment of a lunatic's anterior debts, if it will deprive him or his family of maintenance, (*Smith v. Pipkin*, 79 N. C. 569,) and that he is entitled to his personal property exemption. But none of these questions can arise. The lunatic is dead, and the only child is of age. The question is not as to reserving a sufficiency for maintenance, but whether, in this final settlement, the guardian shall be allowed for just debts paid in good faith by him. These credits were therefore erroneously stricken from the account, and should be restored to it.

The plaintiff's second exception was made at January term, 1893, for that, in reforming the account, the referee had failed to make a deduction of \$41.75 allowed by the court in voucher No. 10 from the sum total of the debts. It seems to us, from inspection of the account, that the deduction was made. But as the account must be reformed by reinstating vouchers 11-17, inclusive, the inadvertence, if such there be, in regard to this \$41.75, will be corrected.

The plaintiff further excepted at the final judgment to any judgment being entered, upon the ground that there are no pleadings in the cause. This proceeding was instituted by the plaintiff seven years ago. It has been referred three times, with four reports made. There have been numerous orders, and two final judgments, in the court below, and the case is now for the second time in this court. The objection came too late. *Stancill v. Gay*, 92 N. C. 455. This court might permit pleadings to be filed here *nunc pro tunc*, (Code, § 965,) but we deem it unnecessary, as it would serve no useful purpose.

The plaintiff further excepts in this court, for the first time and *ore tenus*, on the ground of a want of jurisdiction, in that the action was instituted before the clerk originally. This he can do. Rule 27 of this court. 12 S. E. vii. But the objection is unfounded. *Donnelly v. Wilcox*, 18 S. E. 339, (at this term.) The clerk has jurisdiction of settlements between guardian and ward, and, of course, of settlements between the guardian and the ward's personal representative. Code, § 1619; *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265. But had the ac-

tion been "begun wrongly before the clerk. It having gotten into the superior court by appeal or otherwise, the latter has jurisdiction of the whole cause, and can make amendment of process to give effectual jurisdiction." *Capps v. Capps*, 85 N. C. 408; *Cheatham v. Crews*, 81 N. C. 343; *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263. The court here, in such case, would amend the process, if necessary, (*State v. W. U. Tel. Co.*, 18 S. E. 389, [at this term;] Code, § 965,) or might remand the case that the amendment might be made in the court below. Where, however, a cause has been so long pending as this, without exception on that ground, it would be presumed that the requisite amendment of process had been in fact already ordered in the superior court. The judgment, thus modified as indicated, is affirmed. The costs of this court will be taxed against the appellees. Code, § 540.

STEVENSON et al. v. FIDELITY BANK OF DURHAM.

(Supreme Court of North Carolina. Dec. 19, 1893.)

BANKING—COLLECTIONS—CORRESPONDING BANKS.

Plaintiff deposited a draft with the Bank of H. for collection, which forwarded it for collection to defendant bank, and defendant collected it after the Bank of H. failed. The arrangement between the banks was that each should daily remit to the other every collection as made, but this was not strictly complied with by the Bank of H., and the final drafts sent by it to defendant in payment of balance were dishonored. *Held*, that defendant was liable to plaintiff for the collection, defendant not being a purchaser of the draft, but merely a subagent for its collection.

Appeal from superior court, New Hanover county; Henry R. Bryan, Judge.

Action by J. C. Stevenson and others against the Fidelity Bank of Durham for the proceeds of a draft collected by defendant. Judgment for plaintiffs. Defendant appeals. Affirmed.

J. S. Manning, for appellant. George Rountree, for appellees.

MacRAE, J. The ingenious argument of defendant's counsel is based entirely upon the assumption that the defendant was a purchaser of commercial paper for value, and without notice of any equities between the original parties thereto, and before maturity. If such had been the case, there can be no question that the defendant would have been entitled to hold the avails to its own use. If the course of dealings between the two banks had continued as it had been prior to June, 1891,—the forwarding by the one to the other of commercial paper for collection on account of the bank so forwarding, the charging and crediting each other with said items upon a mutual running account, and the remission by the debtor to the creditor bank of balances from

time to time,—the question would have arisen whether one bank became the purchaser for value of the paper received by it for collection, by reason of the fact that the balance of account was against the remitting bank. Even if this were the case presented to us, we should be inclined to adopt the rulings of the New York court of appeals in *McBride v. Bank*, 23 N. Y. 450: "It is not a purchaser for value by reason of its having a balance against the remitting bank, for which it had refrained from drawing, and from having discounted notes for the latter upon its indorsements, in reliance upon a course of dealings between the banks to collect notes for each other, each keeping an open account of such collections, treating all the paper sent for collection as the property of the other, and drawing for balances at pleasure;" or that of the supreme court of the United States in *Bank of the Metropolis v. New England Bank*, 6 How. 212, where the above-stated principle seems to be somewhat modified. In substance, the court say that the receiving bank is not entitled to retain against the real owners, unless credit was given to the transmitting bank, or balances suffered to remain in its hands, to be met by the negotiable paper transmitted, or expected to be transmitted, in the usual course of dealings between the two banks. See 2 Morse, Banks, § 591 et seq., where the subject is largely discussed. If this were an open question, it would not affect the case before us. By the case agreed, it appears that up to June, 1891, there had been such a course of mutual dealings and running accounts between the two banks as is referred to above, but some time prior to June 1, 1893, there was a change in the arrangement between these banks, and it was mutually agreed to close the mutual accounts, and that each bank should remit to the other, daily, the respective items when collected. However, in fact, the Bank of New Hanover did not remit daily each item when collected, as appears by the appended statement; and it further appears that by this change of the course of dealings between the banks, although the agreement was not strictly complied with by the Bank of New Hanover, the said bank did remit to the Fidelity Bank its drafts on New York in payment of the balances against the former, and in favor of the latter bank, and that the draft in question was sent for collection. It was by the dishonor of the New York paper sent in payment of balances that the defendant became the loser; and we are of the opinion that the defendant was acting in the capacity of subagent in the collection of the plaintiffs' draft. *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193. Under the arrangement that then existed between the two banks, the defendant could in no sense be considered a purchaser for

value of the draft in question. The defendant was the agent of the Bank of New Hanover to collect the draft, and, if it had authority to credit the said bank with the avails of the collection, it was only so while the bank was a going concern; but the bank became insolvent before the agency was completed and the money received, so that no authority existed to credit the money on general account. 2 Morse, Banks, § 568. As we hold that in no event was the defendant a purchaser of the draft, it will not be necessary to follow the argument of counsel upon that line. There is no error.

JENKINS v. WILKINSON et al.
(Supreme Court of North Carolina. Dec. 19, 1893.)

NOTES—TRANSFER—MORTGAGES—LIMITATION OF ACTION—PARTIES.

1. A note may be transferred by delivery and without indorsement, (Code, § 177,) and, though such transfer does not pass the legal title according to the law merchant, the transferee is the equitable assignee thereof.

2. The transfer of a note carries with it a mortgage given to secure it, without any formal assignment or delivery, or even mention, of the mortgage.

3. The lien created by a mortgage given to secure a note is not impaired by the fact that the statute of limitations has run against the note.

4. Where a note is given and a mortgage transferred as collateral to the cashier of a banking firm for the benefit of the firm, he holds the collateral as trustee for the firm, and, under Code, § 179, an action to foreclose the mortgage is properly brought in his own name.

Appeal from superior court, Lincoln county; Armfield, Judge.

Action by L. L. Jenkins, cashier, against L. A. H. Wilkinson and others, to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Affirmed.

It was in evidence that on the 5th day of January, 1888, the defendant L. A. H. Wilkinson executed a note to the plaintiff in the sum of \$800, bearing interest after maturity, and that M. A. Wilkinson indorsed the said note, and became surety therefor. It was in evidence that at the time the \$800 note was executed, and at the time M. A. Wilkinson indorsed it, the defendant M. A. Wilkinson placed in the hands of the plaintiff the \$900 note and mortgage set forth in the pleadings as collateral security for the payment of the \$800 note, and thereupon the plaintiff paid over to the defendant L. A. H. Wilkinson the money.

First. When the plaintiff offered to show that the \$900 note and mortgage were placed in his hands as collateral security, and were a part of the same transaction as the execution of the \$800 note, the defendants excepted. Exception overruled. Evidence allowed by the court.

Second. It was in evidence that the defendant L. A. H. Wilkinson was sued on the

\$800 note at the fall term, 1890, of Gaston court, and that judgment was obtained for \$752 and costs, which said judgment has never been paid.

Third. As will appear in the pleadings, the \$900 note and mortgage placed by M. A. Wilkinson as collateral in the hands of the plaintiff was executed by L. A. H. Wilkinson and wife, the principals in the \$800 note.

Fourth. It was in evidence that the \$800 note belonged to a banking firm by the name of Craig & Jenkins, and that the plaintiff, to whom the note was made payable, was cashier of the firm at that time.

Fifth. It was in evidence that no suit had been brought against M. A. Wilkinson except the present, and that no relief has been asked as against him except the foreclosure of this mortgage, as the \$900 note and mortgage in question were executed to M. A. Wilkinson by L. A. H. Wilkinson and wife.

Sixth. It was in evidence that there was no written transfer of the \$900 note and mortgage to plaintiff, but at the time it was given him it was stated that it should be held as collateral security for the payment of the \$800 note given by L. A. H. Wilkinson, and indorsed by M. A. Wilkinson at the same time.

His honor submitted the following issues to the jury, to wit: (1) "Did L. A. H. Wilkinson and Nannie Wilkinson make and deliver to M. A. Wilkinson the \$900 note and mortgage described in complaint? Ans. Yes." (2) "Did M. A. Wilkinson deliver the \$900 note and mortgage to the plaintiff to hold as collateral security for the payment of the \$800 note on which judgment was obtained? Ans. Yes." (3) "Is plaintiff's action barred by statute of limitations? Ans. No." The defendant tendered the following issues, which were not submitted to the jury by the court, to which defendants except: (1) "To whom was the money loaned?" (2) "Is this action barred by the statute of limitations as to the indorsement on the note given by L. A. H. Wilkinson?" (3) "Was there any writing passed between M. A. Wilkinson at the time of this loan as to the note and mortgage?" Defendants contend that, inasmuch as there was no written assignment of the note and mortgage to plaintiff, nor any stipulation in said mortgage that it was made to secure the note to plaintiff, the plaintiff could not be subrogated to the rights of defendant M. A. Wilkinson; that a mere verbal transfer from the mortgagee to the plaintiff, and no judgment had against the mortgagee, would not authorize the plaintiff to subrogate the plaintiff to the rights of the mortgagee; that, inasmuch as the note indorsed by the defendant M. A. Wilkinson is barred by the statute of limitations, and the plaintiff has no claim against the mortgagee, M. A. Wilkinson, he has no right to be subrogated to the rights of the mortgagee aforesaid. The defendants further contend that the plaintiff could not maintain this suit,

because the note given by L. A. H. Wilkinson and indorsed by M. A. Wilkinson belonged to the firm of Craig & Jenkins, and not to the plaintiff.

M. L. McCorkle and L. L. Witherspoon, for appellants. Jones & Tillett, for appellee.

MacRAE, J. 1. The first exception is to evidence offered by plaintiff to prove that the \$900 note and mortgage were delivered to plaintiff as collateral security for the other note. We suppose that the ground of the objection by defendants was a contention on their part that the note and mortgage could not be transferred by delivery and without writing. A note may be transferred by delivery and without indorsement. Code, § 177. Such transfer does not pass the legal title, according to the law merchant, but the transferee is the equitable assignee thereof. *Miller v. Tharel*, 75 N. C. 148; *Jackson v. Love*, 82 N. C. 405; *Kiff v. Weaver*, 94 N. C. 274; *Carpenter v. Tucker*, 98 N. C. 316, 3 S. E. 831. The debt is the principal thing; the mortgage to secure it is the incident or accessory. "Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both." The transfer of the note carries with it the security without any formal assignment or delivery, or even mention, of the latter. *Carpenter v. Longan*, 16 Wall. 271. See, also, *Coleb. Coll. Sec. § 144*, where a multitude of authorities are cited.

2. The issues submitted by his honor seem to cover all the real contentions in the case. As to the first issue tendered by defendant, it made no difference to whom the money was loaned, if any money was loaned. The action was brought to foreclose a mortgage made to secure the payment of a note under seal, and transferred to the plaintiff, who, as we shall see, was the proper party to bring the action. The question of the statute of limitations could be fairly presented in all its aspects under the third issue, and it seems that the note itself was not barred. In deed, although an action upon the note was barred by the statute, the lien created by the mortgage is not impaired in consequence of the running of the statute of limitations on the debt. *Wood, Lim. § 222*; *Clark's Code, § 152, (3),* and cases cited page 45.

3. The defendants contend that the plaintiff could not maintain this suit, because the note given by L. A. H. Wilkinson and indorsed by M. A. Wilkinson belonged to the firm of Craig & Jenkins, and not to the plaintiff. It appears to have been made to the plaintiff L. L. Jenkins, cashier. It is found that plaintiff was cashier of the banking firm for whose benefit the note was given and the collateral transferred. He was the holder of the collateral as trustee of the firm, and the action was properly brought in his name. Code, § 179. No error.

KELLY v. OLIVER.

(Supreme Court of North Carolina. Dec. 19, 1893.)

CONTRACTS—PAROL EVIDENCE—ACTION.

1. In an action on a written contract, by which defendant agreed to furnish pupils if plaintiff would continue his school, defendant may show that it was agreed that the instrument should not go into effect until plaintiff should procure 20 signatures, as this does not contradict the terms of the instrument, but shows a collateral agreement postponing its legal operation until the happening of a contingency.

2. Where a contract to furnish pupils for a school is signed by a number of persons, it cannot be claimed that those who signed first signed in reference to the last signer's becoming a party, so as to prevent his showing that the instrument was to take effect as to him only on the happening of a contingency.

3. Nor is he prevented from so showing on the ground that his release would increase the liability of the other signers, where no specific sum was to be raised.

4. A contract by which a number of persons each agree to send a certain number of pupils to a school, if it shall be continued by another, at a certain sum for the scholastic year, must be fully performed by the latter before he can recover thereon, and an action against one of the signers who refused to send pupils, brought before the end of the scholastic year, is premature.

Appeal from superior court, Mecklenburg county; R. F. Armfield, Judge.

Action by J. E. Kelly against Frederick Oliver on a contract by which defendant agreed to send pupils to plaintiff's school. From a judgment for plaintiff, defendant appeals. Reversed.

The contract, which was signed by defendant after it had been signed by 16 others, was as follows: "In order to secure the continuance of Prof. Kelly's school in Charlotte, we, the undersigned, agree to furnish the number of scholars opposite our respective names for the scholastic year beginning in September, 1891, at the sum of eighty dollars for the scholastic year." At the trial, defendant proposed to prove by a witness that before and at the time of signing the paper it was agreed between plaintiff and defendant that the paper should not be binding until plaintiff should procure 20 signatures thereto, but the evidence was excluded. Defendant asked the court to charge the jury that plaintiff could not recover, as his action was brought before the cause of action had accrued, the action having been commenced in April, 1892, and the paper showing that the scholastic year did not terminate until May or June, 1892, and that therefore the money was not due, if at all, until May or June, 1892, when the service contracted for was fully performed. The court held that the money was due when the contract was made, or at least at the beginning of the session, according to the legal construction of the said paper, and refused to give the instruction, and also refused to charge that the action was prematurely brought.

Walker & Cansler, for appellant. Jones & Tillett and F. I. Osborne, for appellee.

SHEPHERD, C. J. As the name of the defendant is the last on the instrument, it cannot be claimed that the other parties signed it in reference to his becoming a party. Neither does it appear that any specific sum was to be raised, so that the release of the defendant would increase the liability of the others. This being so, it was competent for the defendant to show that, although he signed the instrument, it was not to go into effect as to him until the plaintiff had procured the signatures of 20 others to the same. This does not contradict the terms of the writing, but amounts to a collateral agreement postponing its legal operation until the happening of a contingency. *Penniman v. Alexander*, 111 N. C. 427, 16 S. E. 408. The contract sued upon is a special and entire contract, and must be performed before the plaintiff can recover. The scholastic year ended on the 1st of June, 1892, and this action was brought in April of that year. We think the action was prematurely brought. *Brewer v. Tysor*, 3 Jones, (N. C.) 180; *Lawing v. Rinties*, 97 N. C. 350, 2 S. E. 252. We have examined the authorities cited by plaintiff's counsel, and are of the opinion that they do not sustain his contentions. There must be a new trial.

BURWELL, J., having been of counsel. did not sit.

BAIRD v. RICHMOND & D. R. CO.

(Supreme Court of North Carolina. Dec. 19, 1893.)

REMOVAL OF CAUSES—ALLOWANCE BY STATE COURT.

Plaintiff being a resident of the state and judicial district, defendant, a nonresident corporation, obtained from the United States circuit court a writ of certiorari to remove the cause from the state court on the ground of prejudice and local influence, filed a certified copy of its petition and affidavit in the state court, and there moved for an order adjudging that the court would proceed no further in the cause, and that the clerk should certify the record to the United States circuit court. The judge declined to sign the order or permit the removal. Held that, the record showing on its face good ground for removal, defendant's procedure was correct, and the court should have granted an order for removal.

Appeal from superior court, Buncombe county; Armfield, Judge.

Action by W. L. Baird, administrator of the estate of Rufus Hemphill, deceased, against the Richmond & Danville Railroad Company, for damages for personal injuries. From an order refusing to permit removal of the cause to the United States circuit court, defendant appeals. Reversed.

Busbee & Busbee, for appellant. J. D. Murphy, for appellee.

EVERY, J. Where it appears by affidavit and petition, as prescribed by the act of congress, that the circuit court of the United States has jurisdiction of the parties to, and subject-matter of, a suit pending in the state court, and that on account of prejudice and local influence the petitioner will not be able to obtain justice in the court in which the action has been brought, or in any other state court to which it may be removed under the laws of the state, the federal court, if satisfied as to the sufficiency of the proof of prejudice and local influence adverse to the petitioner, may grant the order of removal. In reference to the practice in such cases, Foster, after calling attention to the fact that it is not clearly settled by the adjudications of the courts how much of the Revised Statutes relating to removal had been repealed by implication by the act of 1888, makes the following suggestion: "The prudent practitioner, when seeking to remove a cause for prejudice or local influence, will comply with the provisions of the Revised Statutes, and also with the practice in ordinary removals. It seems that the petition should be presented to the federal court, and a certified copy of the same, with the proceedings thereon, filed in the state court." 2 Fost. Fed. Pr. § 386. It would seem that the defendant has acted upon the foregoing suggestion in filing a certified copy of the petition and affidavit in the state court, but has gone further in procuring a writ of certiorari, and moving for a formal order for the transfer, founded upon the record so filed. The judge below, after reciting the order offered for his signature, declined "to permit the removal of the cause to the circuit court of the United States, and to sign the order presented by the defendant." The material part of the order which the court was asked to make was as follows: "It is considered and adjudged that the court will proceed no further in this cause, and that the clerk of the court certify to said circuit court, before the next term thereof, a copy of the record in this case." The plaintiff is a resident and citizen of the district in which the action was brought, while one of the defendants is a nonresident corporation. The circuit court, in the exercise of its discretion, has found, *prima facie*, upon the defendant's affidavit and petition, that, on account of prejudice and local influence, the foreign corporation cannot obtain a fair trial in the court where the action was brought, or in any other state court to which it might by law be transferred, and has ordered the removal to the federal tribunal. There is no ground for questioning the power of the circuit court to make and enforce such an order, since it had jurisdiction of the parties and subject-matter, upon its unreviewable finding that the necessary conditions existed for its exercise, to wit, prejudice and local adverse influence. The only points presented for adjudication by this appeal are (1) wheth-

er the court below was authorized to declare that it declined "to permit the removal;" (2) whether the proper practice was to recognize the fact by a formal order, the cause having already been transferred to the federal tribunal, that the court would not proceed further, and thereby give notice to parties and witnesses that they would not again be called; (3) whether, conceding that the circuit court had already acquired jurisdiction, the defendant could insist upon an order from the state court to certify the record.

We do not understand why the learned counsel for the defendant should have pressed the point that there was any conflict between the decision of this court in *Lawson v. Railroad Co.*, 112 N. C. 390, 17 S. E. 169, and an opinion of one of the circuit judges of the United States, since no such conflict appears to exist; and, if it had been shown, we claim the right, nevertheless, to hold to our own construction, until the supreme court of the United States shall have interpreted the meaning of the statute otherwise. If, in the case at bar, it had appeared from the petition that the plaintiff was a citizen of a state other than North Carolina, then the circuit court would have had no jurisdiction of the case, and we would have adhered to our rulings in the *Bostian Bridge Cases*, and unhesitatingly have sustained the judge below in declining to desist from further proceeding, and to have the record of the cause certified to a tribunal which, upon the face of the record transmitted from it, appeared to have no authority to take cognizance of the controversy. In order to confer jurisdiction upon the circuit court, by the terms of the law as amended, all of the plaintiffs must be citizens of the state where the suit is brought, and at least one of the defendants must be a nonresident. 20 Amer. & Eng. Enc. Law, 909; *Thouren v. Railroad Co.*, 38 Fed. 673; *Niblock v. Alexander*, 44 Fed. 306; *Pike v. Floyd*, 42 Fed. 247; *Jefferson v. Driver*, 117 U. S. 272, 6 Sup. Ct. 729; *Young v. Parker's Adm'r*, 132 U. S. 267, 10 Sup. Ct. 75. On the other hand, it is only where the petition and affidavits show that the cause is one which the federal tribunal is empowered to remove, and to try, that the jurisdiction of the state court is ousted, *ipso facto*, upon the making of the order by the other court. Whether the petition for removal be based upon the allegation of local prejudice, diverse citizenship, or other grounds recognized as sufficient by statute, if it appear from the application itself that the circuit court cannot lawfully take cognizance, it is both the right and the duty of the state court to ignore an order of removal, and proceed as though it had no notice of it. *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510; *Gibson v. Bruce*, 108 U. S. 561, 2 Sup. Ct. 873. "A state court," said Chief Justice Waite, in delivering the opin-

lon in *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, "is not bound to surrender its jurisdiction on a petition for removal, until a case has been made which on its face shows that the petitioner has the right to the transfer. * * * The mere filing of a petition for the removal of a suit which is not removable does not make a transfer." *Steamship Co. v. Tugman*, 106 U. S. 122, 1 Sup. Ct. 58; 2 Fost. Fed. Pr. § 385a. The constitution of the United States, and the statutes enacted, and treaties made, in pursuance of its provisions, are the supreme law of the land, and when one of its courts, in the exercise of its rightful jurisdiction, issues an order to one of the judicial tribunals of a state, it is at least a breach of judicial courtesy in the state court to refuse compliance. *Id.* § 385a; *State v. Hoskins*, 77 N. C. 530. It was error to "decline to permit" the removal upon the affidavit offered therefor, and we think that it is the usual practice, and is proper, to enter a formal order that the state court will not proceed further, to the end that parties and witnesses may understand that they will not be required to attend, unless upon notice that the cause has been remanded. *State v. Hoskins*, supra. In all cases where the circuit court has the power to remove, and exercises it by making an order, it may issue a certiorari to the state court, or, without asking for such writ, the parties may, upon filing a certified copy of the affidavit, petition, and order of the federal tribunal in the state court, demand a certified copy of the record. 2 Fost. Fed. Pr. § 390. It has been generally held that, upon the filing of the certified copy of the record of the state court, the federal court may proceed to hear and dispose of a civil cause. *Id.* Where a criminal action is removed, it is the practice to issue a writ of habeas corpus cum causa. *State v. Sullivan*, 110 N. C. 518, 14 S. E. 796; *State v. Hoskins*, supra. It is not error in the state court to refuse to order the record to be certified, because the clerk was required, on request, to furnish a certified copy, and it was his duty to certify it to the federal court, in obedience to the writ of certiorari, without any motion or order made in his own court, though comity to the federal tribunal might dictate a different course; but it was clearly error in the court below to resist the order after the record had been certified, showing sufficient ground for removal. We think, also, that, when the jurisdiction of the federal tribunal attached, the order that the court would not proceed further should have been made, on motion of the defendant, for the reason already stated. *State v. Hoskins*, supra. If the application had been made to the state court, and founded upon an affidavit or complaint alleging only diverse citizenship as a ground of removal, as in the case of *Douglas v. Railroad Co.*, 106 N. C. 77, 10 S. E. 1048, it would have been properly refused on the ground that the controversy was

not wholly between citizens of different states, and was not a separable controversy. 20 Amer. & Eng. Enc. Law, pp. 995-998. But, as we have already shown, where the petition is filed in the federal court, and founded upon prejudice and local influence, if the plaintiff is a resident of the district, it is sufficient, under the amended act, if either of the defendants be a nonresident. *Id.* p. 999, and note 5; *Fisk v. Henarie*, 32 Fed. 417. Where a removal is asked upon the ground of prejudice or local influence, the order may be granted, upon a proper showing as to other matters, at any time before the cause has been effectively tried, unless a trial be in progress, when the motion is submitted, "and undetermined." *Fisk v. Henarie*, 142 U. S. 460, 12 Sup. Ct. 207. So that the order was made by the proper tribunal and in apt time, and the defendant took the precaution to procure a writ of certiorari, and file a copy of the record in the state court, (2 Fost. Fed. Pr. p. 832,) and afterwards submit his motion, thus conforming to the construction of the law, which was most exacting in its requirements. The order declining to permit the transfer of the cause was erroneous. Error.

STATE v. SPRAY et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

CRIMINAL LAW—DISTURBING SCHOOL—SPECIAL VERDICT.

1. To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of Code, § 2592, making it a misdemeanor to willfully interrupt or disturb a school.

2. Where the jury render a special verdict, and the court, on the facts found, adjudges defendant not guilty, no formal verdict of not guilty is necessary. *State v. Ewing*, 13 S. E. 10, 108 N. C. 755, followed.

Appeal from superior court, Swain county; Boykin, Judge.

Prosecution of N. W. Spray and others for disturbing a school. The jury rendered a special verdict, on which the court adjudged defendants not guilty, and the state appeals Affirmed.

The special verdict was as follows:

"The jury find that Big Cave Indian schoolhouse was built, as to the walls and roof thereof, by the Cherokee Indians, and the building thus made was paid for out of the common school fund. That the building was finished and furnished under the direction of the Society of Friends, and paid for partly out of the church fund and partly out of the money furnished by the United States for that purpose. There was in the house a box of books, the property of the defendant Spray. The schoolhouse had been under the supervision of the Society of Friends as a day school, and had been leased, so far as

their right extended, to their agent, Spray. There had not been any school taught since May, 1892. The house was after that taken possession of by the committee men of the common school had in December, 1892. The school committee employed Lula Hayes to teach the school for Indians in that house, and she went in, and began to teach. After she had taught three or four days, the defendant Spray went to the schoolhouse, and notified her that she could not occupy the house to teach in until the property rights therein were adjusted. That for a few days she, the said Lula Hayes, did not teach therein. That she began to teach in the same house on the 8th of December, and taught three days. That on the morning of the 12th of December she went to the schoolhouse for the purpose of continuing to teach her school. That on that morning, when she went there, the schoolhouse was occupied by the defendants, and she asked to be allowed to occupy the house, and to teach her school, and the defendant Spray forbade her,—the defendant Blythe being in the house. That she was prevented by the conduct of the defendants from occupying the house, and teaching therein. That there were no pupils present at the time of this occurrence, and none came before she left it; but, on leaving, she met three scholars on their way to school, about a mile from the schoolhouse. If, upon these facts, the defendants are guilty in law, we find them guilty; but, if otherwise, we find them not guilty."

The Attorney General, for the State.

BURWELL, J. We concur with his honor in the opinion that the facts found by the special verdict do not constitute a violation of section 2592 of the Code,¹ which makes it a misdemeanor to willfully interrupt or disturb any public school. The act of the defendant may have prevented the coming together of the school, meaning thereby an assemblage of pupils and teachers; but it cannot be said that it interrupted or disturbed such an assemblage. The statute was contrived to put the schools of the state under the protection awarded by the law to religious assemblages, and the principles that govern the prosecution of persons charged with disturbing religious meetings (*State v. Jacobs*, 103 N. C. 397, 9 S. E. 404) must control this.

There was no formal verdict of not guilty, in accordance with the opinion of the court, as seems to be required by the ruling in *State v. Moore*, 107 N. C. 770, 12 S. E. 249, and *State v. Monger*, 107 N. C. 771, 12 S. E. 250. This is not necessary, since the decision in

State v. Ewing, 108 N. C. 755, 13 S. E. 10, which has established what is the better practice. No error.

SPRAGUE v. BOND et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

EQUITY—ACCOUNTING—JOINT LAND SPECULATIONS —INTERVENTION—WITNESS.

1. In an action for an accounting, a judgment for plaintiff on the pleas in bar, ordering an account, is appealable.

2. When a party's declarations, made soon after the transaction in question, are admitted to corroborate his testimony, it is error to refuse to charge that such evidence is not substantive evidence of the truth of the matters alleged, but only competent to corroborate the testimony of the declarer.

3. Plaintiff alleged that he prospected and bought lands for joint account with defendant, she advancing the purchase money; that he, being about to leave the county, was induced by her agent to deed the lands over to her, she to sell and account to him for a share of the profits; that she had sold the lands, but had failed to account; and prayed a receiver for the proceeds, and for an accounting. Intervener claimed an interest in certain of the lands under an unrecorded deed of plaintiff prior to that to defendant, and as having advanced the price of such lands. *Held*, that she was entitled to intervene.

4. In an action for accounting for an interest in the proceeds of land conveyed by plaintiff to defendant and sold by her, his deed having been made, as he alleges, under an agreement with defendant's agent reserving him such interest, plaintiff is not estopped to show his equities in the land by his prior deed of an undivided one-half of the same to said agent personally.

5. In an action against a principal, founded on contracts made with plaintiff by a deceased agent, plaintiff may testify as to his transactions with said agent, and the latter's declarations as a part thereof.

Appeal from superior court, Caldwell county; James D. McIver, Judge.

Action by W. D. Sprague against Louisa N. Bond and another for receiver, and accounting for the proceeds of certain lands conveyed by him to said Louisa, and sold by her, in which plaintiff claims an equitable interest. Rebecca B. Adams intervened as to certain of the property, claiming under an unrecorded deed from plaintiff prior to that to defendant, and as having advanced the purchase money for the lands conveyed to her. Judgment for plaintiff. Defendants appeal. Reversed.

S. J. Ervin, for appellants. M. Silver and Avery & Ervin, for appellee.

BURWELL, J. The motion to dismiss the appeal must be denied. The case of *Clements v. Rogers*, 95 N. C. 248, is decisive of the point. In that action, as in this, there was a verdict for the plaintiff on the trial of the pleas in bar, and an order for an account. An appeal from that order was not considered premature, because, if the pleas in bar were established, the plaintiff would not be entitled to an account, and the action

¹ Code, § 2592, provides that "every person who shall willfully interrupt or disturb any public or private school, or any meeting lawfully and peacefully held for the purpose of literary or scientific improvement, either within or without the place where such meeting or school is held, * * * shall be guilty of a misdemeanor," etc.

would be at an end. The reason of the rule applies with full force here. Upon the trial, certain evidence was offered on plaintiff's part to corroborate his own testimony in regard to the matter in controversy. This evidence was not competent for any other purpose, consisting, as it did, of declarations made by him soon after the transaction, corresponding with the statements made by him on the witness stand. When this evidence was offered, it was conceded that it was only competent for this purpose, and for that purpose alone did his honor admit it. Among the instructions asked for by defendants was the following: "The evidence of the declarations of the plaintiff in regard to the matters in controversy are not substantive evidence of the truth of said matters, and are only competent in evidence for the purpose of corroborating the witness Sprague, and can only be considered by you for this purpose, and you can give it such weight as you think it is entitled to." The case states that this instruction was refused. In this there was error that entitled the defendants to a new trial. It is settled by *Bullinger v. Marshall*, 70 N. C. 520, that it must follow, from a party's being allowed to be a witness, that, if his testimony be impeached, he may be corroborated by showing that he had, soon after the matter occurred, made the same statement in regard to it. The rule was there established as a necessary corollary of the statute which allowed a party to be a witness in his own behalf. The learned justice who delivered the opinion of the court in that case was evidently loth to yield to this innovation, as he considered it, foreseeing, as he no doubt did, that it would be most difficult to restrain the effect of such evidence, and prevent it from operating on the minds of the jury as substantive proof of the facts in dispute. Because there is this danger of its exercising an improper influence upon the jury, it is incumbent on the judge presiding at the trial where such corroborative evidence is introduced, to see to it, even without any request for special instructions, that the jury fully understand the use they are permitted to make of it; and we must hold that the failure to caution them in this particular when such a request is made, as was done by the defendants here, entitled them to a new trial.

As this cause, for the reason above stated, must be tried again, we deem it proper to say that, upon the allegations made by Mrs. Rebecca B. Adams in her pleadings filed, we think she is a proper party to this action, and that the truth of the allegations made by her, and controverted by plaintiff in his reply, should be inquired into. Issues should be framed to cover all the controverted transactions between the plaintiff and each of the defendants, L. N. Bond and R. B. Adams, in relation to the land, the proceeds of sale of which are here in dispute, to the end

that, if the facts alleged by the plaintiff are found to be true, an account may be ordered; and, if the facts alleged by Mrs. R. B. Adams are found to be true, the court may be in position to adjudge the rights of the respective claimants, and to mold the order of reference accordingly. If, at the time of the alleged contract between the plaintiff and the defendant L. N. Bond, through her agent, H. F. Bond, by the terms of which the plaintiff conveyed the land to said defendant in consideration of her agreement, made for her by her said agent, that when she sold the land she would pay to the plaintiff one-half or other part of the proceeds, after deducting certain expenses pertaining to the business, the defendant Rebecca B. Adams had an equitable interest in said land, or a right to call for a deed therefor, which she had acquired from the plaintiff, and which she then held, and now holds, by titles or contracts good against him, but not valid against her codefendant, Louisa N. Bond, or her vendees, because of want of registration or other notice, it would surely be unjust to allow him to take the proceeds of the sale, and appropriate them to his own use. It seems to us that, if Mrs. Adams' allegations are true, the plaintiff, at the time of the alleged contract with H. F. Bond, agent, held whatever interest or estate he had in the land in trust for Rebecca B. Adams. As between the latter and him, if her allegations are true, he had no right to make this sale and contract. It was valid between him and L. F. Bond, because she had no legal notice. But Rebecca B. Adams may ratify that transfer, contract, and subsequent sale, and contest, as she does here, the plaintiff's right to the fund, claiming that in equity it is hers.

It is proper for us to say, further, that, as the pleadings now stand, we do not think that the defendants are entitled to have the first issue tendered by them on the late trial submitted to the jury. The third paragraph of their answer, upon the allegations of which this issue is founded, does not set out as a fact that the alleged contract, if made, as stated by plaintiff, with H. F. Bond, agent, was made to defraud the creditors of plaintiff, he being insolvent. Its phraseology seems rather to indicate a purpose to assert the high character of Mr. Bond, as proof that the contract was not made as plaintiff alleges, because, under the circumstances, it might have been a fraud on plaintiff's creditors, than to plead the fact that plaintiff, if he made the alleged contract, was thereby intending and contriving to defraud his creditors. If the defendants intended to raise such an issue, their allegations should be distinct and unequivocal. If they state on the trial that such was their purpose, they will no doubt be allowed to amend this paragraph so as to entitle them to this issue. If it is admitted or proved that H. F. Bond was the agent of the defendant L. N. Bond

In the negotiations and transactions that resulted in her acquisition of the title to the lands which she sets up in her answer, then it would be competent for the plaintiff to testify in regard to transactions that took place between himself and that agent within the scope of his agency, and also to the declarations of the agent as a part of those transactions. This right of the plaintiff so to testify is not destroyed or restricted by the death of the agent. *Howerton v. Lattimer*, 68 N. C. 370. With like restrictions he may testify to transactions with, and declarations of, H. F. Bond, that concern Mrs. R. B. Adams, if the latter's agency for her is proved or admitted. Nor can this right so to testify be affected by the deed from plaintiff to H. F. Bond, dated in 1873, and registered in 1891, for an undivided half of the land, the proceeds of the sale of which are here in controversy. The defendants in their answer set up no claim to the land as heirs of H. F. Bond, but, on the contrary, assert title adverse to him. They decline, as it seems to us, to contest with the plaintiff in their capacity as heirs of H. F. Bond, but insist that they can stop his mouth by producing a deed from plaintiff to said Bond which can have no relation to this controversy, except, perhaps, to throw light for the jury upon the subsequent transactions between plaintiff and defendants through their agent. Because, for the reasons heretofore stated, there must be a new trial, we do not deem it best to discuss with more particularity the question presented about the admission or exclusion of evidence. New trial.

AVERY and CLARK, JJ., did not sit.

WESTERN CAROLINA BANK v. ATKINSON et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

ACTION ON NOTE—PLEADING—FRIVOLOUS ANSWER.

An answer to a complaint in an action on a note, which denies that plaintiff is the owner and holder of the note, is not frivolous.

Appeal from superior court, Buncombe county; R. F. Armfield, Judge.

Action by the Western Carolina Bank against Natt Atkinson and others. Judgment for plaintiff. Defendant Patton appeals. Reversed.

The complaint was as follows: "(1) That the plaintiff is a corporation duly chartered and organized under the laws of North Carolina. (2) That heretofore the defendant Natt Atkinson made his promissory note in writing, in words and figures as follows: '\$1,284.00. Asheville, N. C., Jan. 14, 1893. Five months after date, without grace, for value received, I promise to pay to the order of P. F. Patton, twelve hundred and eighty-four dollars, borrowed money, negotiable and payable at the Western Carolina

Bank, Asheville, N. C., with interest after maturity at the rate of eight per cent. per annum. Natt Atkinson. Due June 14, '93,'—and thereby promised to pay to the order of the defendant P. F. Patton the said sum of \$1,284, as aforesaid, on the 14th day of June, 1893. (3) That thereafter the defendant P. F. Patton indorsed the said note, and delivered the same so indorsed. (4) That thereafter the defendants C. E. Graham and N. A. Reynolds indorsed the said note, and delivered the same so indorsed; and thereafter, and before its maturity, the said note lawfully came into the hands of the plaintiff, for value, and the said plaintiff is now the holder and owner of the same. (5) That at the maturity of said note it was duly presented for payment, but was not paid, of all which all the defendants had due and sufficient notice. (6) That no part of said note has been paid. Wherefore the plaintiff demands judgment against the defendants for the said sum of \$1,284, with interest thereon from the 14th day of June, 1893, and the costs of this action."

The defendants Atkinson, Graham, and Reynolds filed no answer. The defendant Patton answered as follows: "The defendant P. F. Patton, separately answering the complaint of the plaintiff, says: (1) That as to the allegation contained in the first paragraph of said complaint he has no knowledge nor information sufficient to form a belief, and he therefore denies the same to be true. (2) That the allegations contained in the second paragraph thereof he admits to be true. (3) In answer to the third paragraph of said complaint this defendant says that he admits indorsing the note referred to in the second paragraph of said complaint, but denies indorsing the said note to the plaintiff, Western Carolina Bank. (4) That as to the allegations contained in the fourth paragraph of said complaint this defendant has no knowledge nor information sufficient to form a belief; therefore he denies the truth of the same. (5) That the allegations set forth in the fifth paragraph of said complaint are not of this defendant's knowledge, nor has he sufficient to form a belief as to the truth thereof. He therefore denies the same to be true. Wherefore the defendant P. F. Patton prays judgment that he be allowed to go without day, and recover his costs, to be taxed by the clerk."

This answer was adjudged to be frivolous, and judgment was rendered against all the defendants, according to the prayer of the complaint, and Patton alone appealed.

Thos. A. Jones, for appellant, Patton.

BURWELL, J. In *Hull v. Carter*, 83 N. C. 249, it is said that "an answer should never be held frivolous, and judgment given in disregard of it, unless, as stated in some of the New York cases, it be so clearly and palpably bad as to require no argument or illustration to show its character; or, in oth-

er words, such as to be capable of being pronounced frivolous, or indicative of bad faith in the pleader on bare inspection." It cannot be said that this answer on bare inspection indicates bad faith in the pleader, for in the fourth paragraph it formally denies that the plaintiff is the owner and holder of the note sued on, and thus properly put him to proof of that fact, which is essential to his recovery. True, that fact may be established by the mere production of the note on the trial of the issue thus raised, (*Pugh v. Grant*, 86 N. C. 39;) but by the rules of evidence, under the pleadings in this action, that formal act must be done before the defendant is required to rebut the presumption of ownership which arises from the mere possession of the instrument. *Pugh v. Grant*, supra. Error.

MORRISON v. McDONALD.

(Supreme Court of North Carolina. Dec. 12, 1893.)

OPENING JUDGMENT ON VERDICT—RETROSPECTIVE LEGISLATION.

Code, § 274, authorizing a judgment taken in defendant's absence to be opened for mistake or excusable neglect, did not apply to judgments on verdicts; and hence Acts 1893, c. 81, extending this provision of the Code to judgments on verdicts, applies only to judgments rendered after its passage, and cannot be given a retrospective effect, since to do so would deprive plaintiff of his vested right in the judgment.

Appeal from superior court, Moore county; Connor, Judge.

Motion by defendant, K. M. McDonald, to open a judgment rendered in favor of plaintiff, Levi Morrison. The motion was denied, and defendant appeals. Affirmed.

The plaintiff recovered judgment against the defendant for \$150, with interest, before a justice of the peace, from which the defendant appealed to the superior court. At the December term, 1892, of the superior court, in the absence of the defendant, the case was tried, the following issues having been submitted to the jury, viz: "Is the defendant indebted to the plaintiff? If so, in what amount?" To which the jury responded: "Yes; \$150, with interest from the — day of August, 1891,"—whereupon the following judgment was rendered: "This cause coming on to be tried upon appeal from justice's court, and being tried, and the jury having found all issues in favor of plaintiff, on motion of Douglass & Shaw it is adjudged by the court that the plaintiff recover of the defendant the sum of one hundred and fifty dollars, with interest from — day of August, 1891, and the cost of this action; hereby affirming the judgment of the justice's court. Robt. W. Winston, Judge, presiding." Said cause had been continued the preceding term for the defendant, on ac-

count of his absence. At August term, 1893, the defendant moved to set aside judgment and verdict of the jury upon his affidavit and the certificate of his physician showing that when said judgment was recovered at the December term the defendant was sick, and unable to attend court. His honor refused to grant said motion, for the reason that said judgment was rendered and duly docketed previous to the passage of the act of the legislature authorizing the setting aside the verdict, and therefore refused to set aside the judgment and verdict.

Black & Adams, for appellant. Thos. J. Shaw, for appellee.

SHEPHERD, C. J. While it is true, as a general proposition, that laws may be passed so as to operate retrospectively upon existing remedies or procedure, it is also well established that, where such legislation has the effect of disturbing vested rights, it must be construed as prospective in its operation only. In accordance with this qualifying principle, it is laid down by Black in his Constitutional Prohibitions (sections 198, 199) that "the legislature has no constitutional power to grant to a party litigant a right to an appeal or writ of error in cases where no such right existed when the judgment was pronounced, or where the right has been definitely forfeited. * * * It is well ruled that a statute authorizing the opening of judgments rendered since a certain anterior date impairs vested rights, and infringes on the judicial department of the government." Wade, in his *Retrospective Laws*, (section 171,) says: "The rights secured to either party to a suit by an adjudication of the matter in controversy between them are proprietary rights, which the constitution will protect. * * * If the constitutional provisions referred to were insufficient to protect judgments, final and conclusive, under the law as it existed at the time of their rendition, because there was no appeal, then they would be equally insufficient to secure the rights of judgment creditors after affirmation by the court of last resort. Litigation would have no end, so long as the legislature maintained the power to reopen a case in which possible errors may have been committed." In Black on Judgments (section 298) it is said: "While a statute may, indeed, declare what judgments shall in future be subject to be vacated, or when or how or for what causes, it cannot apply retrospectively to judgments already rendered, and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void, on two grounds: First, because it would unlawfully impair the fixed and vested rights of the successful litigant; and, second, because it would be an unwarranted invasion of the province of the judicial department. It is therefore

held by a majority of the decisions that a statute vacating, or directing the courts to vacate, a particular judgment or class of judgments already rendered and become final before the enactment of the statute, and granting new trials in such actions, is unconstitutional and invalid." 1 Freeman. Judgm. § 90; Sedgwick St. & Const. Law, 195; Potter, Dwar. St. 162, note 9. In support of the foregoing propositions many decisions are cited, but we will refer to only a few, and these simply by way of illustration: In *Stewart v. Davidson*, 10 Smedes & M. 351, it was held that a statute giving to probate courts the power to entertain bills of review of its own decrees and judgments had no retrospective operation, so as to allow the entertainment of a bill to review a decree of the court rendered prior to the passage of the act. Chief Justice Sharkey, in delivering the opinion of the court, said that the judgment was liable to be reversed by appeal or writ of error upon exceptions; but, as no such course had been pursued, the parties interested in the judgment had acquired rights under it, which could not be impaired by subsequent legislation. In *Atkinson v. Dunlap*, 50 Me. 111, it was held that a statute allowing previously adjudicated cases to be opened by a petition for review, if retrospective and intended to apply to cases in which existing remedies had been exhausted, and the judgments had become final by the expiration of the time limited for appeals or reviews, was "manifestly unconstitutional." In *McCabe v. Emerson*, 18 Pa. St. 111, it was held that a statute allowing a writ of error, in cases where none lay before the passage of the act, could have but a prospective operation; and this, on the ground that, as to existing judgments, it would be unconstitutional and void. In *Ratcliffe v. Anderson*, 31 Grt. 105, it was held that an act authorizing the reopening of judgments rendered prior to its passage was in conflict with the fundamental law. The court (Christian, J.) said: "Both upon principle and authority we conclude that the legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees already final, by which the rights of the parties are finally adjudicated, fixed, and vested; and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void." In another part of the opinion the learned justice said: "At the time the act under review was passed the money adjudged to be paid to the defendant in error was his property in a legal sense, and of this he could not be deprived, and his vested right therein could not be impaired by subsequent legislation. 30 Barb.; *Wood v. Oakley*, 11 Paige, 400; *Den-*

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ny v. Mattoon, 2 Allen, 361; *Van Rensselaer v. Smith*, 27 Barb. 154."

The application of the above principles affords an easy solution of the question presented by this appeal. At the December term, 1892, of the superior court of Moore county, a judgment was rendered against the defendant in favor of the plaintiff for the sum of \$150. This judgment was based upon a verdict, and there was no appeal; nor is it contended that the judgment was in any respect irregular. The defendant, therefore, can only seek relief under Code, § 274, on the ground that the judgment was taken against him through his mistake or excusable neglect. It is well settled that at the time of the rendition of the judgment it could not have been set aside under the above-mentioned provision of the Code, as it has been decided that it was not applicable to cases in which a judgment had been rendered upon verdict. *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840. The plaintiff then had an absolute and final judgment, duly docketed; and, as the law then stood, no court had the authority to set it aside. This judgment, according to the foregoing authorities, was "property," or a "vested right," and could not be disturbed by the legislature. Some time after the judgment was rendered and docketed an act was passed extending the said provision of the Code to cases in which a verdict had been rendered, (Acts 1893, c. 81,) and it is under this amendatory act that the defendant prosecutes his motion. This certainly comes within the principles we have stated, and we think his honor was correct in holding that the amendatory act was applicable only to judgments rendered after its enactment. The result thus reached is all the more satisfactory when it is considered that the plaintiff, by having had his judgment docketed, had acquired a lien upon the real estate of the defendant. Affirmed.

CURTIS v. PIEDMONT LUMBER, RANCH & MIN. CO.

(Supreme Court of North Carolina. Dec. 12, 1893.)

CORPORATION—CONTRACT—REQUIREMENT TO BE IN WRITING.

In an action against a corporation for its breach of a verbal contract to purchase logs, evidence by plaintiff that he delivered the logs to it, but that it did not receive them, and that he subsequently sawed them into lumber, does not so clearly show an executed contract of sale by delivery and acceptance of the logs as will take the case out of Code, § 683, requiring contracts with domestic corporations to be in writing; and it is error to instruct the jury to find for plaintiff, though his evidence is uncontradicted.

Appeal from superior court, McDowell county; E. T. Boykin, Judge.

Action by A. T. Curtis against the Piedmont Lumber, Ranch & Mining Company for

the price of logs alleged to have been sold and delivered to defendant. From a judgment for plaintiff, defendant appeals. Reversed.

A. T. Curtis was introduced as a witness in his own behalf, and testified as follows: "Had contract with John L. Martin, treasurer of defendant, and resident manager of the company. He had the general management of the defendant's business in this state. He told me he was manager. Mr. Claywell so told me. He gave me the checks of the company on New York bank, and they were paid. In June, 1888, delivered 24,000 feet of logs there. These logs were paid for. I delivered 90,000 feet of large logs at \$12 per thousand, 40,000 feet of small logs at \$10 per thousand, at Old Fort, N. C., according to contract with Martin. I complied with all instructions given me by Martin. These were reasonable prices for the logs. He was paying more than this for other logs of same kind further up the road. He ordered me to brand all logs with his brand, P. I did so. They paid me \$150 and \$125 on these logs. Claywell said they were the finest logs he ever saw, and that the company would pay me soon. The large logs were hewn on two sides. They stayed on yard there from June till September. They were damaged very much. There were great cracks in the logs. They were soft, yellow poplar logs, liable to injury by exposure. Claywell said they would be shipped at once. This was in October. He did not ship the logs at once. Claywell was an agent of the defendant. I sawed the logs into lumber and sold it. I got \$1,200 for the lumber. Had to move logs about a fourth of a mile. It cost \$400 to saw and haul logs. The amount now due is \$455. The market price for sawing is \$3 per thousand. The hauling was done as cheaply as possible; so was the sawing. I handled lumber carefully, and sold it for a good price. I made all I could out of it. The first suit was brought 27th July, 1890. The plaintiff took nonsuit, and brought this action 10th August, 1892. The company never refused to receive the logs. I delivered them as directed, and branded them as directed. It was under this same contract I sold four car loads to company, and the company shipped them. I was paid \$275 on the logs not shipped. Martin was there, and saw logs a number of times. The logs were to be paid for at a certain price per thousand feet. Martin never measured logs, nor did Claywell. I measured the logs as I bought them from different parties. Neither Martin nor Claywell were present. I was paid for all the logs I shipped. All these logs were for shipment. It was arranged between Martin and me that I should measure. I sawed the logs into lumber in order to get my money out of them. I swore in the complaint in the first action that the company refused to receive the logs. They have never received them. I tried to get the company to take the logs. I notified

the company if they did not take the logs in thirty days I'd take them. They did not do it, and I sawed the logs into lumber. They paid me the \$275 on general account. The company did not receive the logs. They did receive them by instructing me to brand the logs as I delivered them, which I did. I sawed up the logs because the company would not pay me for them. If they had accepted the logs, I could not have had them sawed. They accepted the logs by not paying for them. The company did not take the logs. Martin said he would pay for the logs when he sold them. When I say the company did not receive or accept the logs I mean that they did not ship them." J. G. Neal was introduced as a witness in behalf of the plaintiff, and testified: "I saw the logs at Old Fort. The logs were cracked open from exposure. Curtis said he was getting logs for a company, and they would not ship them and pay him. They were badly damaged. They were large, poplar logs of good quality. Plaintiff's character is good. Curtis said they had not paid him for the logs. It was in 1888, 1889, or 1890." Sheriff Burgin testified in behalf of plaintiff as follows: "I saw logs at Old Fort. They were poplar logs, large and small. They were considerably damaged. I think they lay there from June till September of the next year. Curtis said that Martin would not take the logs. Curtis' general character, good." Curtis recalled: "I measured the logs that were shipped." The following letter from John L. Martin to the plaintiff was introduced in evidence by the plaintiff: "Piedmont Lumber, Ranch and Mining Company, Morganton, Burke County, N. C. John L. Martin, Treasurer and Resident Manager. J. D. Cheever, President. C. A. Cheever, Vice-President. Victor E. Burke, Secretary. 15 Park Row, New York City. Owners of the Piedmont Sulphur and Chalybeate Springs and the Piedmont Springs Hotel. July 16. 1888. A. T. Curtis, Esq., Old Fort—Dear Sir: I inclose you check \$70.58, to close out balance on last four car loads as per bill. Also one check, \$100, on logs on yard. Will send order soon as possible. In great haste. P. L. Martin, Treasurer. 15 Park Row, N. Y." Here the plaintiff rested.

The defendant introduced no evidence. The defendant, at the close of the plaintiff's evidence, and in apt time, asked the court to give the following special instructions to the jury: Charges requested: "(1) The defendant corporation having pleaded the statute of frauds, which requires all contracts of domestic corporations to be in writing and signed, the court charges you that the said contract was void, and you will therefore answer the first issue, 'Nothing.' And if this is refused, then: (2) The defendant corporation is not liable on the contract sued on unless the logs contracted for were actually delivered to, accepted and received by, the defendant, or some one lawfully authorized by

It. Here there is no evidence that the logs were actually delivered to or received by the defendant, and you will therefore answer the first issue, 'Nothing.' (3) The court charges you that the title to the logs did not pass to the defendant until the logs were measured, and the amount which was to be paid ascertained, and that the defendant had a right to participate in such measurement; and, there being no evidence that the logs were measured, or the amount to be paid ascertained, you should answer the first issue 'Nothing.' (4) As there is no evidence that the defendant corporation actually received and used the logs for the purchase money of which this action is brought, you will answer the first issue, 'Nothing.'" The court declined to give any of said instructions, and the defendant excepted to the refusal of the court to give each and all of said instructions.

It was admitted that the contract sued on was not in writing, and the defendant, at the time of the introduction of evidence in regard thereto, objected to the same, on the ground that the same was not in writing, and was void under section 683 of the Code. His honor stated that he would charge the jury that if they believed the evidence the plaintiff was entitled to recover. The defendant's counsel stated that under this intimation they did not desire to argue the case to the jury, and that they conceded that, if the plaintiff was entitled to recover anything, he was entitled to recover \$455, with interest; but that, in their opinion, plaintiff was not entitled to recover any amount, and they asked his honor to so charge. The court charged the jury that if they believed the evidence the plaintiff was entitled to recover, and the defendant excepted to this charge.

Isaac Avery and S. J. Ervin, for appellant. Carter & Craig, for appellee.

MacRAE, J. This is substantially the same action as that which was heard in this court at September term, 1891, and is reported in 109 N. C. 401, 13 S. E. 944. It was then held that there was no evidence to go to the jury to prove a contract in writing signed by defendant's officer, and hence the plea of the statute, (Code, § 683,) requiring certain contracts of corporations to be in writing, should have been sustained. After the above decision, the plaintiff submitted to a nonsuit in the superior court, and brought the present action. The cause of action set out in this complaint is nearly identical with that in the former action. The only question open, and which has not already been adjudicated, is whether the contract declared upon is such a one as should have been in writing, under section 683 of the Code.¹ When it was here

before, the late Chief Justice Merrimon pointed out that the statute in question applies to executory contracts, and not to those in which defendants have availed themselves of property actually sold and delivered to them. In the present action his honor instructed the jury that, if they believed the evidence, the plaintiff was entitled to recover. To this charge there was an exception, and we think there was error. The testimony relied upon to prove that there was an executed contract, a sale, and delivery, was that of the plaintiff himself, and was not clear upon this point. If the plaintiff had testified to the sale and delivery of the logs, there being no testimony to the contrary, the instruction given by his honor would have been undoubtedly correct. But, without meaning at all to reflect upon the plaintiff, his testimony still leaves it unsettled whether the contract was an executed one or not, and is not so direct as to warrant the instruction given. New trial.

AVERY, J., did not sit on the hearing of this appeal.

STATE v. RAMSOUR.

(Supreme Court of North Carolina. Dec. 12, 1893.)

CARRYING CONCEALED WEAPONS — JURISDICTION OF SUPERIOR COURT—RECORD ON APPEAL.

1. Where, on appeal in a criminal cause, there is a repugnancy between the record and the case stated, the record will control.

2. The superior court does not acquire jurisdiction over a prosecution for carrying a concealed weapon by the fact that at the time of the presentation of the indictment therefor it had exclusive cognizance of such offense, where, at the time of the commission of the offense, sole jurisdiction was in justices of the peace.

Appeal from superior court, Lincoln county; McIver, Judge.

John Ramsour was indicted for carrying a concealed weapon. From a judgment quashing the indictment, the state appeals. Affirmed.

The Attorney General, for the State. D. W. Robinson, for appellee.

AVERY, J. There is a conflict between the record proper and the statement of the case on appeal. The judge states that the judgment was suspended after a trial and verdict of guilty, it being admitted that the offense was committed in December, 1892. From the record proper it appears that no jury was impaneled, but that the defendant was brought to the bar of the court, and arraigned upon an indictment (in the usual form for carrying a concealed weapon) which was found on the 16th of October, 1893, whereupon the following entry was made: "Motion by defendant to quash bill of indictment. Admitted by the state that the offense was committed in the year 1892. The

¹ This section provides: "Every contract of every corporation, by which a liability may be incurred by the company exceeding one hundred dollars, shall be in writing, and either under the common seal of the corporation or signed by some officer of the company authorized thereto."

carrying admitted by the defendant. Motion to quash allowed. Defendant discharged. State excepts, and appeals to the supreme court." "Where there is a repugnancy between the record and the case stated, the record will control." *State v. Keeter*, 80 N. C. 472; *Farmer v. Willard*, 75 N. C. 401. We must, therefore, consider the case as though it had been found on a special verdict on a plea in abatement that the offense was committed on the 25th of December, 1892, as charged in the indictment. The statute which was in force on the 25th of December, 1892, (Laws 1887, c. 68), by limiting the punishment for carrying a concealed weapon so that it could not exceed a fine of \$50 or imprisonment for 30 days, gave courts of justices of the peace exclusive cognizance of the offense; and the act of 1891 (chapter 26) left the jurisdiction still in the same tribunals. The later statute, (Laws 1893, c. 10), by repealing the act of 1887 and the amendatory act of 1891, restored vitality to section 1005 of the Code, which leaves the punishment for carrying a concealed weapon to the sound discretion of the court, and again makes the offense solely cognizable in the superior court. This statute took effect on the 2d day of February, 1893, and is still in force. The superior court, therefore, has no authority to try one who carried a concealed weapon prior to the enactment of the statute now in force; and, as all laws giving jurisdiction to justices of the peace have been repealed without reservation or saving clause, it would seem that offenders who violated the act of 1887, as amended by that of 1891, are not now liable to indictment. *State v. Massey*, 103 N. C. 356, 9 S. E. 632. The legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe—even though it is so provided in express terms—than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the federal constitution which forbids the enactment by a state of any ex post facto law could, in either event, be invoked for the protection of the person charged. *Ordr. Const. Leg.* p. 223. The judgment quashing the indictment is affirmed.

REDMOND et al. v. MULLENAX.

(Supreme Court of North Carolina. Dec. 12, 1893.)

EJECTMENT—ISSUES—BOUNDARIES—COMMENCEMENT OF ACTION.

1. In an action to recover land, the controversy being as to the right location of plaintiffs' southern boundary and adverse possession by defendant, the court submitted the issues: (1) Are plaintiffs owners, and entitled to possession of the land? (2) Is defendant in unlawful possession of any part thereof? (3) What damages are plaintiffs entitled to? Plain-

tiffs submitted similar issues, with two others, viz.: Where is plaintiff's southern boundary, as described on the plat? Has defendant had such possession as to ripen his color of title into a perfect title? These were refused. *Held*, that plaintiffs, not having shown that they were prevented from fully enlightening the jury on the law applicable to the facts, could not question the sound discretion of the court in making up the issues.

2. Code, § 2769, requires the county surveyor, on receiving an entry and order of survey for any claim, to survey its boundaries, and make two plats; one to be attached to the grant when issued, and the other filed with the secretary of state. *Held*, that such plat is evidence of the true shape and location of the land.

3. Where plaintiff's attorney procures a blank summons from the clerk, fills it out, and also the cost bond on its back, and, after procuring the signatures of the sureties to the bond, hands the paper to the sheriff, without giving the clerk opportunity to pass on the bond, as Code, § 200, requires him to do, there is no process, and no subsequent amendment can be effective.

4. Where the case does not purport to set out the charge in full, and the propositions which are set out as charged are abstractly correct, the court cannot reverse for the failure to give more specific instructions, in the absence of any exception on that ground, taken below.

Appeal from superior court, Henderson county; J. D. McIver, Judge.

Action by William Redmond and Francis M. Scott against J. A. Mullenax to recover land. Judgment for defendant. Plaintiffs appeal. Affirmed.

The case settled by the court below states the facts as follows:

The plaintiffs claimed title under a grant from the state of North Carolina to one Tench Cox, dated the 25th day of June, 1796, and mesne conveyances down to themselves. The first call in the Tench Cox grant was: "Beginning at a poplar in the South Carolina boundary line, and runs north," etc. It was admitted that the poplar was the beginning corner. The last call but one was: "Thence south 106 chains to a stake in the South Carolina line." The last call: "Thence east with the South Carolina line to the beginning." The defendant claimed title under a grant from the state to one Kuykendall, dated the 2d day of February, 1882, and thence by mesne conveyances to himself. The grant recited that the money to secure the same was paid into the state treasury on the 31st day of December, 1881. The plaintiffs claimed that their southern boundary line was a direct line from the terminus of the last call but one, "south 106 chains to the beginning," which would include the land in controversy. The defendant claimed that plaintiffs' southern boundary line was a line running due east from a point on the line of 106 chains to the poplar, the beginning corner of the Cox grant, which would not include the land in controversy; that, even if plaintiffs' contention as to boundary was correct, he had been in possession of said land under color of title for more than seven years prior to the commencement of this action.

The plaintiffs tendered the following issues: Are the plaintiffs the owners of, and entitled to the possession of, the land described in the complaint? Where is the southern boundary of the plaintiffs' grant as described on the plat? Has defendant had such possession of the land by him as to ripen his color of title into a perfect title? Is defendant in the wrongful possession of any part of plaintiffs' land? What damage are plaintiffs entitled to recover? The court submitted the following issues: (1) Are the plaintiffs the owners, and entitled to the possession, of the land in controversy? Answer: "No." (2) Is the defendant in the unlawful possession of any part of said land? Answer: "No." (3) What damage are plaintiffs entitled to recover? Answer: "None." The plaintiffs excepted to the issues submitted.

The plaintiffs introduced in evidence certain acts of the legislature of North Carolina from 1803 to 1814, for the purpose of showing that the South Carolina line was not established as contended at the time of the issuing of the Cox grant in 1796. There was evidence tending to show that the land in controversy was west of the termination of the line of 1772. There was also evidence tending to show that the South Carolina line, as it was understood to exist at the time of issuing of plaintiffs' grant, (Cox grant,) was a line west from the poplar to and beyond the line in plaintiffs' grant, and deeds running south 106 chains being next to the last call in said grant.

The plaintiffs requested numerous special instructions to the jury, all of which were given by the court, except the following: "If the plaintiffs, on the 15th day of January, 1880, applied to the clerk for a summons, and filed their prosecution bond, and the clerk issued the summons, even without signing the same, and docketed the case in January, 1889, as shown by the record, this action of the plaintiffs would be sufficient to arrest the running of the statute,"—which was refused by the court, because there was no evidence in support of the prayer asked; the evidence being that a blank summons was taken from the office of the clerk by Mr. Justice, agent for the plaintiffs, which was taken to the office of Mr. Smith, one of the attorneys for the plaintiffs, who filled out the summons and bond in his office; that the summons was never in fact issued or served. Plaintiffs excepted. The clerk stated that he did not know when the entry on his docket, "Issued January 15, 1889," was made; that his custom was to make such entry when the summons issued. There was evidence that defendant left the state, and went to South Carolina, 16th of January, for the purpose, as he testified, of putting up tombstones to his child's grave; that he knew nothing about the suit until after his return.

The defendant asked the court to submit

to the jury sundry special instructions, all of which were refused except the following: "The original plat in doubtful questions of boundary is evidence of the true shape of the land and of the intent of the contracting parties as to the location of the lines, and such intent, in such cases, determines the true location." Plaintiffs excepted.

The defendant testified that he went into the possession of the land in controversy on the 8th day of January, 1879, and had been in the open and continuous possession since said time. There was no evidence to the contrary.

After the evidence was all in, the plaintiffs moved that the clerk be allowed to sign the summons of the 15th of January, 1889, which motion was refused, upon the ground that the court had no authority to allow the same, it not being an amendment to the process.

Upon the question of location the court charged the jury that the rule is, if the beginning is admitted or approved, and only courses and distances are given, the lines must be run by the course and distance; but if, in addition to course and distance, natural objects, marked trees, or lines of other tracts, are called for, these, when shown, will control; but, if none such can be found, then course and distance must control in fixing the boundary line or lines. "Applying this rule, you are instructed that if you find from the evidence that the last course of the Cox grant but one is the chestnut, (144 on plat,) the course and distance from that point south 106 chains to a stake in the South Carolina line will be controlled by that line as it was recognized and existed in 1776, if found; but, if not found, course and distance south 106 chains must control, and the southern boundary of the plaintiffs' land will be a direct line from that point to the beginning at the poplar, regardless of course and distance. If you find from the evidence and the instructions given that the Cox grant includes the land in controversy, you will respond 'Yes' to the first issue, unless you shall find the defendant has been in the continuous adverse possession for seven years, under color of title, before the commencement of this action; and if you so find you will respond 'No' to the first issue. You are also instructed that this action commenced on the 15th day of May, 1889, and defendant's color of title began February 2, 1882."

Justice & Justice, for appellants. T. R. Rickman and S. V. Pickens, for appellee.

AVERY, J. The court submitted the three issues usually adopted in actions for possession of land, and there was no error in the refusal to allow the jury to pass upon the more specific inquiries suggested by the plaintiff. The court settled the issues in the exercise of a sound discretion, which in that case would be reviewable here only on con-

dition that the party complaining could show from the record that the form of the issues was such as to preclude him from having presented to the jury some view of the law arising out of the evidence. *Denmark v. Railroad Co.*, 107 N. C. 185, 12 S. E. 54; *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665; *Emery v. Railroad Co.*, 102 N. C. 209, 9 S. E. 139; *Bonds v. Smith*, 106 N. C. 553, 11 S. E. 322. He has not attempted to show that he was deprived, by the ruling excepted to, of the opportunity to enlighten the jury upon the law applicable to the facts; and it is difficult to conceive how he could have done so.

"An action is commenced as to each defendant when the summons is issued against him." Code, § 161. Though the paper purporting to be a summons may be informal in some respects, or even defective, in failing to contain all that, according to the requirements of the statute, should appear in it, its informality and defects may be cured by amendment, if there is evidence upon its face that it has emanated from the proper office, and was intended to bring the defendants into court to answer a complaint of the plaintiff. *Henderson v. Graham*, 84 N. C. 496; *Jackson v. McLean*, 90 N. C. 64. If the paper bear internal evidence of its official origin and of the purpose for which it was issued, it comes within the definition of original process; and the broad discretion with which judges are clothed by section 273 of the Code may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervening rights of third parties. *Cheatham v. Crews*, 81 N. C. 343; *Thomas v. Womack*, 64 N. C. 657. But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all; no more than one of the usual printed blanks kept by the clerks of the courts. The seal of the court is evidence throughout the state of the fact that a paper to which it is attached emanates from the tribunal to which it belongs, and, though the clerk's signature is the prescribed evidence of genuineness as to all process to be served in the county in which his court is held, yet if he issue to such county a summons in the usual form, attested by his official seal, but not subscribed, and containing his name only as printed in the body of the paper, the court has the power, after the defendant has entered an appearance, to amend by allowing the clerk to sign his name. *Henderson v. Graham*, supra. On the other hand, where a summons was issued to an adjacent county, signed by the clerk of the superior court, but not attested by the seal, and served upon the defendant, it was held that, after an appearance by virtue of such service, the court might, in its discretion, allow the seal to be attached; as it could also to final process upon which property had been sold in another

county, and after it had been returned by the officer who sold. *Clark v. Hellen*, 1 Ired. 421; *Seawell v. Bank*, 3 Dev. 279; *Purcell v. McFarland*, 1 Ired. 34. The cases cited mark the extreme limit to which this court has gone in recognizing as valid and perfecting by amendment defective process. We cannot extend the discretion of the court so as possibly to include a case where counsel obtains from the clerk a form of summons, fills the blank in the body of it, and, after procuring the signatures of sureties on the undertaking indorsed thereon, places it in the hands of the sheriff, without giving to the clerk the opportunity to pass upon the sufficiency of the security for costs, as the statute (Code, § 209) requires him to do. The issuance of the summons in such a case is the act of the attorney, not of the clerk; and the paper is void as process, and incurable by amendment. *Shepherd v. Lane*, 2 Dev. 148. Even between the parties, we cannot, by amendment, give such a paper relation back to the time when, as an unsigned and unattested summons, it issued. The seal, though not required, or the signature, though not imparting authenticity, in the county to which the summons issues, is evidence of the fact that the clerk has approved the prosecution bond, or permitted the issuance on a proper affidavit; and, when the defendant waives the informality or irregularity by appearing, the curative power of amendment may be invoked, but not when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. There was no error in the ruling of the judge that he had no authority to amend the summons. Here, however, the appearance was entered after the service of a second summons, of a later date, and in proper form.

The surveyor is required by the statute, (Code, § 2769,) upon receiving the entry and surveying its boundaries, to make two fair plats; one of which is to be attached to the grant when issued, and the other filed in the office of the secretary of state. The original plat is thus made a part of the grant, for the purpose of indicating the shape and location of the boundary, and is, of course, evidence, though not conclusive, to be submitted to the jury as to the true shape and location of the land. Even field notes of the original survey of the boundary line between North Carolina and Tennessee, when properly identified, were declared admissible as tending to show the location of that line, when called for in a grant. *Dugger v. McKesson*, 100 N. C. 9, 6 S. E. 746. Upon examining the record it does not appear that the plaintiffs excepted to the charge of the court on the question of the location of the boundary lines on the ground that it was not sufficiently specific. The abstract propositions set forth in the record are correct statements of the general principles applicable in such cases, and,

in the absence of such exception, it does not appear that the charge did not embody more definite instructions directed to the facts in this case. The statement of the case on appeal does not purport to set forth the charge in full. We can only consider assignments of error made below, and founded upon exceptions submitted in apt time. There is no error.

RUSSELL v. HEARNE.

(Supreme Court of North Carolina. Dec. 12, 1893.)

APPEAL IN FORMA PAUPERIS—USURY—EVIDENCE.

1. Code, § 553, (Acts 1873-74, c. 60,) provides that when a party to a civil action in the superior court "shall at the time of the trial desire an appeal," and cannot, through poverty, give security, the judge shall allow him an appeal without security on his affidavit of poverty, and advice by counsel of error in law committed, and counsel's written statement that he has examined the case, and thinks that there is error. Act 1889, c. 161, authorizes the clerk to make the order, and allows appellant five days to make his affidavit, provided that the appeal, when granted by the clerk, shall be within 10 days from the expiration by law of the term of court. *Held*, that the appellant in such case need not intimate his desire to appeal at the time of trial, his timely compliance with the statute being sufficient indication of his desire at the time of trial.

2. In an action under Code, § 3836, to recover twice the amount of interest paid on a usurious contract, the issue being as to the existence of usury, and the parties' testimony conflicting, it is error to allow defendant to ask his own witness if plaintiff has not sued for usury before, and has not the reputation of suing for usury.

Appeal from superior court, Stanly county; Winston, Judge.

Action by J. M. Russell against S. H. Hearne under Code, § 3836, to recover twice the interest paid on a usurious transaction. From a judgment for defendant, plaintiff appeals. Reversed.

This was an action brought under section 3836 of the Code, to recover twice the amount of interest alleged to have been paid by plaintiff to defendant in certain usurious transactions, tried before Winston, J., and a jury, at spring term, 1893, of Stanly superior court. There was a verdict and judgment for defendant. Plaintiff appealed in forma pauperis. In this court defendant moved to dismiss the appeal, "because it does not appear that the plaintiff desired an appeal at the time of the trial, according to section 553 of the Code.

Brown & Jerome, for appellant. Jas. A. Lockhart and Battle & Mordecai, for appellee.

MacRAE, J. The term of the court began on the 10th of April, and was by law then limited to one week. The provisions of section 550 of the Code, with regard to entry of appeal and services of notice, appear by the record to have been strictly complied

with. The affidavit of inability to give security on appeal, required by section 553, was made on the 15th, and the certificate of counsel, and order of the clerk allowing the appeal to be taken without giving security, were made and filed on the 22d, of April; the affidavit on the last day of the term, if the court continued during the week; in any event, within five days of the trial. And the other proceedings above referred to were within ten days from the expiration by law of said term of court. By the Acts of 1873-74, c. 60, "when any party to a civil action tried and determined in the superior court shall at the time of the trial, desire an appeal from the judgment rendered in said action to the supreme court, and shall be unable by reason of his poverty to give the security required by law for said appeal, it shall be the duty of the judge of said superior court, to make an order allowing said party to appeal from said judgment to the supreme court, as in other cases of appeal now allowed by law, without giving security therefor. Provided however, that the party desiring to appeal from said judgment shall make affidavit that he is unable by reason of his poverty to give the security required by law for said appeal, and that said party is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court in said action. Provided further that said affidavit shall be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case and that he is of opinion that the decision of the superior court in said action is contrary to law." As the law then stood, an appeal in forma pauperis was required to be perfected during the term at which the judgment was rendered. But by the act of 1889 (c. 161) the authority to make the order was extended to the clerk, and the party desiring the appeal was allowed five days to make his affidavit; and it was further provided "that the appeal when passed upon and granted by the clerk shall be within ten days from the expiration by law of said term of the court." Clark's Code, (2d Ed.) § 553, and notes. We do not think that under the statute it is necessary that there should be an intimation by the party at the time of the trial that he desires to appeal. If he fulfills the requirements of the statute within the time prescribed by law, it is a sufficient indication of his desire at the time of the trial. The motion to dismiss is denied.

It will only be necessary to notice the third exception. The allegations of usury were denied. A clear issue arose upon the pleadings, and the testimony was conflicting; the plaintiff and defendant each testifying. A witness offered by the defendant was asked by defendant's counsel if plaintiff had not sued for usury before, and if he did not have the reputation of suing for usury.

Plaintiff objected. The objection was overruled, and witness answered in the affirmative, and plaintiff excepted. This testimony was entirely irrelevant, and might not have been harmless. Its only object could have been to impeach the plaintiff's testimony, and in this view it was incompetent; for, if it were true, he had a right, under the statute, to "sue for usury," if he had paid for the loan of money a greater rate of interest than was allowed by law. *Cox v. Brookshire*, 76 N. C. 314. Error. New trial.

SUMMERS v. MOORE et al.

(Supreme Court of North Carolina. Dec. 12, 1893.)

TRUSTS—ACTION TO ESTABLISH—EVIDENCE—INSTRUCTIONS.

1. The fact that plaintiff consented that the title to land for which he paid be taken in defendant will not defeat his right to have a resulting trust declared in the land in his favor.

2. In an action to establish a trust in land, the title to which is in defendant, the burden of proof is on plaintiff, and only facts strong, convincing, and unequivocal can overthrow the deed.

3. Several years after the purchase by plaintiff of land, the title to which was placed in defendant, the latter prepared a deed to plaintiff. Plaintiff, under a mistaken idea as to his outstanding debts, and for the purpose of avoiding payment thereof, requested defendant not to execute the deed, but to let the title continue in his (defendant's) name. *Held*, that this fact was not, of itself, sufficient to defeat plaintiff's right to have a trust declared in the land, but that it might be considered by the jury in determining the intent with which the title was originally placed in defendant.

Appeal from superior court, Rutherford county; Armfield, Judge.

Action by W. D. Summers against Eliza Moore and others to establish a trust in plaintiff's favor in certain land. From a judgment for plaintiff, defendants appeal. Affirmed.

Justice & Justice, for appellants. P. J. Sinclair and Armfield & Turner, for appellee.

SHEPHERD, C. J. It is a well-established principle that where, upon a purchase of property, the conveyance of the legal title is taken in the name of one person, while the consideration is given or paid by another, at the same time or previously, and as part of the same transaction, the parties being strangers to each other, a resulting trust immediately arises from the transaction, and the person named in the conveyance will be a trustee for the party from whom the consideration proceeds. "The rule has its foundation in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the purchase money intends the purchase for his own benefit, and not for another, and that the conveyance in the name of another is a matter of convenience and arrangement between the parties for collateral purposes." 1 Perry, *Trusts*; 2 Story,

Eq. Jur. 1201; *Bisp. Eq.* § 79; *Lewin, Trusts*, 143. The above quotation from Mr. Perry, which is fully sustained by the authorities we have cited, is sufficient to meet the proposition of the defendant that, if the plaintiff consented that the title should be taken in the name of George L. Moore, the transaction amounted to a gift, and there could be no resulting trust. An examination of the authorities will disclose that in many of the cases the title was intentionally taken in the name of the third person as a matter of "convenience and arrangement" of the parties, and it is manifest that the exception of the defendant in this respect cannot be sustained. Undoubtedly, parol evidence may be received to rebut a resulting trust, but the burden of proof is upon the nominal purchaser, and he must establish by sufficient testimony that it was intended that he should take a beneficial interest. 1 Perry, *Trusts*, 140; 2 Sugd. *Vend.* 139. There is no evidence in this case of any such purpose; nor, indeed, is there any evidence from which we can clearly infer that the plaintiff knew or assented to the title being taken in the name of the said Moore. Neither is there any force in the exception addressed to the charge as to the intensity of proof. His honor charged "that the burden of proof was on the plaintiff," and that "the law gave a peculiar force and solemnity to deeds, and would not allow them to be overthrown by mere words, but only by facts, and that these facts must be strong, convincing, and unequivocal." This, we think, was a substantial compliance with the rule laid down in *Harding v. Long*, 103 N. C. 1, 9 S. E. 445, and the cases there cited. We are also of the opinion that the facts relied upon, dehors the deed, were sufficient to authorize the finding in favor of the resulting trust.

The issue as to whether the title was taken in the name of Moore for the purpose of hindering, delaying, or defrauding the creditors of the plaintiff was answered in the negative. Had it been answered in the affirmative, it is clear that the plaintiff would have no standing in a court of equity. *Turner v. Eford*, 5 Jones, *Eq.* 106. But it is insisted that this result must follow from the conduct of the plaintiff some two or three years after the creation of the trust. It seems that a deed from Moore to the plaintiff had been prepared, but not executed, and that the plaintiff, under the mistaken idea that he was liable as surety upon a supersedeas bond for \$6,000, instead of an appeal bond for \$25, wrote the said Moore, for the purpose of avoiding the payment of the supposed liability, not to execute the said deed, but to let the legal title continue in his name. His honor held that this, in connection with other circumstances, might be considered by the jury in determining the issue above mentioned, as to the intent with which the deed was originally made to Moore, but that, in the absence of any fraudulent intent existing

at that time, this subsequent conduct of the plaintiff could not defeat his equitable rights in the said land. The principle invoked by the defendant is that, as between wrongdoers, the courts will not interfere, but will leave each in the position which his own acts have placed him. There must, of course, be some act by which his relation to his property is changed; otherwise, there is nothing upon which the principle can operate. In the present case the plaintiff did nothing which in the least altered his relation to the land. The legal title had not been made to him, and by postponing the execution of the conveyance he parted with nothing. The mere intention to defraud, unaccompanied by some change or disposition of property, cannot have the effect of depriving the owner of his interest therein. We have examined the authorities cited by defendant's counsel, but they do not establish his contention. Very clearly, the case of *Warlick v. White*, 86 N. C. 139, is not in point. In that case a deed had been made by the husband directly to the wife, and, being lost, the court held that it would not be upheld in equity as against the heirs of the husband. There was no valuable consideration, and the court refused her relief because, while her husband was in the army, she had adulterous intercourse with a negro, the fruit of which was a mulatto child, born soon after the death of the husband. In our case the entire consideration proceeded from the plaintiff, and whatever his intentions may have been, in view of his supposed insolvency, he has done nothing, as we have said, by which his equitable rights in the property were changed.

As to the property substituted for a part of that affected with the trust, it is settled that the plaintiff may follow it, as he has done in this case. See authorities cited in *Edwards v. Culberson*, 111 N. C. 342, 16 S. E. 233. We have carefully examined the whole record, and are unable to discover any ground which entitles the defendants to a new trial. It may not be improper to observe that the conclusion reached is in furtherance of justice, as the plaintiff, it seems, has actually charged this property with a mortgage to secure some of his creditors, while the defendants are relying upon a mere technicality to defeat the rights of those creditors, as well as the plaintiffs, and get the property without having paid for it. Affirmed.

FULBRIGHT et ux. v. YODER et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

DEED—CONSTRUCTION—WORDS OF INHERITANCE.

A deed reciting that the grantors "hath sold unto J., in trust for M., all that tract of land, [describing it,] unto the said J., agent, his heirs and assigns, forever. The said [grantors] hath a right to convey the same, and by these presents doth convey the same, in fee simple, unto J., agent,"—gives M. an equitable

fee, though words of inheritance are omitted in the limitation. *Holmes v. Holmes*, 86 N. C. 205, followed.

Appeal from superior court, Catawba county; Boykin, Judge.

Action by Andrew Fulbright and wife against Daniel Yoder and others for partition of land. From a judgment for defendants, plaintiffs appeal. Affirmed.

Defendants claimed the land through a deed to their ancestor Z. T. McCaslin, who was an infant at the time the deed was executed. The deed was as follows: "This deed, made the 12th day of October, 1860, between Matthew McCaslin and wife, Margaret, of the first part, and J. C. McCaslin, agent of Z. T. McCaslin, of the second part, * * * witnesseth, that the said Matthew McCaslin and wife, for and in consideration of one dollar to them in hand paid, and of natural good will and affection, hath bargained and sold unto J. C. McCaslin, in trust for Z. T. McCaslin, all that tract or parcel of land on Potts creek, in Catawba county, [describing it,] containing 83 acres, all woods, ways, waters, and water courses, unto the said J. C. McCaslin, agent, his heirs and assigns, forever. The said M. McCaslin and wife hath a right to convey the same, and by these presents doth convey the same, in fee simple, unto J. C. McCaslin, agent."

C. A. Cilley, for appellants. D. W. Robinson and M. L. McCorkle, for appellees.

PER CURIAM. The case of *Holmes v. Holmes*, 86 N. C. 205, is similar to the one before us, and, according to the principles there laid down, Z. T. McCaslin took an equitable fee, although words of inheritance were omitted in the limitation. It is therefore unnecessary to pass upon the sufficiency of the evidence offered for the purpose of correcting the deed. While it must be admitted that the doctrine of the above-mentioned case is not supported by text writers or the previous decisions of this court, yet it is believed to be founded upon more equitable principles in arriving at the real intention of the grantor. It is also in accord with the spirit of recent legislation, (Code, § 1280,) which declares that limitations without the use of the word "heirs" shall be construed as limitations in fee unless a contrary intention plainly appear. In view of these considerations we do not feel inclined to overrule the said decision. Its application to this case, as well, perhaps, as to the great majority of others, very clearly gives effect to the true intention of the parties. Affirmed.

STATE v. LEE.

(Supreme Court of North Carolina. Dec. 19, 1893.)

"PEDDLER"—SELLING BY SAMPLE.

A person who sells stoves or ranges by sample and taking orders is not a "peddler,"

and is not subject to the tax of \$50 annually "on every itinerant person or company peddling clocks, stoves or ranges," provided for by Acts 1893, c. 294, § 28.

Appeal from superior court, Yancey county; Boykin, Judge.

E. N. S. Lee was acquitted of the charge of peddling stoves or ranges without paying the tax or obtaining the license required by Acts 1893, c. 294, and the state appeals. Affirmed.

The Attorney General, for the State. G. S. Ferguson, for appellee.

CLARK, J. Whether the taxing of the occupation of selling "clocks, stoves or ranges" by sample, under the state of facts found by the special verdict in this case, and whether to do so would be an interference with interstate commerce, is an interesting question. There are cases which would seem to indicate that the state could lawfully collect such tax upon the facts here found to exist, if the legislature had seen fit to impose it. *Machine Co. v. Gage*, 100 U. S. 676; *State v. French*, 109 N. C. 722, 14 S. E. 383. But we need not, and do not, pass upon that point.

The tax, for the failure to pay which the defendant is on trial, is that which is levied by section 28, c. 294, Acts 1893, which provides: "On every itinerant person or company peddling clocks, stoves or ranges, fifty dollars annually on each wagon (if wagons are used) in each county where he or they may peddle. If wagons are not used the tax shall be paid on each agent." The special verdict finds that the defendant sold the ranges by a sample range which he carried around in his wagon, and that he "did not sell any sample range." The tax is laid only on "peddling," and the defendant did not peddle his ranges. The usual and ordinary signification of that word indicates the occupation of an itinerant vendor of goods, who sells and delivers the identical goods he carries with him, and not the business of selling by sample, and taking orders for goods to be thereafter delivered, and to be paid for wholly, or in part, upon their subsequent delivery. Webster's International Dictionary defines "peddle:" "To sell from place to place; to retail by carrying around from customer to customer; to hawk. Hence, to retail in very small quantities." Also: "To travel about with wares for sale; to go from place to place, or from house to house, for the purpose of retailing goods; as, to peddle without a license." Worcester defines it simply: "To carry about and sell; to retail as a peddler." To the same purport are the other dictionaries. As the defendant did not "carry about and sell" the ranges, but sold only by sample, he did not violate the statute by failure to pay the tax upon the business of "peddling ranges." No error.

TRIPLETT v. FOSTER et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

APPEAL—DISMISSAL—FAILURE TO FILE TRANSCRIPT.

Under Sup. Ct. Rule 17, (12 S. E. vi.) providing that, if appellant shall fail to file a transcript of the record before the call of causes from the district from which his cause comes is concluded, appellee may move to docket and dismiss the appeal, a motion to docket and dismiss for failure to file the transcript, made after the close of the call of the docket of the district to which the appeal belongs, and after the appeal is docketed, is too late, and will be denied.

Action by Joel Triplett against John P. Foster and others. Judgment for plaintiff. Defendants appeal. Plaintiff moves to dismiss. Motion denied.

Cranor & Buxton, for appellee.

CLARK, J. This is a motion to docket and dismiss, under rule 17.¹ This motion was not made at the close of the call of the docket of the district to which it belongs, but since; and now, during the same term, being the first term of this court after the trial below. the appellant has brought up the transcript of the appeal, and docketed the same. This brings the case directly under *Bryan v. Moring*, 99 N. C. 16, 5 S. E. 739, as explained in *Bailey v. Brown*, 105 N. C. 127, on page 130, 10 S. E. 1054. If, notwithstanding his failure to docket in time for argument at this term, the appellant thus obtains a delay of six months, the appellee himself has been negligent in not moving to docket and dismiss at the close of the call of causes from that district, as he might have done. "Vigilantibus non dormientibus leges subveniunt." Motion denied.

¹ Sup. Ct. Rule 17 provides that "if the appellant in a civil action shall fail to bring up and file a transcript of the record before the call of causes from the district from which it comes is concluded, during the week appropriated to the district, at a term of this court in which such transcript is required to be filed, the appellee, on exhibiting the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been filed, and filing said certificate or a certified transcript of the record in this court, may move to have the appeal docketed and dismissed at appellant's cost with leave to the appellant during the term and after notice to the appellee to apply for the redocketing of the cause; and if an appellant shall fail to file transcript of the record of his appeal within the time he might do so, so that the appeal shall stand for argument at the term to which it is taken, the appellee may move, during the week assigned to the district, to dismiss the same as above provided, and his motion shall be allowed unless reasonable excuse for such failure shall be shown within such time as the court may direct, in which case the court may deny the motion and allow a continuance."

WILSON et al. v. CRAIG.

(Supreme Court of North Carolina. Dec. 19, 1893.)

INJUNCTION—VIOLATION—CONTEMPT—RES JUDICATA.

A judgment overruling a motion to attach defendant for an alleged contempt in violating an injunction, and dismissing the rule to show cause, not having been appealed from, is an adjudication that defendant was not guilty of the contempt charged, and a bar to a subsequent motion to punish for an alleged contempt on an affidavit identical with that used in the first proceeding.

Appeal from superior court, Yancey county; E. T. Boykin, Judge.

Action by J. W. Wilson and others against Locke Craig for an injunction. An injunction having been granted, plaintiffs moved to attach defendant for contempt in violating the same. The motion was overruled, and the rule to show cause discharged, and plaintiffs appeal. **Affirmed.**

T. W. Mason and R. O. Burton, for appellants. W. J. Peele, for appellee.

PER CURIAM. It is conceded that the plaintiffs' affidavit, upon which this motion to attach the defendant for contempt because of an alleged disobedience of an injunction order of the superior court, is identical with the affidavit upon which a similar proceeding was prosecuted against the defendant in 1892, before his honor, Judge Graves. The record shows that that proceeding was terminated by the following judgment: "Motion to attach defendant for contempt of court. Motion overruled. Rule dismissed." From this judgment there was no appeal. It therefore stands as an adjudication in defendant's favor of the very matter which plaintiffs seek again to have considered. The plaintiffs' affidavit filed in that proceeding, the defendant's answer thereto, and that entry constitute a complete defense against the plaintiffs' further prosecution of this matter. It is an adjudication that the defendant was not guilty of the contempt charged against him then and now. If the plaintiffs were for any cause dissatisfied with that decision, they should have appealed from that judgment. No error.

AVERY, J., did not sit on the hearing of this case.

STATE v. WHITT.

(Supreme Court of North Carolina. Dec. 19, 1893.)

JURY—CHALLENGE TO ARRAY—HOMICIDE—AIDING AND ABETTING—ACQUITTAL OF PERSON KILLING—EVIDENCE.

1. The fact that one of the men named on the list of a special venire was dead, and another had removed from the county, is not ground for a challenge to the array.

2. Neither is the fact that the sheriff was allowed to amend his return, showing the sum-

moning of 150 men, so as to show who were summoned, and who not, and the reason they were not summoned, ground for challenge to the array.

3. Nor is it ground for such challenge that one named on the venire was not summoned, or that, by mistake in copying the list of the venire, the name of one was omitted, so that he was not summoned.

4. One may be convicted of murder in the second degree for aiding and abetting, though the person who did the killing has been acquitted.

5. Testimony that, a few minutes after a fight, deceased told witness that he was shot in several places; that he thought he was killed; and that he believed he could feel the blood running inside of him,—though not part of the *res gestae*, is admissible.

Appeal from criminal court, Buncombe county; Thos. A. Jones, Judge.

George Whitt was convicted of murder in the second degree, and appeals. **Affirmed.**

Chas. A. Webb, for appellant. The Attorney General, for the State.

CLARK, J. The prisoner was indicted for murder, and was convicted of murder in the second degree. There was a special venire of 150 men ordered and drawn from the box by the court. Code, § 1739; *State v. Brogden*, 111 N. C. 656, 16 S. E. 170. The prisoner challenged the array: (1) Because one of the men named on the special venire had removed from the county, and another was dead at the time the jury list had been revised by the county commissioners. (2) Because the sheriff had indorsed on the writ and list of special venire, "Received 25th October, 1890, executed 30th October, 1890, by summoning a jury of 150 men." The solicitor moved that the sheriff be allowed to amend his return, so as to show those of the list furnished him by the clerk who were actually summoned, and those of said list not summoned, with the reasons why they were not. The sheriff was permitted to amend his return as moved, and the prisoner again excepted. (3) Because one of those named on the venire was not summoned. (4) Because the sheriff, in copying the list of the venire, by mistake, failed to copy the name of one man, who, in consequence, was not summoned. The jury was selected before the prisoner had exhausted his peremptory challenges.

1. The first ground of exception was expressly held adversely to the prisoner in *State v. Hensley*, 94 N. C. 1021. The amendment of the sheriff's return was in the discretion of the court at this term, and removed the second ground of objection, if it had any merit. The other two grounds assigned likewise did not "affect the integrity and fairness of the entire panel," and were properly disallowed. *State v. Hensley*, supra. The prisoner excepted because the court refused to charge the jury that there was not sufficient evidence to go to them to show a conspiracy between the prisoner and John Llewellyn to murder the deceased. A consideration of the evidence sent up justifies such refusal. The

prisoner also excepted to the charge of the court, in that the court charged that, "if the jury should find from the evidence that there was no conspiracy between the prisoner and John Llewellyn, it would then be their duty to consider whether he was an aider and abetter in the killing of Charles Brockers,—that is, as principal in the second degree,—and in determining that fact they should not be influenced by the fact that John Llewellyn had been acquitted of the murder of Brockers; that the acquittal of John Llewellyn should have nothing to do with their verdict in this case." Brockers was a deputy marshal, who had arrested John Llewellyn on a warrant, and had been killed in attempting to carry him to jail. John Llewellyn and his father had been tried and acquitted. The prisoner was charged, not as an accessory before or after the fact, but as a coprincipal. What another jury had done as to Llewellyn was inadmissible for or against one charged as a principal. The case of *State v. Jones*, 101 N. C. 719, 8 S. E. 147, therefore, has no application. A principal in the second degree is not an accessory, but a coprincipal. 1 Bish. Crim. Law, § 604, (4.) Even if the prisoner had been charged as principal in the second degree, he could have been convicted when the principal in the first degree had been acquitted. 1 Whart. Crim. Law, § 222, note 2, and numerous cases there cited; 9 Amer. & Eng. Enc. Law, 574, note 2.

2. The prisoner further excepted because the court charged the jury "that, in order to find the prisoner guilty as a principal in the second degree, the jury must be satisfied, from the evidence, beyond a reasonable doubt, that he actually aided and abetted John Llewellyn in the killing of Brockers. That if they were satisfied beyond a reasonable doubt, from all the evidence, that the deceased was murdered by John Llewellyn; and that, just before the fight begun, the prisoner stood at the northeast corner of the house, with a pistol in his hand; and that John Llewellyn came to the door with a pistol in his hand, and the prisoner then said to him, 'You can go to Marshall if you want to go, and, if you don't you need not. By G—d, I am here;' and that this was said for the purpose of encouraging John Llewellyn to resist a lawful arrest by the deceased; and that, during the fight that ensued, the prisoner had a pistol in his hand, prepared and ready to assist John Llewellyn if it should become necessary; and that he stood near the witness Samuel Cox, cocking his pistol backward and forward twice, either for the purpose of preventing the said Cox from assisting Brockers in the arrest, or for the purpose of showing John Llewellyn that he was prepared to assist him, or encouraging him in resisting arrest; and that, by reason of such action and words and behavior, the said John Llewellyn was encouraged and assured by the prisoner,—that,

then, this would be an aiding and abetting by the prisoner, and he would be guilty as a principal in the second degree, whether he fired the fatal shot or not, and could be convicted of murder in the second degree." Wallis' Case, 1 Salk. 334, is an authority exactly in point. He was tried at Old Bailey in 1703. The indictment was against A. for murder, and against Wallis and others as persons present aiding and abetting A. therein. A. was first tried, and acquitted. When Wallis was afterwards put on trial and convicted, Holt, C. J., determined that though the indictment be against the prisoner for aiding and assisting and abetting A., who was acquitted, yet the indictment and trial of that prisoner (Wallis) was well enough, for all are principals, and it is not material who actually did the murder. *Brown v. State*, 28 Ga. 199; 9 Amer. & Eng. Enc. Law, 570. Indeed, as is said by Dr. Wharton, (1 Crim. Law, 9th Ed., 221:) "The distinction between principals in the first and second degree is a distinction without a difference." To same effect is 1 Bish. Crim. Law, (8th Ed.) § 604, and other authorities.

The solicitor asked the witness Cox: "What did Brockers say to you immediately after the fight about his having a wound?" The prisoner objected, on the ground that, not being a part of the *res gestae*, and not having been made in the presence of the prisoner, it was incompetent. The court ruled, after preliminary inquiry, that what Brockers then said to the witness about his feelings or the nature of the wound he had received was competent, but anything that he said about the fight was incompetent. The witness then testified that "not over ten minutes after the fight, and about 100 or 150 yards from the place of the fight, as soon as he and Brockers had gotten on their horses, Brockers asked him if he was shot. Witness told him 'No,' and asked Brockers if he was. He said, 'Yes,' he thought he was killed. Witness then asked him where he was shot, and he said through the leg, the arm, and the thigh, and the body, and that he believed he could feel the blood running inside of him." The prisoner excepted. It was also in evidence that Brockers died within 48 hours from the wounds received on that occasion. The court correctly held that the conversation was not a part of the *res gestae*. *Cockburn, C. J., in Reg. v. Beddingfield*, 14 Cox, Crim. Cas. 341; *Rosc. Crim. Ev.* 26, 29, and cases there cited; *State v. Frazier*, 1 Houst. Crim. Cas. 176; *Jones v. State*, 71 Ind. 66. Upon the evidence, it would seem that the court might well have held these dying declarations, and have admitted what it excluded, to wit, Brockers' statement of the transaction. *State v. Mills*, 91 N. C. 581, on page 594. The declarations of the deceased were, however, only admitted by the court as to the statement of his condition,—that he thought he

was killed, and believed he could feel the blood running inside, and locating the wounds he had received. The latter were sufficiently proved by uncontradicted evidence, and, as it is not seriously controverted they caused the death, we do not see how the recital of them by the deceased, nor his statement of the intensity of his suffering therefrom, as that he thought he was killed, and could feel the blood running inside, could have possibly prejudiced the prisoner. Besides, such statements, not containing any reference to the transaction in which the wounds were received, are competent as natural evidence. 21 Amer. & Eng. Enc. Law, 103; Insurance Co. v. Mosley, 8 Wall. 397; 1 Greenl. Ev. § 102. No error.

SHEPHERD, C. J., being absent, did not participate in the decision of this case.

WARD et ux. v. SUGG. et al.

(Supreme Court of North Carolina. Dec. 19, 1893.)

USURY—NOTES—INNOCENT PURCHASER.

A note given wholly for usurious interest is void, even in the hands of an innocent purchaser, under Code, § 3836, declaring the taking or charging of usurious interest, when knowingly done, to be a forfeiture of the entire interest. Burwell, J., dissenting.

Appeal from superior court, Pitt county; Shuford, Judge.

Action by Lawrence Ward and wife against I. A. Sugg and another to enjoin a sale under mortgage, and to have the note secured thereby declared void. Judgment for defendants. Plaintiffs appeal. Reversed.

Jas. E. Moore, for appellants. T. J. Jarvis, for appellees.

CLARK, J. The jury found that the \$400 note in suit was wholly given for a usurious charge for the use of money, and that the present holder acquired it before maturity, for value and without notice. The question whether it is valid in his hands is not an open one in this state. Such note is held to be void, into whatever hands it may pass. Ruffin v. Armstrong, 9 N. C. 411; Collier v. Nevill, 14 N. C. 30. Such was also the law in England until the law was in some respects modified by the act of 58 Geo. III., and is the law in New York and other states, except where modified by statute. Rand. Com. Paper, § 525; 3 Pars. Cont. (5th Ed.) 117; Powell v. Waters, 8 Cow. 669; Wilkie v. Roosevelt, 3 Johns. Cas. 206; Solomons v. Jones, 5 Amer. Dec. 538; Onelda Bank v. Ontario Bank, 21 N. Y. 496, cited by Smith, C. J., in Rountree v. Brinson, 98 N. C. 107, 3 S. E. 747; Callanan v. Shaw, 24 Iowa, 441. When the statute makes a note void, it is void into whosoever hands it may come, but, when the statute merely declares it illegal, the note is good in the hands of an inno-

cent holder. Glenn v. Bank, 70 N. C. 191, 206. Hence, it was argued strenuously that the authorities above cited were good under our former statute, which made the contract void, but that the present statute merely makes the contract illegal. It does not so seem to us. The former statute (Rev. Code, c. 114; Rev. St. c. 117) denounced the contract as void as to the whole debt,—principal and interest. The present statute (Code, § 3836) makes it void, not as to principal, but as to the interest only. It provides that "the taking, receiving, reserving or charging a rate of interest greater than is allowed * * * shall be deemed a forfeiture of the entire interest * * * which has been agreed to be paid," with a further provision that, if such interest has been paid, double the amount can be recovered back by the debtor. The only difference between the two acts is that formerly the whole note was forfeited and of no avail, and now only the stipulation as to the interest is ipso facto deemed forfeited and void. But the point has already been adjudicated by this court. In two cases this court, and by most eminent judges, has expressly held that the words "deemed a forfeiture," in the act of 1876-77, (now Code, § 3836,) make void the agreement as to interest. If any attention is to be paid to the doctrine of stare decisis, the precedents in our own court do not leave this open to debate. In Bank v. Lineberger, 83 N. C. 454, (on page 458,) Ashe, J., quotes this section in full, and says: "The purpose and effect of this statute were not only to make void all agreements for usurious interest, but to give a right of action to recover back double the amount after it has been paid." Dillard, J., in Moore v. Woodward, 83 N. C. 531, (on page 535,) says: "They [the notes there sued on] are both wholly for illegal interest, if the allegations of the answer be true, and, if so, then the sentence of the law is that they are void;" and further says: "The device of taking a distinct bond and mortgage for the interest does not take the case out of the operation of the statute." The opinions of such judges upon a court constituted as the bench then was are surely entitled to be considered the law in this state until changed by legislation. And in Glenn v. Bank, 70 N. C. 191, (bottom of page 205,) Rodman, J., says that "it is admitted law" that "notes vitiated by a usurious or gaming consideration cannot be enforced in the most innocent hands, but are always, and under all circumstances, void." Our own decisions upon our own statute should govern, even though a court of another jurisdiction, upon a somewhat similar statute, had ruled differently. But in fact the case relied on to that effect (Oates v. Bank, 100 U. S. 239) merely holds that the contract, being not void in toto, but only as to the interest "being legal in part and vicious in part, the former will support a contract of indorsement." But here the note is solely for usury,

and, being wholly vicious, this authority is against its validity in the hands of the assignee. In 1 Daniel, Neg. Inst. § 198, it is stated that where the statute provides that when, "in an action brought on a contract for payment of money, it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest so taken, it was held to apply to the innocent indorsee of a note, who received it in due course of trade; and, as a general rule, all contracts founded on considerations which embrace an act which the law prohibits under a penalty are void;" citing *Kendall v. Robertson*, 12 Cush. 156; *Woods v. Armstrong*, 54 Ala. 150. In *Kendall v. Robertson* the Massachusetts law had undergone a change similar to ours, and Shaw, C. J., says: "The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee. The natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the legislation to extend such partial forfeiture in like manner, and attach it, as before, to the note, although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same,—to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequence to the contract itself, whenever set up as a proof of a debt." And at the last term of this court (*Moore v. Beaman*, 112 N. C. 558, 16 S. E. 177,) it is said: "The contract, usury being pleaded, is simply a loan of money which in law bore no interest." The note for the usurious interest being in the hands of an assignee, he, and not the maker, must suffer. The law regards the maker, not as in *pari delicto* with the payee, but as the victim of an oppression which the law has denounced and prohibits under penalty. *Bank v. Lutterloh*, 81 N. C. 142. If, by passing the note off before maturity and for value, the indorsee may recover on it, the statute is useless, as the protection intended, and the penalty and prohibition, are alike rendered nugatory. The victim would have no recourse but to suffer in silence. The usury would be collected in spite of the law, which had declared the "entire interest forfeited" *ab initio*, by the fact of "charging or reserving" it. On the other hand, the innocent indorsee has his recourse upon the payee who has indorsed the note to him, (1 Daniel, Neg. Inst. § 807;) a recourse which would more surely protect him, being against the party who has money to loan, not to borrow. At any rate, the fact that the indorsee's sole remedy as to the interest is against the payee and indorser, not against the maker, will cause such lenders to be more chary of shoudering off upon innocent parties the collection of their usurious contracts.

The only case in our Reports that seems mitigate against the otherwise uniform

tenor of our decisions on this subject is *Coor v. Spicer*, 65 N. C. 401, which held that a mortgage given to secure a usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the statute. Rev. Code, c. 50, § 5, (now Code, § 1549.) Aside from the fact that this is held expressly otherwise in the later case of *Moore v. Woodward*, 83 N. C. 531, an examination of section 1549 will show that *Coor v. Spicer* was a palpable inadvertence. The statute cited (Code, § 1549) in fact does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at sale under the mortgage, who buys without notice of the usurious taint in the debt secured. It would be a fraud for the mortgagor to stand by and let him purchase without giving him notice, but the maker can give no notice, usually, to the assignee of the note. There is a broad distinction, which runs through all the cases everywhere, between contracts upon an illegal consideration, as to which, the parties being in *pari delicto*, the courts will aid neither party, but will protect the note in the hands of a holder for value without notice, and a contract which, in whole or in part, is declared void or forfeited in its inception, which can acquire no validity by being passed on to other hands. *Henderson v. Shannon*, 1 Dev. 147; *Glenn v. Bank*, *supra*. As to usurious contracts, the law regards the maker, not as in *pari delicto*, but as acting "in chains," (1 Story, Eq. Jur. § 302;) and to permit his contract which is deemed exacted under duress to come under the general rule in favor of innocent holders for value of commercial paper would be to nullify the protecting statute. The recourse of the holder is against the payee and indorser, who is more likely, by far, to be able to respond than the maker. The statute makes the "taking, receiving, reserving or charging usury when knowingly done," i. e. intentionally done, and not by a mere error of calculation, a forfeiture (not merely forfeitable) of the entire interest which the note carries with it, "or which has been agreed to be paid thereon." The note in this case falls exactly within the evil denounced in the last clause. It is a written promise to pay the usury reserved or charged on the note, and such charging or reserving is *ipso facto* a forfeiture, which attaches either by the taking, receiving, reserving, or charging, as the lawmakers evidently intended to prevent and head off all casulstry, for which this class of law breakers have in all times been specially noted, and to carry out the legislative intent of bona fide protecting the public, not nominally, but in fact, from evasions of this law. But if, in truth, the forfeiture was limited to the "knowingly receiving," the holder of this note certainly knows now, and doubtless did before suit brought,

that this note was given for usury "agreed to be paid," and his receiving it would eo instanti work a forfeiture. Besides, if the maker should have voluntarily paid this note, the receiver of such payment knowing it was for usury, the statute gives the person "by whom it was paid, or his legal representative," an action to recover back twice the amount. Cui bono, then, shall the debtor be compelled by law to pay the usurious note, when instantly he can recover back double the sum of the party to whom he pays it, as a punishment for knowingly receiving it? Such multiplicity of actions was not tolerated under the old practice, and certainly will not be under the present simpler and more practical system of procedure. *Bank v. Lutterloh*, 81 N. C. 142, was decided under the act of 1866, and, to cure the defect in that act, the wording of the present statute is made explicit, and gives the action to recover back. Under the act of 1866 there was no forfeiture, as now, but simply interest could not be collected, while the "charging, reserving," etc., is now a forfeiture of the contract as to all interest ab initio. The recovery of double the sum paid is necessarily from the party to whom it is paid, for the language is "may recover back" double the sum paid, which can only be from the party receiving the money. With the policy of the lawmaking power the courts have nothing to do, further than as it may throw light upon the meaning of the statute by considering the evil to be remedied. That is thus considered by Taylor, C. J., in *Ruffin v. Armstrong*, 9 N. C. 411, 416: "It is not less important now than it was then to restrain the power of amassing wealth without industry, and to prevent those who possess money from sitting idle and fattening on the toil of others; it is not less important to prevent those who desire profit from their money without hazard from receiving larger gain than those who employ it in undertakings attended with risk, calculated to encourage industry, and to multiply the sources of public prosperity; nor is it less important to facilitate the means of procuring money on reasonable terms, and thereby to render the lending of it more extensively beneficial." In a matter so capable of oppression as the lending of money, the legislature has deemed it wise to regulate the limit of what is a reasonable exaction for its use, since all interest is the creation of statute. *Moore v. Beaman*, supra. As to lenders upon a lawful rate of interest, the legislature has looked upon them with a favorable eye, and of late years has raised the limit from 6 to 8 per cent. But there is nothing in the action of the legislature, nor in the circumstances of the day, which indicates that this is a propitious time to relax the restrictions placed heretofore upon the illegal exactions of those who would use their money contrary to law, and yet call upon the law to aid them, directly or indirectly, to secure their unlawful gains. Error.

BURWELL, J., (dissenting.) I cannot agree to the conclusion of the court, and deem it proper to give the grounds of my dissent. By the terms of the statute which was in force in this state before the act of 1866, all contracts founded upon a usurious consideration were declared to be void, and, according to all the authorities, promissory notes thus expressly avoided are void in the hands of indorsees for value without notice. By the act of 1866 the legal rate was fixed at 6 per cent., with a proviso allowing 8 per cent. to be charged for money loaned, if the contract was in writing, and signed by the party to be charged; and it was therein enacted that, if a greater than the legal rate was charged, the interest should not be recoverable. This law, as was said by Justice Dillard in *Bank v. Lutterloh*, 81 N. C. 144, introduced a new theory. It was an expression of the popular will. It did not declare the contract void in whole or in part. It did declare that the contract, so far as it related to interest, was not enforceable in the courts,—that it could not be collected by law,—and in effect it enacted that so much of the contract as concerned the rate of interest was void, the word "void" being used here as it is in *Moore v. Woodward*, 83 N. C. 531. Speaking accurately, the contract for interest in excess of the legal rate was made by that act, not void, but illegal. This act remained in force until 1875, when the legislature adopted a law which distinctly declared "void" all contracts, both as to principal and interest, if a greater than the legal rate was charged. When this statute went into effect, what are called "usurious contracts," and all notes, bonds, etc., founded on such contracts, were not only illegal, but void. At January term, 1874, of this court, the case of *Glenn v. Bank* was decided, (70 N. C. 191,) and Justice Rodman said, in his opinion filed in that cause: "If the statute declares a security void, it is void in whosoever hands it may come. If, however, a negotiable security be founded on an illegal consideration, (and it is immaterial whether it be illegal at common law or by statute,) and no statute says it shall be void, the security is good in the hands of an innocent holder, or of one claiming through such a holder. The case of *Hay v. Ayling*, 16 Adol. & E. (N. S.) 423, is a notable illustration of the difference. Gaming securities were declared void by 9 Anne, c. 14, § 1, and it was held that they were void in the hands of a bona fide, innocent indorsee. The act of 5 & 6 Wm. IV., c. 41, § 1, modified the act of Anne, and declared they should be illegal. The court held that after that act they could be recovered on by an innocent holder." It is to be presumed that the act of 1874-75, enacted, as it was, one year after that announcement of the rule of law, was framed by men acquainted with that decision, and that it was then provided that all usurious contracts should be void in order that they

might be invalid in whosoever hands they might come. In 1876-77 another change was made in the law, and the statute then enacted is in force at this time. That act nowhere, in totidem verbis, declares void a contract for interest in excess of the legal rate. It is to be presumed that this enactment was also framed in distinct recognition of the rule laid down by the learned justice in *Glenn v. Bank*, supra, and I think much significance is to be attached to the fact that, with this rule thus brought to its attention, the legislature repealed a law which declared all such contracts void, and adopted one which omitted to so declare them. And here it may be well to note the often inaccurate, or rather misleading, use of the word "void," in statutes and reports. *Parker, C. J.*, in *Somes v. Brewer*, 2 Pick. 184, says, of the words, "void and voidable," that they "have not always been used with nice discrimination; indeed, in some books there is a great want of precision in the use of them;" and he adds that, for the purposes of the case he was considering, "the term 'void' will be used to express that which is in its very creation wholly without effect,—an absolute nullity." In *Baucom v. Smith*, 66 N. C. 538, *Pearson, C. J.*, said of the bond there in suit that it "was void in the hands of the obligee for the illegality of consideration;" and then he adds: "Had the bond been assigned before it was due, the assignee for valuable consideration, and without notice, could have maintained an action to enforce payment. This is settled. *Henderson v. Shannon*, 1 Dev. 147." Numerous instances of this use of the word "void" could easily be cited from our Reports. Justice Reade makes similar use of the word in *Ooor v. Spicer*, 65 N. C. 401. What he there says may well be quoted here: "Except as otherwise provided by statute, a negotiable instrument, void as between the original parties by reason of any illegality in the consideration, was nevertheless good in the hands of an indorsee for value and without notice."

If it be said that the effect of the provision of the act of 1876-77 is to make void all contracts entered into contrary to its provisions, it is to be replied that, in the interest of commerce and trade, bona fide purchasers of commercial paper are favorites of the modern law of every enlightened nation, and, at this day at least, it is not allowable to destroy, by an inference, negotiable instruments in the hands of such purchasers. The rule is, as I understand, that if the maker of a negotiable note contests the right of one who has acquired it by indorsement for value, before maturity and without notice of any defense, to recover of him the amount of the note, he must be able to show a statute that in totidem verbis declares the note to be void, or one that makes the contract illegal, and, expressly or by necessary implication, declares that this illegality shall avoid

the contract and all securities given in fulfillment of such illegal contract into whosoever hands they may come, and thus render them unenforceable in the courts. *Story, Prom. Notes*, § 192; *Converse v. Foster*, 32 Vt. 828. In sections 807 and 808 of *Daniel on Negotiable Instruments* it is said that, "in many localities, negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations,—that is, void between the parties, but valid in the hands of a bona fide holder;" and that "where the instrument was executed upon an illegal consideration, especially if illegal by statute, (but not absolutely avoiding the instrument,) it throws upon the holder the burden of proving bona fide ownership for value; * * * and in all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover." The reason of this rule is well stated in *Bank v. Prather*, 12 Ohio St. 497, as follows: "The cardinal principle of the commercial law which protects commercial paper regular upon its face, and negotiated before its maturity, cannot be otherwise vindicated; and this is of much more importance than that one who has received the benefits of the paper should be compelled to perform an engagement which he voluntarily made." In *Converse v. Foster*, supra, the rule, as I conceive it to be, is thus expressed by *Poland, J.*: "The English statutes against usury and gaming not only impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds, and other securities given for such illegal consideration shall be utterly void. All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between the statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff, or some other party between him and the defendant, took the bill or note bona fide, and gave a valuable consideration for it; but, unless it has been so expressly declared by the legislature, illegality of consideration will be no defense in an action at the suit of a bona fide holder for value, without notice of the illegality." A recognition of the principle thus well expressed may be seen, I think, in the chapters of the Revised Code that relate to usury and gaming, and in the act of 1874-75, above referred to. In *Moore v. Woodward*, supra, the learned justice who delivered the opinion says: "Under our present statute, while the contract is valid as to the principal, a stipulation for usurious interest, secured by a separate bond and mortgage therefor, ought, as between the parties at least, on plea of the illegality, to bar the direct collection of the same by an action

therefor." In a former part of the opinion he had remarked that, under the provision of the Revised Code, a usurious contract was void, "in whosoever hands it might come." His subsequent statement, quoted above, seems to indicate that he thought that contracts made in contravention of the provision of the present law, which he was discussing, were illegal, and were void as between the parties, but, being only illegal, were not void in whosoever hands they might come; evidently having in mind the rule laid down by Justice Rodman in *Glenn v. Bank*, supra. The act of 1876-77, (Code, § 3836,) which we are construing, is in all essential particulars copied from the national banking act, (Rev. St. § 5198.) The words are almost identical. The forfeitures and penalties are the same. The supreme court of the United States has held, in *Oates v. Bank*, 100 U. S. 239, that that act "does not declare the contract, under which the usurious interest is paid, to be void;" and it is to be noted that this language is used by that court in drawing a contrast between the act it was construing and the law of Maryland, which did declare all usurious contracts void, and therefore not enforceable, even in the hands of bona fide indorsees. We therefore have an adjudication of the point under discussion from the highest court. In conclusion, our statute does not expressly make void notes given for a usurious consideration. It is not a necessary inference from its provisions that the legislature intended they should be so. I think, therefore, that, though the note here in suit is founded upon an illegal consideration, it is recoverable in the hands of a bona fide holder for value and without notice.

DICKEL v. SMITH et al.

Supreme Court of Appeals of West Virginia.
Dec. 11, 1893.)

CHARGES ON MARRIED WOMAN'S ESTATE DURING INSANITY—VALIDITY OF JUDICIAL SALE—RIGHTS OF PURCHASER.

1. The real estate of an insane married woman during her coverture and insanity can be charged with indebtedness only to the same extent as if she were not insane, and neither her committee nor a court of equity can subject the corpus of such real estate to debts or claims with which it would not be chargeable if she were sane.

2. If the committee of an insane married woman file his petition under section 44, c. 58, of the Code of 1868, for the purpose of selling, and sell, her real estate for debts with which it is not chargeable, he is guilty of constructive fraud against her estate, and all the proceedings of the court in relation thereto are void for want of jurisdiction of the subject-matter.

3. A purchaser of such property under such void decrees, being a party to the petition, will be presumed to have full knowledge of the fraud vitiating his title, and he will be held to be a trustee of such property for the benefit of such insane married woman.

Brannon, J., dissenting.

(Syllabus by the Court.)

v.18s.e.no.16—46

Appeal from circuit court, Wood county; A. I. Boreman, Judge.

Action by Hubert F. Dickel, committee of Della Doer, an insane person, against W. H. Smith, Jr., and others to remove a cloud on title. From a decree dismissing the bill as to defendant Smith and those claiming under him, plaintiff appeals. Reversed.

W. N. Miller and John A. Hutchinson, for appellant. Merrick & Smith and Van Winkle & Ambler, for appellees.

DENT, J. The facts in this case are as follows, to wit: On the 1st day of October, 1874, Adam Hettick, now deceased, was appointed a committee to manage the estate of Della Doer, an insane married woman confined in the asylum. She had no personal property, but the only property owned by her was the reversion of a certain house and lot on Third street, in the city of Parkersburg, in which her husband, Anton Doer, held a life estate, and was therefore entitled to the rents and profits thereof, and liable for the necessary repairs and taxes due thereon. Adam Hettick took possession of this property, and collected and disbursed the rents for a number of years. In the mean time the life estate was sold under a deed of trust executed by Anton Doer, and W. H. Smith, Jr., one of the appellees, became its purchaser. Hettick still retaining possession, the purchaser brought suit in ejectment against him, and on the 2d day of January, 1882, recovered the possession and \$155.20 damages. On the 11th day of April, 1882, said Hettick, as such committee, under section 43, c. 58, of the Code of 1868, filed his petition in the circuit court of Wood county, asking for a sale of the reversion of said property to pay alleged indebtedness of said Della Doer, she still being insane. The indebtedness set out in said petition was as follows, to wit: Balance due petitioner on settlement, \$46; amount due petitioner, \$50; amount due petitioner for services, \$350; judgment of W. H. Smith, Jr., \$155.20. W. H. Smith, Jr., was made a party to this petition. On the 17th day of April, 1882, R. H. Smith was appointed guardian ad litem for Della A. Doer, and filed his answer, and the court referred the case to Kinnard Snodgrass, one of its commissioners. He made his report, and on the 16th day of May, 1882, the court entered a decree confirming said report, and allowing against the estate of the insane defendant the following debts: Adam Hettick, committee, \$46.37; M. P. Amiss, executor of William Spencer, deceased, \$46; Adam Hettick, committee, \$10.50; L. P. Neal, \$5; Thomas Murphy, \$6.15; G. L. Later, \$2.50; Joseph Sefferts, \$7; Phillip Dollinger, \$5.25; W. H. Smith, Jr., judgment, \$155.20, and costs, \$36.85; A. Hettick, services as committee, \$150.00,—and ordered a sale of the reversion to pay said debts, appointing said Het-

tick commissioner to make the sale. On the 10th day of July, 1882, the commissioner sold said property in accordance with said decree, and said W. H. Smith, Jr., became the purchaser for the sum of \$525. On the 14th day of July, 1882, the circuit court entered a decree confirming said sale, and ordering distribution of the purchase money on the debts decreed. No notice of the fact that Delia Doer was a married woman, except incidentally, is taken in said proceedings. Some time in 1890, Adam Hettick died, and Hubert F. Dickel, appellant, was appointed to succeed him as committee of Delia Doer. On the 10th day of March, 1890, Anton Doer died, and shortly afterwards said Dickel, as such committee, brought an ejectment suit against W. H. Smith, Jr., and his tenants, to recover possession of said property for Delia A. Doer; and also filed the bill in this cause, setting out all the facts aforesaid, to which he made Louisa Hettick, administratrix with the will annexed of Adam Hettick, deceased, a defendant, and prayed, among other things, that the cloud on the title by reason of the decrees aforesaid, and the deed made in accordance therewith, might be removed, and for general relief. W. H. Smith, Jr., filed his answer to said bill, admitting substantially the facts contained therein, but claiming that the decrees under the petition of Hettick were valid and binding, and that therefore his deed for said property was good, and could not now be disturbed, by reason of section 18, c. 83, of the Code. Louisa Hettick, administratrix of Adam Hettick, answered to the same effect. Some depositions were taken, but are not material to the determination of this case. On the 1st day of September, 1892, the circuit court of Wood county dismissed the bill as to W. H. Smith, Jr., and his tenants, M. L. & M. A. Jones. From this decree, this appeal was allowed.

The law of this state at the time of all these proceedings was that the corpus of the real estate of a married woman could only be affected or charged by a vendor's lien when reserved, or by a conveyance or specific lien created by deed in which her husband has united with her, and which she executed after privity examination. "The common-law disability of a married woman to contract a debt effectually protects all her lands from liability." "The real estate not being her separate property, all her common-law disabilities with regard thereto are in full force and effect." *Radford v. Carwile*, 13 W. Va. 683; *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 794, 15 S. E. 997. The fact that she has become insane does not change the law as to the corpus of her real estate, nor as to the possession and control and sale of real estate not her separate property, and it cannot be subjected by a court of equity, acting under section 43, c. 58, of the Code of 1868, to any other debts than those to which it would have been liable in case she would

have been sane. Insanity cannot create a liability on real estate, nor destroy coverture, nor abrogate the marital rights of a husband. This being the real estate of a married woman, not her separate property, her husband was entitled to the full control and possession thereof during coverture, notwithstanding her insanity, and her committee was neither entitled to the possession or control thereof, nor the right to file a petition to sell the same, any more than he would have the right to file a petition to sell some one else's property to pay her debts. Courts of law have no jurisdiction to render judgment against a married woman. Such judgments are absolutely void. *Tavener v. Barrett*, 21 W. Va. 685; *White v. Manufacturing Co.*, 29 W. Va. 385, 1 S. E. 572. Equity follows the law herein, except as to her separate property, and then the proceedings are in rem. *Pickens' Ex'rs v. Kniseley*, 36 W. Va. 799, 15 S. E. 997. Courts of equity will not entertain jurisdiction to collect debts against a married woman unless there is a plain intention to bind her separate property. 1 Story, Eq. Jur. § 243, and 2 Story, Eq. Jur. § 1397. Mrs. Doer, so far as the petition shows, did not contract any debts herself, nor does the law permit her committee to do so on her account. The statute was not designed to change the legal status of a married woman. Hence, these debts, while they might have been good as against her husband, were mere nullities as to her. The law is that the committee could sell real estate to pay her debts. She had no debts, and the petition shows this fact clearly and plainly. It is not a question of doubt, because it is made certain by the plain provisions of the law. The law says the committee may petition for the sale of her real estate; but she had no separate estate, and her existence was merged into that of her husband, so that there was no real estate for the committee to ask to be sold. Being a void debt against an estate or thing not recognized either at law or in equity, following the analogy of the judgments heretofore referred to, the conclusion is unerringly reached that the proceedings and decrees are void, and that the circuit court was without jurisdiction to entertain such petition, and grant the relief prayed; and, had the court's attention been directed to the matter, it would, no doubt, have promptly refused the relief. But the insane woman had no friend at court.

In the commissioner's report and the decree there is included a small debt of \$46, balance due P. Amiss, executor of William Spencer, deceased, on a deed of trust executed by Anton Doer and Delia Doer; but it is not shown, or even alleged, on what property the trust was, or whether the debt was the husband's or the wife's, and the husband was not a party to the proceedings, as he should have been if the proceedings were authorized by law. This debt was a charge

against, and should have been paid out of, the rents received by Adam Hettick.

In addition to the want of jurisdiction, however, it is plain to be seen that the debts set out in Adam Hettick's petition were not only not debts against the corpus of her real estate, but were not debts against her estate in any event, with probably the small exception of the balance on the trust debt. The committee did nothing for her that entitled him to compensation out of her husband's estate. He took charge of and managed her husband's estate. With this she had nothing to do. The charges for repairs and taxes should have been paid out of the rents. Her husband was liable for her support and the support of her children, and her estate was not. The judgment of W. H. Smith, Jr., was in no sense a charge against her estate. It has been said that "fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 Story, Eq. Jur. § 187. In this case this committee, Adam Hettick, though he may have been acting innocently, yet he was guilty of perpetrating fraud, in the sense of a court of equity, in that he instituted proceedings, and subjected estate over which he has no charge to the payment of illegal claims against the same. The law presumes that he was fully informed as to what his legal rights and duties were, and that, in acting contrary thereto, he did so knowingly, and must be held liable for all the consequences of his illegal acts, as "ignorance of law excuseth no one." The decrees, therefore, for the sale and confirmation of Mrs. Doer's real estate, having been obtained by fraud of a tribunal without jurisdiction of the subject-matter, are void.

W. H. Smith, Jr., having been a party to these fraudulent proceedings, and being fully cognizant of the debts allowed, and the beneficiary of the fraud, cannot be held free from guilt, although he may have acted from pure motives, and been entirely ignorant of the law, as this is no excuse. "Property obtained by one through the fraudulent practices of a third person will be held under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion. If such person accepts the property, he adopts the means by which it was procured; or, as Lord Chief Justice Wilmut said, 'Let the hand receiving the gift be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it.' This principle, of course, cannot prevail against a purchaser in good faith for a valuable consideration, and without notice of any fraudulent influence." Perry, Trusts, § 211. W. H. Smith, Jr., being a party to the proceedings, had knowledge of all the facts vitiating the com-

mittee's right to have a sale of the property, and is presumed to know the law, although his lawyers and the courts may be ignorant thereof. He therefore must be held to be a trustee of said property for the benefit of Mrs. Doer, and as such he must account according to the rules of law and equity. It is very plain, then, that Mrs. Doer, if she had recovered her sanity, her coverture being removed, would have the right to maintain this suit to annul the fraudulent and void decrees and deed, and for a restoration of her property; nor would she be barred from so doing by section 18, c. 83, of the Code, because there are errors in the proceedings affecting the very right of the case. *Hull v. Hull*, 26 W. Va. 1. Her committee, under the statute, is charged with the duty of preserving her estate, and granted the privilege of suing in relation thereto, and, her husband being now dead, her common-law disability is removed. The conclusion, therefore, is inevitable, that it was not only his right, but his duty, to institute these proceedings to obtain the possession of, and care for and preserve, said estate. This may appear a harsh determination as to W. H. Smith, Jr., but it is the result of the unfailing rigors of a broken law, whether through ignorance or willfulness, which the court can neither obviate nor modify, whatever may be their sympathies, or however harshly they bear on defeated litigants. For the reasons aforesaid, the decree complained of is reversed, the decrees of sale and confirmation entered on the 16th day of May, 1882, and the 14th day of July, 1882, and the deed made by Adam Hettick, commissioner, to W. H. Smith, Jr., in pursuance thereof, are vacated and annulled, and this cause is remanded to the circuit court to be further proceeded in according to the rules of law and equity.

BRANNON, J., (dissenting.) I make this short note to say that I am not satisfied of the correctness of the decision in this case. I do not realize how it can be said that the decree of the circuit court selling the land of the lunatic was void for want of jurisdiction. Under section 42, c. 58, Code 1868, the court had jurisdiction of such a proceeding. The lunatic was served with process, and a guardian ad litem was appointed for her, as might be done in any suit or proceeding under section 13, c. 125, of the same Code, and he filed his answer. Thus, the court had jurisdiction of the person of the defendants, and of the subject-matter,—the sale of an insane person's land; and, this being so, how can we say, in a collateral proceeding, that its action is utterly void for want of jurisdiction? That the lunatic was a married woman is not material, as the section is as applicable to the sale of a married woman's land, for the causes in it specified, as if not married. Of course, a debt sought to be asserted as an

incident in the proceeding ought not to be decreed further than it bound the estate of the lunatic; but the jurisdiction does not depend on the validity of the debt. The bill was filed to sell the land because the personal estate and rents and profits of the real estate, after the payment of debts, were insufficient to maintain the lunatic, and the debts come in, not as the sole ground of jurisdiction, but as a mere incident, as the statute required the committee to state them. This provision is made for the benefit of creditors. The fact that a debt not binding the corpus of the married lunatic's realty is involved does not oust the court's jurisdiction of the subject, for that is based on the necessity of a sale to maintain the lunatic. I assert that under that statute an insane feme covert's property could be sold, out and out, and the decree of an improper debt does not divest the court of jurisdiction of the subject-matter. Unquestionably, this suit is a collateral proceeding, in the eye of the law. It is not an appellate proceeding. True, its direct object and effect are to annul the decree; but it is none the less collateral. Black, Judgm. § 252. If there was error in law, it was to be corrected by bill of review or appeal, not by a new bill; and an original bill is collateral. I care not that it was a statutory proceeding. The proceeding was according to the statute, and, when this is the case, the general principles of jurisdiction govern. The Hull Case, 28 W. Va. 1, is different. There the widow could under no circumstances file a bill to sell land. *Pulaski Co. v. Stuart*, 28 Gr. 872; 1 Black, Judgm. § 279; *Cochran v. Van Sur- lay*, 32 Amer. Dec. 570. Nor can I see how we can set aside the decree because procured by fraud. Can it be that, because the committee set up debts which in law did not bind the corpus of the estate, it is fraud sufficient to avoid the decree? The very letter of the statute commanded the committee to state the debts against the lunatic. Did he violate law in stating debts merely because they did not, in law, bind the land? He may have thought they did. Does his mistake of law, upon a complicated question of law, convict him of fraud? He and the creditors submitted the debts to the judicial determination of a court of the country, and because mistaken, or rather because the court was mistaken, and decreed debts against the land which did not, in law, bind it, the whole adjudication is fraudulent, and must be annulled. Error in the court it was, we may concede, to be rendered in that proceeding by bill of review or appeal; but it does not show such a fraudulent procurement of the decree as to avoid it, and hurts, not the committee, but the purchaser under that decree, by annulling it for fraud. The fraud consisted in nothing more than error of law in the court. Under this doctrine, how many decrees would be annulled, and titles set aside? Neither of these parties procured the

decree by perjury, duress, or other act such as to avoid the decree. In *Evans v. Taylor*, 28 W. Va. 185, held that the simple fact that a party sued on a false claim—one even which he knows had been adjudged invalid—is not such fraud as entitles him to enjoin the suit. Suing on a false claim is no fraud. What was done was open, in a court of the country, under the color and form of law. However hurtful to the estate of the insane person it may be, I would regard it as many other cases must be; a hard case, it may be, but one done under color of due and orderly proceedings in a public court having jurisdiction, and therefore sheltered under a principle essential to the safety of the highest rights and welfare of person and property. If the decree had been reversed on appeal, the title of the purchaser, he being a creditor and party, might have fallen; but the point I make is that no original bill can be maintained to annul the decree as void. *Hall v. Hall*, 12 W. Va. 1; 1 Black, Judgm. §§ 170, 244, 261, 269.

ANDERSON v. DOOLITTLE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 9, 1893.)

DEFAULT JUDGMENT—PRACTICE—PLEADINGS—VARIANCE BETWEEN WRIT AND DECLARATION—HOW QUESTIONED.

1. Where the clerk improperly enters an order for a writ of inquiry in an action for debt, at rules, the court may correct the mistake, or disregard the same, and enter judgment as though no such order had been entered.

2. An amendable variance between the writ and declaration can only be taken advantage of by plea in abatement, and not on motion to correct the judgment after it has become final.

3. A judgment will be presumed to be right, unless error affirmatively appear on the face of the record.

4. It is not necessary to make the facts proven, nor the evidence, a part of the record, in case of a judgment by default.

5. If any part of the evidence is referred to in the preamble to the judgment, this, of itself, is insufficient to preclude the fact that other evidence might have been heard by the court, unless it affirmatively appear from the record that this was all the evidence heard by the court.

(Syllabus by the Court.)

Error to circuit court, Cabell county; Thomas H. Harvey, Judge.

Action by Joseph Anderson against E. S. Doolittle and others. Plaintiff had judgment, and, their motion to set aside the same having been overruled, defendants brings error. Affirmed.

John B. Laidley and E. S. Doolittle, for plaintiffs in error. Gunn Switzer, for defendant in error.

DENT, J. On the 9th day of May, 1892, E. S. Doolittle, F. L. Doolittle, and C. Molter, after notice given, moved the judge of the circuit court of Cabell county to set aside a

judgment by default rendered by said court in favor of Joseph Anderson, and against them, for the sum of \$636.27 and costs, in a certain action of debt in said court pending. The judge entered a vacation order overruling said motion, and the defendants in said action obtained a writ of error, and rely on the following assignments of error: "(1) The writ of inquiry awarded at March rules, 1892, in said action, was never executed in the manner required by law. (2) There is a variance between the writ and the declaration. The declaration demands two distinct debts, for which judgment was rendered, while the writ demands one only. (3) The plaintiff did not file with his declaration, or in open court, and before the entry of the judgment, the affidavit prescribed in such cases by section 46 of chapter 125 of the Code of West Virginia, nor did he prove his case in open court. Therefore, the circuit court had no jurisdiction to render the judgment entered in said action on the 24th day of March, 1892."

The first assignment is a mere clerical error. Section 45, c. 125, provides that "there need be no such inquiry in an action of debt;" and section 60 of the same chapter provides that "the court shall have control over all proceedings in the office during the preceding vacation. It may reinstate any cause discontinued during such vacation, set aside any of the proceedings or correct any mistake therein and make such order concerning same as may be just." In this case, entering up the judgment in court, and disregarding the writ of inquiry, was a sufficient correction of the mistake.

As to the second assignment of error, the defendants are barred from relying upon it by section 15, c. 125, of the Code, which provides: "In other cases, the defendant on whom the process summoning him to answer appears to have been served, shall not take advantage of any defect in the writ or return, or any variance in the writ from the declaration unless the same be pleaded in abatement. And in every such case the court may permit the plaintiff to amend the writ or declaration so as to correct the variance and permit the return to be amended upon such terms as to it shall seem just." The court, after judgment by default on a motion to correct, will only look to see if the defendants have been properly served with summons, and, if so, it will not look to the writ to see whether there is any variance between it and the declaration, except to see whether it is such a variance as might have been the subject of amendment if a plea in abatement thereof had been filed in proper time, because it is too late to take advantage of such variance, and the defendants, by their silence, have forever precluded themselves from doing so. To hold otherwise would allow pleas in abatement to be filed after a final judgment. *Beckwith v. Molloy*, 2 W.

Va. 477; *Hinton v. Ballard*, 3 W. Va. 582; *Roderick v. Railroad Co.*, 7 W. Va. 54.

The third assignment is founded on the claim that plaintiff did not "prove his case in open court," as required in section 46, c. 125, of the Code. The defendants insist that the judgment of the court must show that this was done, and that the present judgment, on its face, negatives the fact of any proof having been introduced, other than the note. All that is required of the plaintiff is to show to the court sufficient evidence to satisfy it that he is entitled to judgment. It is not necessary to set out such evidence in the judgment, or even to mention it, as it will be presumed that the case was properly proven, unless the contrary appears. The only reference to any evidence is that the judgment recites: "It further appearing to the court from the note sued on in this cause that there is now due from the defendants, E. S. and F. L. Doolittle and C. Molter, to the plaintiff, the sum of \$636.27, including principal and interest to date." Then follows the judgment. This recital is not sufficient to negative the fact that there may have been other evidence before the court, and it only seems to have been made to fix the amount for which the judgment should be rendered. Neither did the defendants, in their motion to set aside and correct the judgment, ask the judge to certify that this note was all the evidence that was before him when the judgment was rendered. The notice of protest does appear to have been before the court, both by the defendants' bill of exceptions and the first judgment rendered and set aside, and yet is omitted from the printed record. Section 8, c. 99, of the Code, makes the notice of protest *prima facie* evidence of all that is therein contained. Hence, taken together with the note, it sufficiently proves plaintiff's case, in the absence of any plea denying it. Nor was plaintiff called upon to prove, negatively, that the defendants had no proper offsets and counterclaims or other defenses to the note sued on. The defendants were summoned, and, if they had any such, they should have presented them, and the fact that they did not do so presumptively establishes the nonexistence of any such defenses. The object of the affidavit required by section 46, c. 125, of the Code, was to prove plaintiff's case, and at the same time prevent defendant pleading that he had any credit, payments, or set-offs, unless he made a counteraffidavit; and therefore, in making such affidavit, it is necessary to strictly follow the language and requirements of the statute. But, when no such affidavit is filed or relied on, the proof need only be in accordance with the rules of the common law. *Vinson v. Railway Co.*, 37 W. Va. 598, 16 S. E. 802. In the case of *Ramsburg v. Erb*, 16 W. Va. 777, the court holds: "Where the judgment of and action of the court below is definite, and intelligibly presented in the rec-

ord, and does not appear from the record to be wrong, it is presumed to be right." This judgment fully complies with this rule, and should be and is affirmed, with damages and costs, according to law.

ANDERSON v. DOOLITTLE et al.

(Supreme Court of Appeals of West Virginia.
Dec. 9, 1893.)

DEFAULT JUDGMENT—DEFECTIVE SERVICE OF
PROCESS—WAIVER OF DEFECTS—AMENDING RE-
TURN.

1. Upon a motion to reverse a judgment by default for defective service of process on a sheriff by his deputy, the defendant, who was sheriff, says he wishes to take no advantage of such return, if defective. Though he is a plaintiff in the motion to reverse, this is a waiver or retraxit of the motion, and a release of error as to him; and, as he alone is prejudiced by the alleged defect, it is no ground for reversal as to any of the defendants.

2. It is proper, on the hearing of a motion to reverse a judgment by default for defective return of the summons in the action, to allow the sheriff to amend his return, and then overrule the motion to reverse, if the amended return be good. The amended return relates back, and takes the place of the original, defective one.

(Syllabus by the Court.)

Error to circuit court Cabell county; Thomas H. Harvey, Judge.

Action by Joseph Anderson against E. S. Doolittle and others. Plaintiff had judgment by default, and a motion to vacate the same was denied. Defendants bring error. Affirmed.

John B. Laidley and E. S. Doolittle, for plaintiffs in error. Gunn & Switzer, for defendant in error.

BRANNON, J. Anderson having recovered a judgment by default in an action of debt against E. S. Doolittle, F. L. Doolittle, and E. Kyle, the judgment debtors moved the judge of the circuit court of Cabell county to reverse it for certain alleged errors, and, the judge having refused to do so, they brought this writ of error.

The first point of assigned error is that the service of the writ upon Kyle in the action in which the judgment was rendered was irregular, in that the return of service shows that it was served on Kyle by his deputy,—Kyle being sheriff,—as the deputy cannot serve on his principal; section 1, c. 41, Code, providing that the county court shall designate some one to serve process, where the sheriff is a party. It is unnecessary to pass upon that question, as, on the motion to reverse the judgment, Kyle appeared, and said he desired to take no advantage of the service of process on him, if defective. This is a waiver or release of error by Kyle, and a withdrawal as to him of the motion to reverse, he being the only party prejudiced by the defect. It is acceptance of service of the

summons, and relates back to the original service. Moreover, Stewart, the deputy, made an affidavit that he served the summons as an individual, which was filed as an amendment to his return by leave of court on the motion to reverse, which was proper. In *Capehart v. Cunningham*, 12 W. Va. 750, it was held that even upon the hearing of a motion to reverse the judgment for defective service of process, like this motion, the sheriff will be permitted to amend his return, and the amended return relates back to, and takes the place of, the original return. So there is no ground of reversal for that cause.

The other errors assigned are that there was a variance between writ and declaration, and that the plaintiff did not file with his declaration, or in court, before judgment, the affidavit prescribed by section 46, c. 125, Code. These points are the same as involved in the case of *Anderson v. Doolittle*, 18 S. E. 724, (decided this term,) and I refer to the opinion by Judge Dent for reasons for holding them insufficient to reverse the judgment. Affirmed.

STEWART v. STOUT et al.

(Supreme Court of Appeals of West Virginia.
Nov. 11, 1893.)

WIFE'S SEPARATE PROPERTY—WHEAT CONSTITUTES.

1. Where a conveyance of real estate is made to a married woman by a person other than her husband, and the purchase money therefor is paid by the wife, partly out of money earned by her by keeping a boarding house, with the consent of her husband, he taking no part in said business, and furnishing none of the means to carry it on, partly by money realized by her by releasing a contract which she had made with another party, and partly with money borrowed on her own individual note, she is entitled, under the statute, to hold the same to her sole and separate use, free from the disposal of her husband, and not liable for his debts.

2. Property purchased by a married woman from a person other than her husband is her separate property, although purchased on credit, and paid for out of profits arising from its use by her, although when purchased by her she had no separate estate.

(Syllabus by the Court.)

Appeal from circuit court, Taylor county; Joseph T. Hoke, Judge.

Action by Allen Stewart, assignee, against James H. Stout and others, to enforce a judgment lien. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Dent & Dent, for appellant. John W. Mason, for appellees.

ENGLISH, P. This was a suit in equity brought by Allen Stewart, assignee of Robert Shaw, against James H. Stout and Martha A. Stout, his wife, William M. Gould, trustee, E. W. Koelz, trustee, Robert Shaw, and Grafton Lodge, No. 31, Independent Order of Odd Fellows, of Grafton, W. Va., in the circuit court of Taylor county, to enforce an alleged judgment lien against a certain

house and lot situated in the city of Grafton, in said county, which judgment was for \$540.25, and \$16.05 costs, with interest from the 7th day of August, 1884, the day on which said judgment was obtained. The bill, among other things, alleges that on the 22d day of March, 1886, the defendant James H. Stout purchased from John T. McGraw a valuable house and lot, situated in Grafton, in said county and state, and made valuable improvements thereon, all of which said Stout paid for out of his own personal estate, but that for the purpose of hindering and defrauding the plaintiff, and to prevent the collection of the judgment aforesaid, the said defendant James H. Stout procured said John T. McGraw to convey said property to his wife, the defendant Martha A. Stout, who had no estate to purchase said property with, save and except that derived from her said husband; and that afterwards the said Martha A. Stout and James H. Stout, her husband, conveyed said property to William M. Gould, trustee, in trust to secure to E. W. Koelz, trustee for Grafton Lodge, No. 31, Independent Order of Odd Fellows, of Grafton, W. Va., a certain note executed by said defendant Martha A. Stout for the sum of \$600, payable one year after date to said E. W. Koelz, as trustee as aforesaid; and plaintiff further alleges that said note had long since been paid off and discharged, and the complainant prayed that said deed from John T. McGraw to said Martha A. Stout be held fraudulent as to said complainant's debt, and that said deed of trust to William M. Gould, trustee, if there should remain anything due thereon, be postponed until the payment of plaintiff's debt, and that the house and lot aforesaid be sold, and the proceeds applied to the payment of the plaintiff's debt, interest, and costs. The defendants Martha A. Stout, James H. Stout, and E. William Koelz filed their separate answers to complainant's bill, putting in issue every material allegation thereof. Several depositions were taken in the cause, and on the 13th day of April, 1891, said cause was heard, and a decree rendered dismissing the plaintiff's bill, with costs, and from this decree the plaintiff obtained this appeal.

The facts in regard to the purchase of the house and lot in controversy in this cause, as disclosed by the evidence found in the record, are as follows: The defendant Martha A. Stout, wife of James H. Stout, was desirous of purchasing and owning a certain house and lot in the town of Grafton, and an ice house in South Grafton, which property was owned by one John T. Whitescarver. This property was purchased by John W. Mason from said Whitescarver, and at the time he purchased said property, for the sum of \$420 and certain back taxes and attorney's fees, it was understood that he was to sell the property to Mrs. Stout for the same price he paid for it; and in pursu-

ance of this understanding, on the 29th day of January, 1880, said Mason entered into a contract in writing with said Martha A. Stout, by which she was to pay him \$420 for said house and lot and ice house, and Mr. Stout had nothing to do with this contract. Said Mason afterwards sold said ice house for Mrs. Stout for \$40. He also rented the house and lot for Mrs. Stout, and paid the taxes, insurance, and repairs, and was to account to her for any excess there might be over and above the interest on the purchase money. At the end of several years, this property, under the charge of said J. W. Mason, had rented for more than enough to pay the interest, taxes, insurance, and repairs, when he proposed to said Martha A. Stout to give her \$150 to release said contract, which she agreed to do, and which \$150 was paid by said Mason to John T. McGraw, as a part payment of the purchase money of the property sought to be subjected in said suit. The residue of the purchase money for said property was raised as follows: On the 23d day of March, 1886, Martha A. Stout borrowed from Grafton Lodge, No. 31, Independent Order of Odd Fellows, \$600, and executed her note for that amount, payable to E. W. Koelz, trustee of said lodge, with interest from that date, payable quarterly. The money borrowed upon this note was paid to said John T. McGraw in the shape of a check, signed by George Brinkham, for said lodge of Odd Fellows, to be applied, as it was applied, as a part of the purchase money on the lot of land in controversy; and \$100 in cash, as John T. McGraw states in his deposition, was handed to him on said purchase money at the same time said check was given him, making the sum of \$850, the entire amount thereof. Mrs. Martha A. Stout, in her deposition, when asked to state whose money and from what source was derived the \$100 paid to John T. McGraw on account of the purchase of this property, answered, "It was mine, my money, that I had taken in when I kept boarding house," and that no part of said fund was derived from her husband. It also appears in the testimony taken in the cause that said Martha A. Stout engaged in the business of keeping a boarding house, out of which said \$100 was realized, with the consent of her husband, James H. Stout. As to the house in which she kept boarders, it is apparent from the testimony of J. H. Stout that she lived in a Mr. Cole's house, and boarded his family, and afterwards she moved into Doonan's house, and kept boarders there for four or five years; and Martha A. Stout says in her deposition that her husband paid his board to her like any other boarder, showing that he was not interested in the boarding business. It is clearly established by proof that she alone carried on the boarding business, and did so exclusively upon her credit, paying for provisions and supplies with which it was

conducted. The very house in which she first carried on the business was one rented of a Mr. Cole by her,—a leasehold, separate estate. It, if not expressly stated, is a fair, if not irresistible, inference, from the facts established, that she paid the rent by boarding Cole and family, and the tenor of the evidence in other respects.

Our statute (section 3, c. 66, of the Code) provides that "any married woman may take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." The property in controversy was conveyed to the defendant Martha A. Stout, not by her husband, but by John T. McGraw; and unless the consideration was furnished by her husband, and said conveyance was made to her with intent to hinder, delay, and defraud the creditors of her husband, the same must be regarded as her separate estate, and not liable for his debts. The proof is clear and uncontradicted in any manner that \$600 of the purchase money which was paid for this property was borrowed from the Odd Fellows on the individual note of said Martha A. Stout. This money, so far as appears from the evidence, was raised on her credit, and said note, with the exception of the interest to April 19, 1890, yet remains unpaid. This court, in the case of Trapnell v. Conklyn, 37 W. Va. 242, 16 S. E. 570, has held that property purchased by a married woman from a person other than her husband is her separate property, although purchased on credit, and paid for out of profits arising from its use by her, and although, when purchased by her, she had no separate estate. As to \$150 of the purchase money, the evidence shows that it was realized by said Martha A. Stout as the result of a contract made by her individually with John W. Mason, in regard to another piece of real estate, said Mason having paid her that amount to release or rescind the contract; and the remaining \$100 were realized by her by keeping a boarding house, and paid as a part of said purchase money. There is nothing in the evidence taken in this cause that tends to show that the credit of the defendant Martha A. Stout was in any manner aided or increased by her husband, or that he in any manner furnished any portion of the \$600 or the \$150 paid by her on the purchase money of said property. Had he any claim to the \$100 realized by her from keeping a boarding house? The facts disclosed by the testimony show that she engaged in the business of keeping boarders with the consent of her husband; that he contributed nothing to her support, but paid his board

to her like the rest; and the testimony of the merchant and butcher with whom she dealt shows the supplies necessary for the business were charged to her individually, and paid for by her. In the case of *Penn v. Whitehead*, 17 Grat. 503, the court of appeals of Virginia held that a married woman might engage in trade on her separate account, and enter into partnership for that purpose by the consent of her husband, and that she would be entitled to the profits of the trade against her husband, even though his agreement be merely voluntary; also, that a married woman, having a separate estate, may engage in trade with the consent of her husband, and may, to the extent of her power over it, subject her estate to the payment of the debts, and she will be entitled to the profits of the trade, as against her husband and his creditors, to the extent, at least, to which such profits may not be due to the labor, skill, capital, or credit furnished by her husband. See 2 Roper, *Husb. & W.* pp. 167-175, c. 18, § 4.

So far as the evidence discloses, it appears that this boarding house was conducted and the necessary supplies purchased on credit, and that credit was furnished by Martha A. Stout, unaided in any manner by her husband; and, when the day of payment came, the bills were paid by her. The money to pay these bills, no doubt, was derived from the profits arising from keeping this boarding house, and the surplus she states was hers, and from these profits she paid the \$100 on the purchase money of the lot in controversy to John T. McGraw. The business she engaged in, fortunately for her, required no capital, but it did require credit, and that credit was the capital which enabled her to conduct her business, and to accumulate the profits which she applied to this purchase. That credit was not the property of her husband, but belonged to her, and enabled her to carry on business to the same extent as if she had owned a separate estate, coequal with the extent of her credit. Her credit was her separate estate, or rather what was purchased by using that credit; for this court has held in the case of *Trapnell v. Conklyn*, *supra*, that "property purchased by a married woman from a person other than her husband is her separate property, although purchased on credit, and paid for out of profits arising from its use by her, and although, when purchased by her, she had no separate estate." The case of *Robinson v. Neill*, 34 W. Va. 128, 11 S. E. 999, was one in which a purchase of real estate was made by a married woman on time, who executed her notes for the deferred payments, which notes were paid by profits made from gathering ice from a pond on the land; and, although her husband acted as her agent in handling the ice, property purchased with the proceeds of said ice was held to be not liable to be sold as the property of said husband for his debts. So, in the case of *Knapp*

v. Smith, 27 N. Y. 277, it was held that, under the statute, the married woman might acquire property, real or personal, by buying on credit, and no interest therein would pass to the husband, whether she antecedently had any separate estate or not. It would be difficult to conceive what benefit a married woman could derive from the fact that the statute authorizes her to take by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried, and that the same should not be subject to the disposal of her husband, nor be liable for his debts, if, by reason of her character for honesty and industry, she was enabled to purchase property, real or personal, on credit, and, as soon as it was thus acquired, it should be subjected to the payment of the debts of an improvident husband. This case, however, seems to be relieved from a considerable portion of the complication involved in cases of a similar character which have been passed upon by this court, by reason of the fact that the husband does not appear to have taken any part by his skill, labor, or otherwise in carrying on the business from which said \$100 was realized, the whole business having been transacted and expenses thereof paid by the wife, without the intervention in any manner or form of the husband; and, under the former rulings of this court, the money arising from the business was clearly hers, and, as a consequence, the property purchased with it was hers, and could not, under the statute, be held liable to the payment of her husband's debts. The proof in this case being clear as to the manner in which the money was derived by Martha A. Stout with which to make the purchase of the property, and it thereby appearing that no part thereof was furnished by her husband, the case does not fall within the ruling of this court in the case of *Burt v. Timmons*, 29 W. Va. 441, 2 S. E. 780; and, applying the law to the evidence taken in the cause, our conclusion is that the court committed no error in dismissing the plaintiff's bill. The decree complained of is therefore affirmed, with costs and damages.

DENT, J., not sitting.

BEALL v. PITTSBURGH, C. & ST. L. RY. CO.

(Supreme Court of Appeals of West Virginia.
Nov. 22, 1893.)

DEATH OF RAILROAD EMPLOYEE — RULES OF COMPANY — CONTRIBUTORY NEGLIGENCE — SETTING ASIDE VERDICT.

1. One of the rules of a railroad company reads as follows: "They [the brakemen] are

charged with the management of the brakes, and the proper display and use of the signals. They must examine and know for themselves that the brakes, ladders, running boards, steps, etc., which they are to use, are in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in order before using."

2. If a brakeman on a train, knowing such rule of the railroad company, also knowing that the nut on top of the standard of the brake, used to hold the brake wheel on, was off, but without putting it in proper condition himself, or reporting it to the proper parties, uses it unnecessarily to check the speed of the train, by which use the brake wheel comes off, throwing him onto the track, whereby he is injured, such brakeman is guilty of contributory negligence, at least; and in such case no recovery should be had against the railroad company.

3. Where the verdict of a jury is wholly without evidence on a point essential to a finding, or the evidence is plainly insufficient to warrant such finding by the jury, the same should be set aside, and a new trial awarded. (Syllabus by the Court.)

Error to circuit court, Ohio county.

Action by Grafton Beall, administrator of the estate of Lucian Beall, deceased, against the Pittsburgh, Cincinnati & St. Louis Railway Company to recover for the death of decedent. There was a verdict for plaintiff; and from an order setting aside the same, and granting a new trial, he brings error. Affirmed.

John J. Jacob, for plaintiff in error. J. B. Summerville, for defendant in error.

HOLT, J. On the 4th of May, 1891, at 6:40 P. M., Lucian Beall, a brakeman on the defendant company's railroad, while using his brake in the city of Wheeling, was thrown off the moving car, and run over, and killed. The immediate cause of the accident was that, when he attempted to check speed by turning the brake wheel, it came off the brake rod, thus causing him to fall off in front of the moving train. The nut at the top of the rod, which holds down the brake in its place, was then and there discovered to be missing, and that part of the rod where the wheel rested, and where the nut was screwed on, was rusted, and indicated that it had been off for two or three days, or longer. He applied the same brake once or twice during the same trip. The defendant had persons whose duty and business it was to inspect cars coming in and going out, taking them as a whole when the train was made up. In addition to that, a written rule of the company made it the duty, and required, of its brakemen, that they should examine and know for themselves that the brakes which they were to use were in proper condition, and, if not, put them in such condition, or report them to the proper ones, and have them put in order before using. Of this rule decedent had been informed before the accident. On July 26, 1891, Grafton Beall, the administrator, brought in the circuit court of Ohio county against the railway company an action on the case, claiming \$10,000 damages, the max-

imum fixed by the statute in such cases. The defendant appeared, and demurred to the declaration, which was overruled. The defendant then tendered a special plea in writing, to which plaintiff objected, but the objection was overruled, and the plea was filed; also, the general issue, "Not guilty;" and issues were joined. But afterwards, on motion of plaintiff, the special plea was stricken out, and defendant excepted. Then came a jury, which, after hearing the evidence, arguments of counsel, and instructions of the court, brought in a verdict for plaintiff, assessing his damages at \$2,000, which the defendant moved the court to set aside, and grant a new trial; and the court, after taking time to consider, set the same aside, and awarded a new trial, for reasons stated in a written opinion, found filed as a part of defendant's counsel's brief; and to this plaintiff excepted, and obtained this writ of error, as allowed by the ninth clause of section 1, c. 135, (see Code 1891, p. 848,) without waiting for the new trial to be had. The plaintiff assigns three errors: First, in refusing to allow the witness Charles Ray to answer certain questions propounded by plaintiff; second, in granting a new trial without requiring the defendant to pay costs; third, in setting aside the verdict, and granting a new trial.

The question propounded by plaintiff, and ruled out by the court, is as follows: "'Now, with the train running at the rate of speed you describe, what opportunity would Lucian Beall have had, when going to turn on the brake, to have examined to see whether or not the nut was safely and securely fastened on the wheel?" The record discloses no ground of objection by defendant, or of rejection by the court. He had already said that the train was running faster than its usual rate of speed, and that, if Mr. Beall had taken time to look, he could have seen whether the nut was on or off. Plaintiff then changed the form of his question: "What opportunity would he (Beall) have to make an examination of the brake wheel?" which was also objected to, and ruled out. The witness then stated that it was getting rather dusk when the accident happened, but was not quite time for "our lamps," but was getting that way. "The wheel and standard are dark red, as iron is. He did not see any of the nuts that went on the brake wheel that night, but had seen them before." Counsel for plaintiff then proposed to ask the following question: "How did the color of the nut compare with the color of the rod and brake wheel?" but the defendant objected, and the objection was sustained, and plaintiff excepted. The counsel for plaintiff explained to the court the purpose and object of the questions; and, far as I can see, the evidence attempted to be adduced was competent and relevant. But the plaintiff was not injured by the exclusion, for the verdict was in his favor, and the court permitted a

subsequent witness called by defendant to be examined on the subject; so that the error is not likely to be repeated. See *Ruffner v. Hill*, 31 W. Va. 428, 431, 7 S. E. 13.

Second Error Assigned. The law on this subject now reads as follows: "New trials may be granted upon the payment of costs or with costs to abide the event of the suit as to the court may seem right." Code, (Ed. 1891,) p. 877, c. 138, § 5. The court exercised its discretion in permitting the costs to abide the event of the suit, as authorized by the statute. See *Miller v. Rose*, 21 W. Va. 291; *Shrewsbury v. Miller*, 10 W. Va. 115; *Ruffner v. Hill*, 31 W. Va. 428, 7 S. E. 13. These questions, however, are treated by the counsel as of no importance; and properly so, unless the case should be again tried, when they may not arise; and the same may be said in regard to some of the instructions.

The main question, the only one of practical importance in the present attitude of the case, is the one discussed by Judge Paul, who presided at the trial, and whose written opinion is given below, as it appears in defendant's brief. I regard it as a fair and accurate statement of the substance of the material facts, to be gathered from the testimony in the record, cautiously restrained within the limits of no conflict, together with a review of some authorities bearing upon the point of law involved, under the doctrine of contributory negligence. But counsel for plaintiff contends that whatever may be the rule in Illinois, and in some other states, as to the duty of the railroad to furnish safe machinery and appliances, and as regards thereafter continually inspecting and keeping the same in repair, such restricted view of the company's duties is certainly not in accord with the rule in this state, as stated in the cases of *Cooper v. Railroad Co.*, 24 W. Va. 37; *Riley v. Railroad Co.*, 27 W. Va. 145; *Madden v. Railroad Co.*, 28 W. Va. 610; *Johnson v. Railroad Co.*, 36 W. Va. 83, 14 S. E. 432; *Daniel's Adm'r v. Railroad Co.*, 36 W. Va. 415, 416, 15 S. E. 162. That conceding that no damages can be recovered if the brakeman did know, or could have known by ordinary attention, the imperfect and dangerous condition of the brake when he used it, yet that was a question of fact, fairly placed before the jury for their decision, almost in the precise language of this court in the cases of *Humphreys v. News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39, and *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53; and the jury, in response thereto, having found against the defendant, that the cases in Virginia and West Virginia did not authorize the court to reverse such finding, and to set it aside. Among the rules of law prescribing the duties of railroads as common carriers, according to our cases cited above, I regard no one as more exacting, or as standing on higher ground of public policy, than the one which exacts, in a reasonable degree, continued supervision, inspection, and

watchfulness to see that all machinery and appliances are kept in good and safe repair, and the track kept safe and clear. Such watchfulness is the price of safety to their own people, as well as to the public; and hence we often see them bringing to the discharge of this duty great intelligence and skill, and constant and anxious care and forethought. We find the defendant in this case, in furtherance of the discharge of such duty, making the brakeman, in explicit terms, by printed rule, a special inspector of the appliances it is his duty to use. "The brakemen must examine and know for themselves that the brakes, etc., which they are to use are in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in proper order before using them." Extract from section 240 of company's rules, etc. The freight conductor "must see that the cars in their trains are in good order before starting, and inspect them when the train stops for water or for other trains." Rule 266. The car inspectors "must inspect all cars passing their stations, especially the running gear and brake fixtures, and make such repairs as may be required. They will send to the shop all cars not fit for service." Rule 360. The rule 240 was distinctly and expressly brought to the knowledge of the deceased brakeman more than once. The violation of duty on the part of other inspectors of machinery and appliances did not relieve him from the duty of inspection, which involved the safety of others, as well as of himself. "If he knew, or might have known by ordinary attention, the condition of the brake, and thus expose himself to danger; in other words, if he did not use his senses as men usually use theirs to keep from harm,—the plaintiff cannot complain of the injury which he suffered." *Railroad Co. v. Herbert*, 116 U. S. 642, 655, 6 Sup. Ct. 590. The brake with the nut off was dangerous, and the brakeman must use diligence and care in protecting himself from harm; nor can any recovery be had if the accident was the direct result of his own disobedience of orders, (*Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 990,) or of his violation of a reasonable rule made by the company for the safety of its servants, of which he had notice, (*Overby v. Railway Co.*, 37 W. Va. 524, 16 S. E. 813.) The testimony of plaintiff's own witnesses shows that there had not been a nut on the standard for some time. "It was rusty where the nut fits on, and the rust shows there had not been a nut on for some time." Now, it is easy to imagine circumstances in a case of emergency, for example, in which the brakeman would be called on to rush to and use a brake without looking down to see if the nut was on. But that is not this case. The evidence shows that, as the train backed down at about the rate of six or seven miles an hour, the deceased was sitting with his arms on the brake; "over it." "As the train passed the

waterworks, he got up to set the brake, and, if he had looked, he could have seen whether the brake was in proper order or not. He had time enough; it was light enough; there would have been no difficulty." The irresistible conclusion is that he took the chances of using the brake wheel, with no nut on the standard to hold it down, and a sudden check of speed threw him forward and off, with the brake wheel in his hands; so that his own neglect to inspect the brake, as the rule and his duty required him to do, or his willingness to encounter a danger known to him by using a brake, knowing that the nut was off, contributed directly and immediately to the deplorable accident which caused his death. The facts of this case make it plainly distinguishable from the case of *Railroad Co. v. Smith*, 90 Ga. 538, 16 S. E. 950. But it is said that this is a question of fact, directly and distinctly submitted to the jury; that they, the proper judges of fact, found otherwise; and that the court should not interfere with the verdict of the jury on a question of fact, "unless there is a plain departure from right and justice;" and the rule has been long and well settled by repeated decisions that the question of negligence is in general one peculiarly for the determination of the jury, from all the facts and circumstances; and that it is only where the jury have plainly decided against the evidence, or without evidence, and not merely because the judge presiding would have found a different verdict, that it will be set aside. But it is as much the province of the court to decide the question whether or not the verdict is wholly without evidence on some essential point, or whether it is plainly insufficient to warrant the finding of the jury, as it is the province of the jury to find such verdict; and if he finds it so, as it sometimes is, without the slightest ground for impeachment of either the jury's integrity or intelligence, it is the plain duty of the court, as the proper one to expound and apply the rules of law, to set such verdict aside, and award a new trial. In this case such power was properly exercised, and the judgment complained of is affirmed.

The opinion of Judge Paul, above alluded to, is as follows: "The facts proved before the jury were, substantially, that prior to May 4, 1891,—the date of the accident,—Lucian Beall had been in the defendant's employ as brakeman for about one year; that during that time he was informed that a rule of the defendant required that its brakemen should examine and know for themselves that the brakes which they were to use were in proper condition, and, if not, put them so, or report them to the proper parties, and have them put in order before using; that about 40 minutes past 6 o'clock on the evening of May 4, 1891, Beall, a conductor, and two other brakemen were engaged in bringing a train, consisting of four gondola cars and an engine, from the Top mill, in this city, to defendant's freight depot; that the engine pulled the train to Fifth street, or near there, when it was reversed on the turntable, and from there was pushing the train towards the depot; that

Beall was stationed on the front car, and had applied the brakes on that car once or twice during the trip; that when the train reached the city waterworks, he attempted to set the brakes, for the purpose of checking its speed, but, the brake wheel becoming detached from the brake rod, he was thrown in front of the moving train, and killed; that, upon examining the brake after the accident, it was discovered that the nut which fastened the wheel to the brake rod was missing; that that part of the brake rod upon which the wheel rested, and where the nut was screwed on, was rusted, and indicated that it had been off for two or three days, or longer; that the brake rod, where it fitted into the wheel, was too small for the hole in the wheel; and that, instead of being square at that point, it was somewhat rounded by use. It will be assumed, for the purposes of this decision, that the defendant negligently and wrongfully permitted this brake to become defective and out of repair; so that the only questions to be decided are (1) whether Lucian Beall, under the facts above set forth, was guilty of contributory negligence; and, if so, (2) whether that negligence was of such a character as to deprive his personal representative of the right to recover in this action. In *Railroad Co. v. Bragonier*, 119 Ill. 51, 7 N. E. 688, the court, on page 60, 119 Ill., and page 691, 7 N. E., says: 'It is as much the duty of a brakeman to observe that the brakes which he is expected to handle are in working order as it is that of the engine driver to see that his engine is in order for use. All employes in these respects must be held to a high degree of care, to insure any safety at all in railroad service.' In *Railroad Co. v. Jewell*, 46 Ill. 99, the second headnote is as follows: 'Where a brakeman was thrown from a car, and killed, it being alleged that the accident was caused by a defect in the brake, the nut which kept the wheel in its place on the upright shaft having become loose, and, in the effort to work the brake, the wheel came off, and the deceased was thrown to the ground, held, it was the duty of the brakeman to see that the brake was in a fit condition for use, and the company was not to suffer for his neglect.' In 14 Amer. & Eng. Enc. Law, 863, it is said: 'Where the printed rules of a railroad company required each conductor, before moving a train, to inform himself of the condition of the cars composing it, and the conductor failed to do so, and was injured by reason of defective brakes, it was held that he could not recover;' citing *Alexander v. Railroad Co.*, 83 Ky. 590. In *Railroad Co. v. Eddy*, 72 Ill. 138, it was held: 'It is the duty of the servant of a railroad company to see that the machinery which he uses is in repair, and, when it is not, to report the fact to the company, and it is negligence on his part to fail to do so; and the company will not be liable for any injury sustained by him, occasioned by such machinery being out of repair.' In *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, the court says: 'Of course, he [the brakeman] was bound to exercise care to avoid injury to himself. If he had known, or might have known by ordinary attention, the condition of the brakes and cars when he mounted the cars, and thus exposed himself to danger; in other words, if he did not use his senses as men generally use theirs to keep from harm,—he cannot complain of the injury which he has suffered.' See, also, to same effect, *Smith v. Car Works*, 60 Mich. 502, 27 N. W. 662. In *Darracott v. Railroad Co.*, 83 Va. 288, 2 S. E. 511, Judge Lewis, after enumerating the duties of a railroad company to its employes, on page 294, 82 Va., and page 514, 2 S. E., says: 'There are also certain correlative duties on the part of the employe to the company. Of these, one is the duty of the employe to be reasonably observant of the machinery he operates, and to report any defects he

may discover therein to the company. Another is to exercise ordinary care to avoid injuries to himself; for the company is under no greater obligation to care for his safety than he himself is. He must also obey the rules of the company prescribed for his safety, and which are brought to his knowledge; and he must inform himself, as far as he reasonably can, respecting the dangers, as well as the duties, incident to the service upon which he enters. It has accordingly been held in numerous cases, and the principle is elementary, that where the employe's willful disobedience of the company's rules is the proximate cause of the injury complained of, no recovery can be had of the company. And, in general, any negligence of the employe, amounting to the want of ordinary care, which is the proximate cause of the injury, will defeat an action against the company,—citing numerous authorities. In *Hoffman v. Dickinson*, 31 W. Va. 143, 6 S. E. 53, and *Humphreys v. News, etc., Co.*, 33 W. Va. 135, 10 S. E. 39, it was held: 'A servant cannot recover for an injury suffered in the course of his employment, from a defect in the machinery or appliances used by the master, unless the master knew, or ought to have known, of the defect, and the servant was ignorant of such defect, or had not equal means of knowledge.' It will also be observed that the rule as announced in *Cooper v. Railroad Co.*, 24 W. Va. 37, and *Riley v. Railroad Co.*, 27 W. Va. 145, which holds a railroad company liable for injuries sustained by its employes, while in discharge of their duties, from the use of defective machinery and appliances, where such injuries resulted from a failure on the part of the company either to furnish safe machinery and appliances in the first place, or to keep them in good order and repair after having been so furnished, by having them continuously inspected by a person competent to perform that duty, is conditional, not absolute; the condition being that employes are at the time exercising ordinary care and caution to avoid the injury, and are discharging their own duties in a careful and prudent manner, (4 Amer. & Eng. Enc. Law, 66:) in other words, that they themselves are without fault.' In *Carrico v. Railway Co.*, (decided by the supreme court of appeals of this state, Nov. 28, 1891,) 14 S. E. 12, it was held: 'The general rule in regard to contributory negligence is that, if the negligence be mutual on the part of the plaintiff and defendant, there cannot be a recovery. But if the injury would have happened just the same, although the plaintiff had been in no wise negligent, his negligence will not prevent his recovery; or if the defendant, after he has discovered the dangerous exposure, refuses or neglects to practice any care or caution to prevent the injury, he will be held liable.' The principles announced in the foregoing decisions, it seems to me, when applied to the facts in this case, show conclusively, not only that Lucian Beall was guilty of contributory negligence, but that that negligence was of such a character as to preclude any recovery on the part of his personal representative. The verdict of the jury must therefore be set aside, and a new trial awarded the defendant."

LIPSCOMB et al. v. LOVE.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1893.)

EQUITY—CANCELLATION OF DEED—SUFFICIENCY OF EVIDENCE.

A case reversed, and bill dismissed, because the proof wholly failed to sustain its allegations, in accordance with the decision of the court in the case of *McCartney v. Bolyard*, 22 W. Va. 641.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; Joseph T. Hoke, Judge.

Action by Eliza H. Lipscomb and William D. Lipscomb against A. W. Love to rescind a conveyance of land. There was decree for plaintiffs, and defendant appeals. Reversed.

W. B. Maxwell, for appellant. A. B. Parsons, for appellees.

DENT, J. On the 27th day of August, 1890, Eliza H. Lipscomb and William D. Lipscomb executed a general warranty deed, conveying to A. W. Love 75 acres of land, more or less, in consideration of "a lifetime support." The grantors, afterwards becoming dissatisfied, filed their bill in the circuit court of Tucker county, seeking a cancellation of this deed, and alleging, as the grounds therefor, "that, in accordance to the said stipulation, [that is, the stipulation of support,] your orators went to the house of the said Love, to be provided for as aforesaid, and said Love, according to his contract, for the period of about one month, carried out the agreement of the said contract according to the letter, and as a Christian gentleman, but from that time forward he and his said family became so intolerably abusive, and, among other things, built a small house on low and unhealthy ground, and placed the goods and chattels of your orators therein, which said premises were unhealthy, and in no way was fit to live in by healthy persons, much less for people aged as your orators; that the said Love has failed to carry out the stipulations of his agreement in the premises, and has furnished your orators with such a scanty support and clothing that they are utterly unable to withstand it or survive; and that, further, they are treated intolerably by the said Love and his family; that on one occasion they went away from the said little building for a short time, and came back, and found the door locked, and they were unable to get in; that a great portion of the time pending the contract of the said Love to support them they have been compelled to go upon the charity of their friends and relatives for support; and that they believe that the whole idea and intention of the said Love in entering into the said contract was to fraudulently get title and possession of the said tract of land without any valuable consideration therefor, and to starve your orators, or compel them to leave, and get their living as best they could, or cause them to become a county charge." The defendant filed his answer, particularly denying the truth of these allegations, and, in concluding his answer, used the following allegations, to wit: "Now, by way of conclusion, respondent repeats that he is willing and able to care for these old people and will do so if they will return to him; that he has at all times, while they were with

him, given them the best he had about him, and they had an abundance of good, wholesome food, suitable to their age and condition in life, and can have the same again if they will return; that he never had any idea of defrauding them in any way, shape, or form, and did not defraud them in any way, shape, or form, and will not defraud them in any way, shape, or form if they will return to him and live with him; that respondent would be willing to let them go and make their way in the world if he could be placed in statu quo, but this cannot be done, for the reason that he went to expense of fixing them a house, bought them clothes, furnished them food, fuel, etc., made improvements of a permanent character on the land which he got of them, and until he is repaid for all this he is not willing to consent to a cancellation of the contract and deed, and, besides, the plaintiffs, by their bill, have accused him of fraud and fraudulent designs, and, in order to vindicate himself from these charges, he is compelled to resist the said bill, and object to a rescission of the said deed, and does so object, and now informs the court that he is full handed with proof to sustain each and every allegation of this answer, and he is also able to show to the court that each and every allegation of the said bill which is in conflict with the averments of this answer is false and untrue." The only admissible evidence the plaintiffs took to sustain the allegations of their bill were their own depositions, and those were positively contradicted by the defendant and his witnesses.

This case comes within almost precisely the decision of this court in the case of McCartney v. Bolyard, 22 W. Va. 641, in which Judge Woods, delivering the opinion of the court, says: "The plaintiffs have neither alleged nor attempted to prove any other ground for a cancellation of the deed or rescission of the agreement than that the consideration thereof going to the plaintiffs has wholly failed, by the failure and refusal of the defendant to maintain and support them on the farm in the manner provided for in said contract. As every allegation of the bill looking in that direction is explicitly denied by the answer, the burden of proof to support these allegations of the bill rests on the plaintiffs. The depositions of the plaintiffs and of many other witnesses * * * wholly fail to prove any failure or refusal of the plaintiffs to discharge any of the duties imposed on the defendants by the terms of said deed, but they do show, beyond all question, that, if they have suffered any loss, it has been caused by their own conduct, in voluntarily abandoning their home and maintenance amply secured to them by the provisions of the deed." Every word above quoted will apply just as truly to this case as to the one then before the court. Parties who enter into solemn contracts of this character should be made to

understand that courts of equity will not set them aside without good substantial grounds for so doing, fully sustained by proof. Dissatisfaction merely is not sufficient grounds for the interference of the court. While our sympathies go out to these old people, yet equity requires that they be held to their contracts in like manner as all others capable of contracting, and that they cannot be relieved from the effects of their premeditated undertaking, unless on equitable cause, supported by evidence. The decree of the circuit court, being for the plaintiffs, without sufficient evidence to sustain it, is reversed, and the bill dismissed, with costs to the defendant.

STATE v. SHANLEY.

(Supreme Court of Appeals of West Virginia.
Nov. 18, 1893.)

INTOXICATING LIQUORS — ILLEGAL SALES — JUDGMENT ON PLEA OF GUILTY — CHANGING PLEA — COURTS — SPECIAL TERMS.

1. On an indictment for a violation of the state revenue law in selling spirituous liquors without a license, the plea of guilty may be entered without formally and expressly withdrawing a plea of not guilty theretofore entered.

2. In a criminal case, the court may permit the plea of guilty to be withdrawn, and another plea to be entered in its place, in the exercise of a sound discretion, if justice and a fair trial on the merits require it; but it must be in time, and the reason for it must be made to appear clearly and distinctly.

3. A judge of the circuit court, in pursuance of section 5 of chapter 112 of Code, by a warrant directed to the clerk appoints a special term, which warrant the clerk enters in the order book of the court, but fails to post a copy of such warrant at the door of the courthouse. *Held*, such omission does not in any wise affect the validity of the proceedings of such special term of the court.

(Syllabus by the Court.)

Error from circuit court, Taylor county; Joseph T. Hoke, Judge.

J. W. Shanley was indicted for selling spirituous liquors unlawfully, and from a judgment entered on a plea of guilty he brings error. Modified and affirmed.

W. R. D. Dent, for plaintiff in error. T. S. Riley, Atty. Gen., for the State.

HOLT, J. This is a writ of error from a judgment of the circuit court of Taylor county, rendered on the 1st of June, 1892, on a plea of guilty to an indictment against J. W. Shanley for the unlawful selling of spirituous liquors. The following is the assignment of errors in the judgment complained of: "(1) The court erred in permitting the plea of guilty to be entered without having the plea of not guilty, theretofore entered by petitioner, disposed of or withdrawn. (2) The court erred in refusing to allow petitioner leave to withdraw the plea of guilty. (3) The court erred in rejecting petitioner's affidavit, marked 'Shan-

ley's Rejected Affidavit,' and refusing petitioner leave to file said affidavit. (4) The court erred in overruling petitioner's motion to quash the warrant of the judge appointing said special term of said court, for the reasons assigned by petitioner. (5) The court erred in overruling petitioner's motion to continue said case until the first day of the next term of said court, for want of jurisdiction to dispose of the same at said special term. (6) The court erred in hearing and considering the evidence of the clerk of said court as to the posting of said warrant calling said special term, and notifying the sheriff and prosecuting attorney thereof, as the law directs. (7) The court erred in overruling petitioner's motion in arrest of judgment, and in entering judgment on the said plea of guilty so entered. (8) The said judgment complained of is absolutely null and void. It deprives petitioner of his liberty and property. Petitioner was induced by the agreements and representations of said prosecuting attorney, made with the knowledge and assent of said court, (as set out in said affidavit,) to enter said plea of guilty, thereby agreeing away his rights, on condition that no such judgment was to be entered; and any judgment rendered on such plea is absolutely null and void, and should be reversed and set aside." The indictment is in the usual form, and to it there is no objection. On April 17, 1891, defendant entered the plea of not guilty, put himself upon the country, and the state did the like. On April 21, 1891, "came the defendant in person, and pleads guilty to the indictment, whereupon the court takes time to consider of its judgment herein." At the April term, 1892, the court issued a *capias* to hear judgment, returnable forthwith, and when brought in, he entered into a recognizance with sureties for his future appearance. By warrant dated April 29, 1892, the judge of the circuit court ordered and appointed a special term, to commence May 31, 1892. See Code, § 5, c. 112. At this term, on the 1st day of June, defendant appeared in discharge of his recognizance, and moved the court for leave to withdraw his plea of guilty, and to permit him to plead not guilty to the indictment, and tendered an affidavit in support of the motion, which affidavit being inspected and read by the court, the court overruled defendant's motion for leave to withdraw his plea of guilty and enter his plea of guilty, and the defendant excepted. He also moved the court to quash the warrant appointing a special term, and moved the court to continue the cause; but the court overruled these motions, and, having fixed the defendant's fine at \$100, and his imprisonment in the county jail at 60 days, rendered judgment accordingly.

Scott's Case, 10 Grat. 749-755, was a case of unlawfully selling liquors. The present

ment was made at March term, 1851, and at the May term the defendant appeared and demurred, and, the demurrer being overruled, he then pleaded not guilty. At the August term, 1852, when the cause was called for trial, he moved for leave to withdraw his plea of not guilty, and plead that he was not a free negro, but an Indian; but it was held the plea was tendered too late, even if it was a good plea. See Code, § 2, c. 159, and Id. § 19. *Mastronada v. State*, 60 Miss. 86, was an indictment for unlawfully retailing liquor. The defendant had pleaded guilty, but, before sentence had been passed upon him, he moved the court for leave to withdraw his plea of guilty. In support of his motion he filed an affidavit, but did not aver his innocence of the charge. The action of the trial court refusing leave to withdraw the plea of guilty was held to be correct. The defendant in that case, as in this, appeared to have been an old offender, who, in other cases for a like offense, had pleaded guilty, and escaped with the mildest penalty allowed by law, but, being alarmed by a rumor that he was to be more severely dealt with, wished to withdraw his plea, and take his chances before the jury. Judge Chalmers, in closing his opinion, says: "The action of the court probably and properly taught him that the infliction of the lowest penalty for the first offense, instead of conferring a vested right to the same measure of punishment for the second, rather suggests the propriety of so increasing the penalty that it may effectually deter from the recurrence of the third." In the case of *Pattee v. State*, 109 Ind. 545, 10 N. E. 421, it was held "that, in the absence of a showing that there was an abuse of discretion, the refusal of the trial court to permit the withdrawal of a plea of guilty will be upheld." Elliott, C. J., says: "Affidavits cannot be made part of the record by the mere recital of the clerk. * * * The presumption is in favor of the ruling of the court, and, in the absence of a clear and strong showing that there was an abuse of discretion, the ruling must be sustained." In *People v. Lee*, 17 Cal. 76, it was held that the granting of leave to withdraw a plea rested in the discretion of the court, and no circumstances were shown which indicated that there was any abuse in the exercise of that discretion. In *Phillips v. People*, 55 Ill. 429, it was held that nothing short of a clear abuse of the sound discretion of the court in such refusal can be assigned as error. In *Com. v. Mahoney*, 115 Mass. 151, 152, Gray, C. J., delivering the opinion, says: "A defendant in a criminal case, who has once pleaded to the charge against him, has no right to withdraw his plea, but is confined to the issues of law or fact thereby raised or left open, unless the court in which the case is pending sees fit to exercise the discretion of allowing him to withdraw it, and plead anew." "Probably a not inaccurate

expression of the American doctrine would be that the judge may permit a pleading to be withdrawn, and another put in its place, whenever this would not violate any positive rule of law or of established practice, but that such a discretion will rarely, if ever, be exercised in aid of an attempt to rely upon a mere dilatory or formal defense." 1 Bish. Crim. Proc. § 124. See *Rocco v. State*, 37 Miss. 357-366, (an indictment for retailing,) a case in which the refusal does not appear to have worked any injury. In *Com. v. Goddard*, 13 Mass. 455-458, the retraction of the plea of not guilty was while the proceedings were in fieri. No matter can be pleaded which is not of right. *Foster v. Com.*, 8 Watts & S. 77-79. While the pleadings are in fieri they may be amended. *Rex v. Knowles*, 1 Salk. 47; *Bonfield v. Milner*, 2 Burrows, 1098. See *O'Hara v. People*, 41 Mich. 623, 3 N. W. 161; *Whart. Crim. Pl.* § 414, (8th Ed.)

The offense charged was a violation of the revenue laws of the state, (chapter 32, §§ 1, 3, 48, 49,) and a writ of error in such cases lies as well for the state as for the accused. Code, § 3, c. 160. The term was passed at which the plea of not guilty was, by necessary implication, withdrawn, and the plea of guilty was entered, and nothing remained to be done but for the court to fix the penalty and render judgment. Nothing else was left open at the following term, when defendant made his motion, and if the case of *Com. v. Scott*, 10 Grat. 749, is in point, his motion came too late. It had ceased to be a mere pleading,—an issue of fact,—but the defendant had by his own confession determined and settled the fact of his guilt of the offense as charged in the indictment. It was no longer a matter in fieri as a pleading, for that had fulfilled its object or as matter still in the breast of the court, for that term was ended and past, and the record fixed beyond ordinary amendment or control. So that it was in strictness no longer a mere question of changing pleas,—withdrawing one and putting in another,—but was more like a motion for new trial after verdict. There was no longer any fact in issue or open for ascertainment by testimony of witnesses or otherwise, but the question remained, what judgment shall the court pronounce? And that, upon the facts found by confession, was a question fixed by the statute within certain limits. Any person, for every such offense, shall "forfeit not less than ten, nor more than one hundred dollars, and may, at the discretion of the court, be imprisoned in the county jail not exceeding three months." See Code, (Ed. 1891,) p. 232, § 3, c. 32. It remained for the court to fix the punishment and pronounce the sentence of the law, but not to the defendant to change the pleading, but to allege and show some valid reason why judgment should not be rendered. Such a ground he presents to the court in his affidavit, in which

he says that at the April term, 1891, the grand jury presented indictments against him for unlawful selling at retail spirituous liquors; that he appeared to defend; that then and there an agreement was made with affiant and his counsel by the prosecuting attorney, with the knowledge and assent of the court, by which judgment was to be taken against him on certain indictments for the minimum fine, (\$10,) a verdict of not guilty was to be rendered in certain other of said indictments, and affiant was to plead guilty as to certain other of said indictments; and the court was simply to enter an order, in effect, that the court took time to consider of the judgment in the same, and that confessions were simply to stand in that way, and no judgment was to be entered thereon against defendant unless defendant engaged in selling liquor unlawfully, which he had not done, and that he is not guilty, etc. The court has certified, as to the only material fact,—that which relates to the agreement,—that it is not true. If proper and material, where and how is such an issue of fact to be tried? Certainly not by that court, or by a jury before that judge. If the case depended upon any such question of fact, the defendant mistook his forum. Even if the material fact in this case were true, it is very different from the case of *O'Hara v. People*, 41 Mich. 623, 3 N. W. 161. In that case it was conceded that on an information for adultery not founded on any true, but only a colorable, preliminary examination, before one who had no authority to make it the defendant was given by the judge to understand that he must submit to a severe sentence, or else withdraw his plea of not guilty, enter a plea of guilty, and immediately pay \$400, and estop himself from bringing error. Graves, J., commenting on this point in the case, says: "When a convicted person is brought up for sentence, he has rights still, and it is specially incumbent on the judge to take care that they are fully observed and protected. No sort of pressure can be permitted to bring the party to forego any right or advantage, however slight. The law will not suffer the least weight to be put in the scale against him, and any such attempt cannot fail to be repudiated. Standing at the bar to receive judgment, the law surrounds him with its protecting principles, and intends that his sentence shall be the reflection of its justice, and, as far as possible, free from all taint of human frailty." It may be that, in this batch of indictments against defendant, the prosecuting attorney concluded to let one case stand on the confession of guilty for some indefinite period before he had judgment entered on it, holding it in terrorem over defendant as some sort of guaranty of good behavior in the future; but it is not very probable that the confession was induced by a promise on his part that there should be no judgment at all, for that would

be out of his power, without leave of the court, and the court certifies positively that there was no such agreement on the part of the court. It would be taking a long step toward unsettling proceedings in such cases if the defendant is encouraged to go broadcast in search of loose verbal agreements with which to nullify and set aside confessions of guilt made in open court, and entered without qualification on the record. The case for relief in such a stage of the proceeding must be very strong and urgent, and clearly and certainly made out, before this court, on grounds of public policy, if on no other, ought to interfere; for, as a mode of ascertaining guilt as the prerequisite of pronouncing the penalty of the law, in cases of great moment, involving life and death, as in treason against the state, (see chapter 143, Code,) and in cases of felony, if the accused refused to plead, the court shall have the plea of not guilty entered, and the trial shall proceed as if he had put in that plea. but, if he confesses his guilt, no further pleading and no trial is necessary; (see section 2, c. 159, Id.) And he may plead guilty of murder in the first degree, (section 19, c. 159, Id.) and in any case he is to be sentenced for such offense or part as is substantially charged in the indictment, (section 18, Id.)

There was a motion to quash the warrant of the judge appointing the special term, because the record thereof made by the clerk in vacation does not show that the same was posted at the door of the courthouse, as required of the clerk by the statute. See Code, § 5, c. 112. It is presumed that the clerk did his duty, according to the maxim; but, being no part of the warrant, but merely a part of the clerk's ministerial duty in regard to what he should do after receiving and recording the warrant, his failure to post a copy could not have the slightest effect on the validity of the warrant, or on the power to hold court under it, and, as the court had jurisdiction to hold the term, and dispose of defendant's case, there could be no ground of continuance for want of such jurisdiction. The court heard the sworn statement, made in open court by the clerk, that the warrant calling the special term was duly posted as the law directs, and the prosecuting attorney and the sheriff duly notified thereof. The defendant makes this the ground of his sixth assignment of error. Inasmuch as such sworn statement could not affect the validity of the warrant or the jurisdiction of the court if the clerk had said it was not posted, etc., it is not easy to see how it could do any harm if he said it was posted. It was wholly immaterial, for the purpose in view, whether it was posted or not. There was no error apparent on the face of the record, and the motion in arrest of judgment was properly overruled; nor do I see anything, nor has anything been pointed out, which renders the judgment null and void.

The act of 1882, c. 41, § 10, (see Code, Ed.

1887, p. 207, c. 36, § 10.) latter clause, reads as follows: "And whether the judgment be for fine and imprisonment or for fine without imprisonment, the court may at any time during said term order that the defendant against whom such judgment was rendered be confined in jail until the fine and costs are paid in addition to the term of imprisonment, if any, fixed by the judgment. Provided; that such additional confinement shall not be for a longer period than sixty days." See Code 1868, p. 224. The court rendered judgment in this case on May 31, 1892, under the law as above stated, and after fixing the fine at \$100, and his imprisonment in the county jail at 60 days, rendered judgment as follows: "It is therefore considered by the court that the state recover from the defendant the sum of one hundred dollars (the fine aforesaid) and the costs; and it is further considered by the court that the defendant be confined in the jail of this county for the term of sixty days; and it is further considered by the court that if, at the end of said sixty days' imprisonment, the said fine of one hundred dollars and costs be not paid, then the said defendant shall further be continued confined in said jail until said fine and costs be paid, said additional confinement not to exceed sixty days from the end of the first sixty days' imprisonment." But by the act of March 9, 1891, (see Acts 1891, p. 206,) which took effect 90 days after its passage, sections 10 and 11 of chapter 36 of Code were amended and re-enacted. Code, (Ed. 1891,) p. 266, c. 36, § 10. By the law as thus amended, which was the law in force when the judgment was rendered, he was entitled to be released, after the expiration of the term of imprisonment fixed as punishment, at any time, upon his giving bond with good security to the state for the payment of such fine and costs, at a time not exceeding 12 months after the date of such bond. By section 11, if imprisoned for nonpayment, and defendant fails to give such bond, the county court may order him to work it on the roads at a dollar per day, etc. So that that part of the judgment complained of, which prescribed the mode of enforcing payment of the fine imposed, was at the time without authority of law to support it, and must therefore be set aside. But that does not affect the body of the judgment, in which there is no error. The part left out is no part of the punishment. That is the same as the law was when the offense was committed. It is a mere mode of collecting, or rather of enforcing, payment of the fine, and safely and distinctly separable from the punishment prescribed by the law and imposed by the court, without in any wise affecting the real and only judgment of the court. Therefore, with such correction, the judgment complained of is affirmed.

DENT, J., not sitting.
v.188.E.no.16—47

ADKINS v. FRY et al.

(Supreme Court of Appeals of West Virginia.

Dec. 2, 1893.)

ACTION ON BOND OF DEPUTY SHERIFF — LIMITATION OF ACTIONS—RIGHTS OF SHERIFF AND HIS SURETIES—DEMURRER TO EVIDENCE.

1. In an action of debt by a sheriff against his deputy upon his bond, conditioned for the faithful performance of his duties as deputy sheriff, and to account for and pay over, as required by law, all money which may come into his hands by virtue of said office, the right of action does not accrue to said sheriff at the time of the default of such deputy, and the statute of limitations does not begin to run against said action until said sheriff has paid the debt occasioned by said default, or some part thereof.

2. Under section 36 of chapter 41 of the Code, a sheriff or his personal representative may proceed by motion against his deputy, who has committed a default, for which his principal is liable, for which a judgment or decree shall be rendered against said principal or his personal representative, and may obtain a judgment for the full amount for which such principal or his personal representative may be so liable, or for which such judgment or decree may have been rendered.

3. In a demurrer to evidence, it is not the practice, nor is it necessary, to state on the face of the record that the evidence set forth is all the evidence that was offered, but it is necessary that the whole evidence should be set out.

(Syllabus by the Court.)

Error to circuit court, Wayne county; T. H. Harvey, Judge.

Action in debt on a bond by Lamech Adkins against Johnson Fry, Jesse Perry, and others. Plaintiff had judgment, and defendants bring error. Affirmed.

Campbell & Holt, for plaintiffs in error.
Simms & Enslow, for defendant in error.

ENGLISH, P. On the 24th day of October, 1890, Lamech Adkins, then late sheriff of Wayne county, brought an action of debt in the circuit court of Wayne county against Johnson Fry, Jesse Perry, Moses Napier, Attison Adkins, Younger Napier, and Lewis Ferguson upon a bond executed on the 10th day of September, 1873, by said Johnson Fry, with the others, defendants, as sureties therein, conditioned for the faithful discharge on the part of said Johnson Fry of his duties as deputy sheriff, and to account for and pay over, as required by law, all money which might come to his hands by virtue of the said office, which bond was in the penalty of \$10,000. On the 2d day of February, 1891, the defendants demurred to the declaration, and each assignment of breach therein, in which demurrer the plaintiff joined, which demurrer, after consideration by the court, was overruled; and thereupon the said defendants filed a special plea in writing of the statute of limitations, and the said defendants, for further plea, pleaded conditions not broken and covenants performed, and the plaintiff traversed each of said pleas, and put himself upon the country and defendants

likewise. On the 1st day of February, 1892, Moses Napier, one of the defendants, pleaded conditions performed and conditions not broken, and the plaintiff replied generally thereto. The death of Johnson Fry was suggested, and it was ordered that the suit do abate as to him. Said Moses Napier also pleaded the statute of limitations, and the plaintiff replied generally. Younger Napier tendered a plea of non est factum, which was objected to by the plaintiff, which objection was overruled, and the plaintiff excepted, and replied generally to said plea, and the case was submitted to a jury; and, after the evidence was introduced, the defendants demurred to the plaintiff's evidence, which demurrer was reduced to writing, and the plaintiff joined therein, and the jury found the following verdict: "If the court should be of the opinion that the law arising upon the demurrer to the evidence should be for the plaintiff on the issues joined, that the defendants Moses Napier, Jesse Perry, Attison Adkins, and Lewis Ferguson are indebted to the said plaintiff on the demands in the declaration mentioned in the sum of \$1,424. But, if the court should be of the opinion that the law arising upon said demurrer was for the defendant, they found for them upon the issues joined, and they further found for the defendant Younger Napier upon the issue of non est factum." On the 4th day of February, 1892, the parties came by their attorneys, and the court, having maturely considered the law arising upon the defendants' demurrer to the plaintiff's evidence, found for the plaintiff, except as to Younger Napier, and gave judgment for the plaintiff against the defendants Jesse Perry, Moses Napier, Attison Adkins, and Lewis S. Ferguson, for the sum of \$1,424, with interest thereon from the 2d day of February, 1892, till paid, and costs; and from this judgment this writ of error was obtained.

No point is made upon the demurrer to the declaration, either in the assignment of errors or in the brief filed by counsel. It is, however, assigned as error, that the breach of the deputy's bond occurred, and the cause of action accrued, in the year 1873, and that this action, at the time of its institution, in 1890, had been barred for nine years. Under this assignment of error, it is contended that the statute of limitations began to run when the deputy committed his default. Now, the sheriff had the right to elect whether he would resort to his common-law action of debt against his deputy, or proceed by motion, under sections 36 and 37 of chapter 41 of the Code. These sections provide for a proceeding by way of motion on the part of the sheriff against his deputy, but do not, so far as I can perceive, affect the question as to the time the statute of limitations commences to run against the action of the sheriff against his deputy for a default committed by the latter. Said section 36 provides that, "where any deputy

of a sheriff or collector shall commit any default or misconduct in office for which his principal, or the personal representative of such principal, is liable, for which a judgment or decree shall be rendered against either, such principal, or his personal representative, may, on motion, obtain a judgment against such deputy and his sureties, and their personal representatives, for the full amount for which such principal, or his personal representative, may be so liable, or for which such judgment or decree may have been rendered. But no judgment shall be rendered by virtue of this section for money, for which any other judgment or decree has been previously rendered, against such deputy or his sureties or their personal representatives." Section 37 provides that, "when any judgment or decree shall be obtained against a sheriff or collector, or his sureties, or their personal representatives, for or on account of the default or misconduct of any such deputy, and shall be paid in whole or in part by any defendant therein, he or his personal representative may, on motion, obtain a judgment or decree against such deputy and his sureties, and their personal representatives, for the amount so paid, with interest thereon from the time of such payment, and five per cent. damages on said amount." The question now is, would the sheriff have shown any greater diligence if he had proceeded by way of motion, under sections 36 and 37 of chapter 41 of the Code, or could he have brought his motion sooner than he did his suit? It is clear that, under the provisions of section 37, the sheriff's right of action would not accrue until a judgment or decree had been obtained against him or his sureties or their personal representatives for or on account of the default or misconduct of such deputy, which shall be paid by any defendant therein; and, when we refer to section 36, the language indicates clearly that a judgment or decree must be rendered against the sheriff or his personal representative before the right accrues to proceed by motion against the deputy. The language of the section as above quoted is: "Where any deputy of a sheriff or collector shall commit any default or misconduct in office for which his principal, or the personal representative of such principal, is liable, for which a judgment or decree shall be rendered against either, such principal, or his personal representative, may, on motion, obtain a judgment against such deputy and his sureties, and their personal representatives, for the full amount for which such principal, or his personal representative, may be so liable, or for which such judgment or decree may have been rendered." It is manifest that under this section the right to proceed by motion does not accrue until judgment shall be rendered against the principal or his personal representative for some amount, and then he may move either for the full amount for which

he is liable, or for the amount of the judgment or decree. So far as appears from the record in the case we are considering, no judgment was obtained against said sheriff and his sureties until the following dates, to wit: February 16, 1888, which was paid by the sheriff, and June 21, 1890; and, until said judgment was so obtained, the right to proceed by motion, under the thirty-sixth section, did not accrue. Our statute above quoted is very nearly identical with sections 46 and 47, c. 49, of the Virginia Code of 1873. It, however, differs very materially in this: Our statute provides that "where any deputy of a sheriff or collector shall commit any default or misconduct in office for which his principal, or the personal representative of such principal, is liable, for which a judgment or decree shall be rendered against either," etc.; while the Virginia statute reads as follows: "Where any deputy of a sheriff, sergeant, coroner or collector shall commit any default or misconduct in office for which his principal is liable or for which a judgment or decree shall be recovered against either, such principal or his personal representative may on motion obtain a judgment against such deputy and his sureties," etc. Yet in the case of *Allebaugh v. Coakley*, 75 Va. 628, the court of appeals of that state held that "the mere fact that a remedy is given the sheriff by the forty-sixth section [which corresponds with our thirty-sixth] for his protection and indemnity can impose no obligation upon him to resort to that remedy, under peril of being barred of a right existing at common law, and under another section of the statute." In that case a deputy sheriff made default in paying over certain collections which were made, or ought to have been made, by him prior to 1869. A judgment for the amount of such collections was obtained by the sheriff in 1874, and the judgment was paid by him in 1878. In May, 1879, the sheriff moved against the deputy and his sureties for a judgment for the amount so paid, with interest and damages. Held, that the claim of the plaintiff was not barred by the statute of limitations, notwithstanding the default of the deputy occurred more than 10 years before the principal moved for judgment against him. How much more is this the case under our statute, (section 36, c. 41,) where both the liability of the sheriff and a judgment or decree against him must concur before the right accrued to him to proceed by way of motion against his deputy. Under the Virginia statute, Barton, in his *Law Practice*, (volume 2, p. 1095,) in treating of this subject, says, under section 910: Whenever a sheriff becomes liable on account of the default of his deputy, whether a judgment has or has not been recovered against the sheriff, and although he has paid nothing to the creditor, he is yet entitled to recover against the deputy and his sureties the amount for

which he may be so liable; but, under section 911, the sheriff is authorized to proceed against the deputy and his sureties only when there has been a recovery against him, and a payment of the amount, in whole or in part, to the creditor; but the provision for the proceeding against the deputy under section 910 is merely cumulative, and was not designed to affect any of the sheriff's existing rights and remedies. He may, therefore, if he pleases, waive any proceeding under that section, await the termination of the creditors' action against him, pay the amount of the recovery, and then proceed by action on the deputy's bond, or by motion, under section 911. Under both sections of our statute, however, as we have seen, a judgment against the sheriff or his personal representatives must precede his right to proceed against his deputy either by motion or action. Our conclusion, therefore, is that, under the facts and circumstances of this case, the plaintiff's action was not barred by the statute of limitations. The right of action at common law against the deputy and his sureties for the default of such deputy did not accrue until the principal had paid the debt, or some part of it, occasioned by such default; neither did the right to proceed by motion, under the thirty-fifth section of chapter 41 of the Code, accrue until a judgment or decree had been rendered against the sheriff or his personal representatives.

The judgment which appears to have been rendered against the sheriff by reason of the default of said deputy was on the 16th day of February, 1888, and the action of debt in this case was brought by the sheriff against the sureties of his deputy on the 24th day of October, 1890. *Murfree on Sheriffs*, at section 54, says: "The bond of a deputy sheriff to his principal is a private bond, with which the public has no concern. It is a matter exclusively between the sheriff and his deputy, and it concerns nobody else whether any bond whatever is given. Consequently, the bond of a deputy to the high sheriff is not to be interpreted by the rules which govern the construction of the official bond of the high sheriff, drawn in pursuance of the statute which specifies what bond shall be given, and the condition of the same." Our statute provides that a sheriff may, with the consent of the county court, entered of record, appoint any person his deputy, and when, in the opinion of the circuit court, the public interests require it, he may, with the consent of said circuit court, appoint any person his deputy; and it is further provided that any default or misfeasance in office of such deputy shall be deemed a breach of the conditions of the official bond of his principal. The object of this bond was to protect the sheriff against the default of his deputy, and until a liability was fixed upon him, his personal representatives, or his sureties, by judgment or decree, his right of action did

not accrue against such deputy. In this case, as has been stated, there was a demurrer to the evidence, and while the action of the court upon said demurrer is not assigned as error, unless it be under the general assignment, yet it is contended that the demurrer to the evidence was informal, in this: that it did not set forth on its face that the evidence set out in the demurrer contained all of the evidence. Was this necessary, and is it the practice, to make the demurrer to the evidence show affirmatively that the evidence set out was all of the evidence offered? We think not. It is true that it has long been held that the whole evidence, both of the plaintiff and defendant, must be set out; yet it has often been said that the forms of the law are the best evidences of the law, and when we look at 1 Rob. Forms, p. 121; 4 Minor, Inst. pt. 1, p. 832; 1 Bart. Law Pr. p. 685; and Hutch. Treat. W. Va. p. 990,—we find that none of these forms contain the clause that the foregoing is all of the evidence offered. In the case of Childers v. Deane, 4 Rand. (Va.) 408, it was held that a demurrer to evidence should contain the evidence on both sides. See, also, Hoyle v. Young, 1 Wash. (Va.) 152; Green v. Judith, 5 Rand. (Va.) 1; Harrison v. Brock, 1 Munf. 35; and numerous other cases,—where it is held that the whole evidence must be set out; that is, not only that offered by the plaintiff, but that offered by the defendant. In making up the demurrer, counsel for both parties are presumed to be present, and the court should not compel a joinder in the demurrer unless the evidence is properly stated. A motion to exclude the evidence of the plaintiff from the jury differs in several respects from a demurrer to the evidence. In the first place, it must be made before the defendant has given in his testimony; and it has been held by this court, in Carrico v. Railway Co., 35 W. Va. 389, 14 S. E. 12, that, "after the defendant has given in his own evidence, a motion to strike out all the evidence, on the ground that it is insufficient to sustain the issue on the part of the plaintiff, should not be granted;" while, in a demurrer to evidence, the whole evidence offered by each party is set forth, and, if it is not so done, the question is raised upon the joinder in the demurrer, and the action of the court may be then excepted to. For these reasons, I am of opinion that there is no error in the judgment complained of, and the same is therefore affirmed, with costs and damages.

ADKINS, Sheriff, v. STEPHENS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 2, 1893.)

DEBT ON BOND—LIMITATION OF ACTIONS.

Same as points 1 and 2 in the case of Adkins v. Fry, 18 S. E. 737, (above reported.)
(Syllabus by the Court.)

Error to circuit court, Wayne county; T. H. Harvey, Judge.

Action in debt on a bond by Lamech Adkins, sheriff, against John B. Stephens and others. Plaintiff had judgment, and defendants bring error. Affirmed.

Campbell & Holt, for plaintiffs in error.
Simms & Enslow, for defendant in error.

ENGLISH, P. The facts in this case are almost identical with the case of Adkins v. Fry, 18 S. E. 737, (above decided.) In fact, the cases are so similar that counsel have argued them both in the same brief. This was an action of debt by the same plaintiff, who was sheriff of Wayne county, against the sureties of A. F. Clark, who was one of his deputies, to recover from said sureties the amount of several judgments which had been recovered from said sheriff by reason of the default of his deputy aforesaid. The action of debt was brought on the 24th day of October, 1890. The judgments set forth in the declaration were recovered against said sheriff as follows: On the 4th day of September, 1886; the 14th day of February, 1889; and the 10th day of September, 1889,—and were paid by said sheriff. The default of said deputy occurred in the months of January and March, 1875, and in December, 1876. The plea of the statute of limitations was interposed by the defendants, and we hold, as we held in the above case, that the action was not barred at the time it was brought, and affirm the judgment, with costs and damages, for the reasons stated in the above case of Adkins v. Fry.

MILLER v. SHENANDOAH PULP CO.

(Supreme Court of Appeals of West Virginia.
Dec. 2, 1893.)

WATER RIGHTS—CONSTRUCTION OF GRANT—DAMAGES—PROVINCE OF JURY.

1. The grant of the water privileges below established mills will be so construed as to preserve the water power of such mills undisturbed, unless a contrary intent plainly appears from a reasonable construction of the instrument conveying the grant.

2. The privilege of turning the waters of a river down a canal does not carry with it the right to dam such waters back, by head gates or otherwise, so as to destroy the water power of mills already established.

3. If, to preserve himself from injury or loss, a person should deem it necessary to unlawfully damage the property of another, the law requires a just compensation to be paid for such damage.

4. The jury are the judges of the compensation to be paid in case of wrongful damage to real property, and the court will not disturb their finding unless plainly unwarranted by the evidence.

(Syllabus by the Court.)

Error to circuit court, Jefferson county.

Action in trespass on the case by Edward W. Miller against the Shenandoah Pulp Company to recover for injury to plaintiff's mill property and water power. Plaintiff had judgment, and defendant brings error. Affirmed.

A. W. McDonald, Frank Beckwith, and J. D. Butt, for plaintiff in error. Forrest W. Brown (Geo. Baylor, of counsel,) for defendant in error.

DENT, J. Edward W. Miller instituted a suit in the circuit court of Jefferson county to recover damages for permanent injury done to his mills and water power on the Shenandoah river by the erection and maintenance of a dam and gates by the Shenandoah Pulp Company, and on the 10th day of December, 1892, recovered judgment for the sum of \$3,750. The defendant obtained a writ of error to this court, and insists that the circuit court erred: (1) In not arresting the judgment and granting a new trial. (2) In not permitting the witness W. L. Black, for the purpose of showing that the use of the head gates complained of in the declaration were necessary and essential to protect the defendant's property and that of other riparian owners below the dam, to answer the following question, viz.: "What would be the effect, in times of a freshet in the Shenandoah river, upon the mill property of the defendant, and the property of other riparian proprietors below, without the use of these head gates at the dam?" (3) In refusing to give the following instructions: "Instruction No. 1. The court instructs the jury that by the terms of the grant from John Strider and wife to the U. S. of America, dated the 27th day of June, 1833, the government of the U. S. had the right to the use of all the water in the Shenandoah river, and, to effect this use, had the right to complete and perfect the dam above and nearly opposite the Guelph mill, either by extending or raising the same, or by both means, to an extent sufficient to catch all the water in said river; and if the jury believe, from the evidence, that the defendant was the owner of the right of the U. S. at the time of the wrongs alleged in the declaration, then they must find for the defendant, even though they should believe that the said dam was either raised or extended, or raised and extended, by the defendant. Instruction No. 2. The court further instructs the jury that if they believe, from the evidence, that the defendant (the Pulp Co.) could not, without liability to injure itself and other riparian proprietors below, use the waters gathered by said dam without the building of the head gates mentioned in the declaration, and further believe that without said head gates the defendant could not reasonably enjoy his rights under the said Strider deed, then the putting in of said head gates are an incident to the right to raise and extend the said dam, and they must find for the defendant upon the question of damages occasioned by said head gates,"—and in giving the following instruction for plaintiff: "If the jury believe, from the evidence, that the defendant has, in the manner alleged in the declaration, unlawfully injured the property of the plaintiff, and that such damage and injury is of a permanent character, and affects the value of plaintiff's property, then they will find for the plaintiff a sufficient amount as will be a full compensation for such permanent injury." (4)

In not setting aside the verdict as contrary to the law and evidence. The issue was joined on the plea of not guilty.

The fact is clearly established that the defendant's dam and head gates do back the waters of the Shenandoah to the foot of Bull's falls, and thus entirely destroy the water power at the plaintiff's mills, and for some distance above them. Both parties derive title through successive alienations from John Strider, and the defendant insists that it had the right to build its dam and construct its water gates by virtue of the deed from said Strider and wife to the government of the United States bearing date the 27th day of June, 1833. The plaintiff denies any such grant by this deed. On the construction of its provisions this case depends. The disputed questions are contained in the following recital from this deed: "That the said John Strider, and Sarah, his wife, for and in consideration of the sum of two thousand six hundred dollars, lawful money of the United States, to them in hand paid by the said United States of America (through the Hon. Lewis Cass, secretary of war) at and before the enrolling and delivery thereof, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, aliened, enfeoffed, released, and confirmed, and by these presents do grant, bargain, and sell, alien, enfeoff, release, and confirm, unto the United States of America and assigns forever, all the right, title, interest, claim, and demand whatsoever of the said John Strider, and Sarah, his wife, of, in, and to the use and privilege of the waters of the Shenandoah river between the mills of the said Strider, called the 'Guelph Mills,' and the public works belonging to the United States on said river below, the fall in the river from the said mills to the termination of the land of said Strider being two feet three inches, commencing two feet five inches below the top of an iron bar now inserted in a rock situated in the tail race of the mill of said Strider, said bar being twenty-three feet six inches distant from the south corner of said mill. The said John Strider, and Sarah, his wife, for the consideration before mentioned, grant, bargain, and sell unto the United States of America the privilege of completing and perfecting the dams now extending partly across the Shenandoah river above and nearly opposite the said Guelph mills, so as to increase the supply of water to any extent passing down the canal that leads to the rifle factory; also, the privilege of increasing the depth and width of the present canal extending from the dams last mentioned past the mills of said Strider to the rifle factory; also, the privilege of increasing and extending the dam or dams at the head of the canal or race which supplies the mills of said Strider with water, and of increasing the depth and width of said canal or race, and of constructing waste weirs in the same at such places as may be considered necessary by the super-

intendent of the Harper's Ferry Armory, his successor, or any future agent of the United States, for obtaining water for the public works now established, or which may hereafter be established, by the United States, at or near the rifle factory on the Shenandoah river: provided, however, that such waste weirs shall not be so constructed as to prevent the free passage to the mills, etc., of said Strider, of whatever quantity of water he may require, without, however, lessening the force or quantity of water required by the United States. And the said John Strider, and Sarah, his wife, for the consideration before mentioned, grant and convey to the United States of America and their assigns forever the privilege of erecting a dam or dams partly or entirely across the Shenandoah river at any point or points below the mills of said Strider, the height of which, however, shall not be more than eight inches above the top of an iron bar now inserted in a rock, situated near the upper end of the island on which the rifle factory is located, being the second rock of a ledge of rocks extending from said island nearly across the Shenandoah river in the direction of south, 29¾ degrees west. The said iron bar is inserted in said rock so that the top thereof is even with the surface of the highest point of said rock."

The first grant is "to the use and privilege of the waters of the Shenandoah river between the mills of said Strider, called the 'Guelph Mills,' and the public works belonging to the United States on said river below, the fall in the river from the said mills to the termination of the land of said Strider being two feet three inches, commencing two feet five inches below the top of an iron bar now inserted in a rock situated in the tail race of the mill of said Strider; said bar being twenty-three feet six inches distant from the south corner of said mill." This fixes a point of beginning, above which Strider continued his ownership, below which he granted to the United States. This point being once determined, the United States nor its vendees could have any rights above it, as the law is well settled that a riparian owner may swell water, when it is in its natural state, by a dam erected below to his neighbor's line above, but no further, without being guilty of a wrong. 4 Amer. & Eng. Enc. Law, 971; Navigation Co. v. Coon, 47 Amer. Dec. 474; Bell v. McClintock, 34 Amer. Dec. 507. This point, so carefully fixed, has not been ascertained in the evidence, and the defendant insists that it is destroyed as a boundary point by the after clauses of the deed. While we cannot agree with his ingenious argument on this question, yet, as the evidence fails to disclose the ascertainment of this iron bar, its actual location can have little to do with the determination of this case. The next grant to the United States is "the privilege of completing and perfect-

ing the dams now extending partly across the Shenandoah river above and nearly opposite the said Guelph mills, so as to increase the supply of water to any extent passing down the canal that leads to the rifle factory." This clause must be construed so as not only to include the one dam nearly opposite the Guelph mills, but also the dams above the mills, all of which the United States was granted the privilege of completing and perfecting, so as to increase the supply of water to any extent passing down the canal that leads to the rifle factory. It was by a combination of all these dams the United States was to have the privilege of turning all the waters down the canal, and not by the dam opposite the Guelph mills alone, as is mistakenly argued by counsel. Next, it is granted "the privilege of increasing the width and depth of the canal extending from the dams last mentioned [that is, this combination of dams] past the mills of said Strider to the rifle factory;" that is, the whole length of Strider's land, so as to convey any increased volume of water needed for the works. Then follows the grant of "the privilege of increasing and extending the dam or dams [belonging to the combination before spoken of] at the head of the canal or race which supplies the mills of said Strider with water, and of increasing the depth and width of said canal or race, and of constructing waste weirs [dams, not ways, as counsel claim] in the same at such places as may be considered necessary by the superintendent of the Harper's Ferry Armory, his successor, or any future agent of the United States, for obtaining water for the public works now established, or which may hereafter be established, by the United States, at or near the rifle factory on the Shenandoah river: provided, however, that such waste weirs shall not be so constructed as to prevent the free passage to the mills, etc., of said Strider, of whatever quantity of water he may require, without, however, lessening the force or quantity of water required by the United States." Lastly, the United States is granted "the privilege of erecting a dam or dams partly or entirely across the Shenandoah river at any point or points below the mills of said Strider, the height of which, however, shall not be more than eight inches above the top of an iron bar now inserted in a rock situated near the upper end of the island on which the rifle factory is located." This last point is not shown in evidence, but it is certainly safe to presume that the object was to prevent the erection of a dam so high as to cause the water to flow back on Strider's mills. Such would be the natural inference until at least some other reasonable motive or purpose is disclosed. But this, like the other iron bar referred to, being unascertained, can have but little weight in the decision of this case.

To recapitulate. There are three grants as

to dams: (1) The government is authorized to complete and perfect the dam opposite, and the dam or dams above, Strider's mills, so as to increase the supply of water to any extent passing down the canal that leads to the rifle factory; (2) also, in addition to completing and perfecting, the government is authorized to increase and extend the dam or dams above the mills; (3) to erect new dams across the river below Strider's mills, the height of which is limited. Counsel in their arguments insist that this first clause, as to the completing and perfecting, only applies to the dam opposite the mills; but a careful consideration should convince them that such cannot be the case—First, because there was only the part of one dam opposite the mills; and, second, if the government had the right to increase this one dam to such an extent as to increase the supply of water without limitation, it would not have had any use for the dam or dams above the mills, and it was because it could not get this privilege that it found it necessary to acquire the right to complete, perfect, increase, and extend the dams above the mills, so that the supply of water to pass down the canals could be increased without limit. The lower dam was only intended to turn the overflow from the upper dams into the canal, while the privilege of constructing the dams lower down was for the purpose of giving the government a larger basin of water, without interfering with the water power of Strider's mills. The water from the lower dam was to flow into the canal unobstructed by waste weirs or head gates; but whatever waste weirs the United States might need for storing water were to be constructed above, and not below, Strider's mills, and then in such manner as to allow the water to flow freely to said mills, unless the United States might temporarily stop it until the storage supply was of sufficient quantity to supply the United States works as well as Strider's mills. In this last case the United States was to keep up Strider's dams; and hence it was a great benefit to him, as it relieved him of a very heavy expense, and he could well afford to subordinate his use of the water from the upper dams to that of the United States, as the water, whenever permitted to pass the waste weirs, would be used in turning his mills before it reached the works of the United States. If the United States had, or could have obtained, the privilege, as to the lower dam, claimed by this defendant, it could have made the one dam so extensive and strong, and put in such ample waste weirs or head gates, that it would have had all the water supply and power it needed without purchasing the privilege and undertaking the expense of increasing and extending the dam or dams above the mills, and of putting in waste weirs or gates, or obtaining the privilege of building other dams below. It would have been much cheaper and better to have erected one strong and

massive and permanent dam, with extensive head gates, after the manner of this defendant, than to keep up a combination of dams and waste weirs; and the only reasonable deduction for its not being done is that the water rights of the Strider mills were in its way. But these water rights did not stand in the way of this defendant; for it not only did not keep up the dams above the mills, but it constructed a commodious dam and extensive head gates in lieu of waste weirs below Miller's mills, and destroyed his water power entirely, back to Bull's falls. The United States preserved and added to the water power of the mills in controversy; this defendant confiscates and destroys it. For this privilege, assumed by it unlawfully, without purchase or condemnation, it should cheerfully pay a just compensation,—a full equivalent for the permanent character of the damage done. The two instructions asked by it were properly refused.

The defendant insists that the verdict of the jury as to the amount found is not sustained by any reasonable view of the evidence, and refers to *Black v. Thomas*, 21 W. Va. 709; *Hatfield v. Workman*, 35 W. Va. 578, 14 S. E. 153; *Wandling v. Straw*, 25 W. Va. 692. The plaintiff's title was sufficiently established for the purpose in issue. Not having been attacked in any manner in the lower court, proof on his part that he was the owner and in possession of the property was sufficient; and any technical questions of title will be presumed to have been waived, and will not be permitted to be raised for the first time in this court. The jury are the sole judges of the amount of the damages inflicted, and, unless their finding is plainly unsustained by the evidence, such finding will not be disturbed. The references of the defendant sustain this proposition. The evidence in this case shows that the fall in the river from Bull's falls, three-fourths of a mile above, is six feet to Miller's mills; that the present dam and head gates have entirely neutralized this fall, and the water is backed up over the mill wheel, completely destroying its use. The damage sued for here is permanent, and a recovery confers a license on the defendant to continue the cause indefinitely. It is a taking of Miller's property for the use of the defendant without condemnation or purchase; so that, in arriving at a verdict, the jury must take into consideration the value of the water power from Bull's falls to the plaintiff's mills, as well as the damage occasioned to the mills by reason of the permanent loss thereof. The plaintiff, in his evidence, states the damage at about \$10,000, one-third of the value of the property, in his estimation. His son Francis states the damage to be from \$10,000 to \$15,000. The opinions of no other witnesses are given as to the amount of damages, except to say it is considerable. The defendant introduces no evidence to contradict these opinions, nor to establish the mar-

ket value of the property, but relies entirely on its adverse title under the Strider deed to the United States. It is the settled law of this state that the opinions of witnesses are admissible as to the amount of damage done in cases of this character, to enable the jury to arrive at a just verdict; and, while the jury are not bound by these opinions, it has the right to give them such weight as, taken together with the other evidence, is justifiable. The jury might have found a much larger verdict, and still have been sustained by the evidence. The instruction given for the plaintiff states the law correctly, and was properly given. *Railroad Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 788.

There was no error committed against the defendant in refusing to allow the witness Black to answer the question propounded to him in regard to the head gates. It could make no difference to plaintiff how much the defendant damaged its own property or that of other riparian owners. His property could not be taken unlawfully, to avoid such damage, without just compensation. The establishing this fact would not have benefited the defendant's case, and it might have increased the moral obligation, at least, on the part of the defendant, to pay Miller for his property, and furnish a further reason why it should compensate him to the full extent of the unauthorized wrong done him. Our conclusion, therefore, is that there is no error in the judgment of the circuit court, and it is affirmed, with costs and damages according to law.

WATSON et al. v. CONRAD et al.

(Supreme Court of Appeals of West Virginia.
Nov. 29, 1893.)

ESTOPPEL — PARTITION — SALE OF ESTATE IN REMAINDER — TITLE OF PURCHASER.

1. By the eleventh clause of the will of John Hoge, he directed "that the lands, property, money, bills, or notes devised to my executors hereinafter named shall be held by them, or the acting or surviving part of them, upon trust for the necessary support of my daughter Eliza A. Long, to be paid out by them for said purpose, and in such proportion, as they might think necessary from time to time, and, if they might think it advisable, to sell the lands which were therein devised to them, and, on receipt of the purchase money, convey the same to the purchaser or purchasers, holding the money in trust for the purposes aforesaid;" and they were thereby authorized, when they thought proper, to make sale of any property which might come into their hands by virtue of the devises aforesaid, or collect moneys due to them by virtue of the devises aforesaid, and loan out said moneys on interest when they might think it advisable to do so, so as that the moneys be kept safe and ready for the purposes aforesaid; and, if the whole of the funds then placed in the hands of his executors as aforesaid, for the purposes aforesaid, be not all paid out and disposed of for the purposes aforesaid during the natural life of his daughter Eliza A. Long, then the residue was to be paid to her children, naming them. With funds thus acquired, said executors purchased a tract of land in Lewis

county on the 28th day of March, 1854, which purchase was adopted by the said Eliza A. Long, and acquiesced in until her death, which occurred in March, 1868. She left three children, who acquiesced in said purchase, and treated the property as land, by conveying their undivided interest therein to third parties. They are thereby estopped from treating said property as personality, and a party holding one-third of said land by virtue of a conveyance of one of said children is entitled to a partition thereof.

2. One of said children of Eliza A. Long having filed his petition in bankruptcy on the 10th day of October, 1867, and having become a voluntary bankrupt, and having included his interest in said land in his schedule, and his assignee having been directed to proceed to sell the interest of said bankrupt in the lands mentioned in his schedule at the time of filing his petition therein, said Eliza A. Long being then in life, a purchaser at such sale acquired no interest in said land, for the reason that said property, although held by trustees, was the absolute property of said Eliza A. Long.

(Syllabus by the Court.)

Appeal from circuit court, Lewis county; M. Edmiston, Judge.

Action by John M. Long and Charles W. Watson against James F. Conrad and others for partition and other relief. There was decree for plaintiffs, and William G. Harrison, guardian for the heirs of defendant Conrad, appeals. Affirmed.

A. Edmiston and W. W. Brannon, for appellant. Geo. J. Arnold, for appellees.

ENGLISH, P. The last will and testament of John Hoge, who was a resident of the county of Pulaski, and state of Virginia, at the time of his decease, contained the following clause, to wit: "I direct that the lands, property, money, bills, or notes devised to my executors hereinafter named shall be held by them, or the acting surviving part of them, upon trust for the necessary support of my daughter Eliza A. Long, to be paid out by them for said purpose, and in such proportion, as they may think necessary from time to time, and, if they may think it advisable, sell the lands which are herein devised to them, and, on receipt of the purchase money, convey the same to the purchaser or purchasers, holding the money in trust for the purposes aforesaid; and they are hereby authorized, when they may think proper, to make sale of any property which may come into their hands by virtue of the devises aforesaid, or collect moneys due to them by virtue of the devises aforesaid, and to loan out said moneys on interest when they may think it advisable to do so, so as that the moneys be kept safe and ready for the purposes aforesaid; and if the whole of the funds now placed in the hands of my executors as aforesaid be not all paid out and disposed of, for the purposes aforesaid, during the natural life of my daughter Eliza A. Long, then the residue is to be paid unto her children, to wit, Margaret Jane Long, John Montgomery Long, James Thomas Long, and Ann Elizabeth Long, and, if my daughter Eliza A. Long should hereafter have any more child-

dren, they are to come in equal with the above-named children;" and he appointed Moses H. Hoge, John M. Hoge, and Moses B. Floyd executors of said will. The two first named alone qualified as such executors. On the 28th day of March, 1854, said Moses H. Hoge and John M. Hoge purchased from Jacob Bush a tract of land situated in the county of Lewis, on Canoe run, a branch of the Monongahela river, described as containing 141½ acres and 36½ poles, more or less, the deed for which tract of land was acknowledged and admitted to record in said county on the 3d day of April, 1854. On the face of said deed it was provided that the said Moses H. and John M. Hoge should hold the above-conveyed tract of land for the uses and purposes following, and no other; that is to say, that the said tract of land, and the profits of the same, is to be for the exclusive use and benefit of said Elizabeth A. Long and her children that she then had, or might thereafter have, free from the control of the said Adam Long, and not liable to his debts then existing or thereafter to be contracted; and it was expressly declared to be the true meaning of said deed that the said trustees should not suffer the said tract of land, nor the profits thereof, to be applied to the debts of the said Adam Long, then existing or thereafter to be contracted, and that, from and after the death of the said Eliza A. Long, the children of said Eliza were to have the said land in fee simple. Said Eliza A. Long died on the 16th day of March, 1868, and her husband, Adam Long, died in the year 1856. In October, 1867, John M. Long, one of the sons of said Eliza and Adam Long, filed his petition in bankruptcy, and in his "Schedule B," filed with said petition, in describing and setting forth his property in reversion, remainder, or expectancy, including property held in trust for him, or subject to any powers or right to dispose of or to charge, set forth and described said tract of land conveyed by Jacob Bush and wife on the 28th day of March, 1854, to M. H. Hoge and J. M. Hoge, of Pulaski county, Va., in trust for his mother, Eliza A. Long, during her life, and the remainder to her children, of whom there were four, viz. John M. Long, Margaret J. Long, James T. Long, and Ann E. Evans, the latter of whom had died without issue and intestate. The interest in the land so described was on the 19th day of March, 1870, sold by D. M. Bailey, assignee in bankruptcy of the said J. M. Long, at which sale E. Ralston, assignee of E. M. Tunstall, surviving partner of Bailey & Tunstall, and A. A. Lewis, became the purchasers thereof; and on the 31st day of August, 1874, said D. M. Bailey, assignee as aforesaid, conveyed to said Ralston and Lewis the undivided interest of said J. M. Long in the reversion in 141½ acres of land, which was described therein as the same interest in

said land surrendered by said J. M. Long in his schedule of property as such bankrupt, which interest was sold and conveyed by said E. Ralston and wife and A. A. Lewis to James F. Conrad. On the 20th day of January, 1874, said John M. Long and wife, by their deed, of that date, conveyed to Charles W. Watson all of his right, title, and interest in said tract of land, describing it as containing 107 acres, more or less. James K. Bywater married said Margaret Jane Long, and they, together with said James Thomas Long, conveyed their interest in said land after the death of said Ann Eliza Long, who died without issue, to said James F. Conrad. And in this way said James F. Conrad claims to be the owner of said entire tract of land, while Charles W. Watson claims to be the owner of the undivided interest of said John M. Long under said deed of conveyance from said Long and wife. This state of facts existing, said John M. Long and Charles W. Watson filed their bill, on the first Monday in January, 1877, against James F. Conrad, Moses H. Hoge, John M. Hoge, James T. Long, James K. Bywater, and Margaret Jane, his wife, setting forth the facts in substance as above detailed, and charging that notwithstanding the said executors, as such trustees, had no right under the will of John Hoge to vest the money coming to said Eliza A. Long in land, they did so, and took the legal title to themselves, but agreed, by the expressed language of said deed from Bush to them, that, after the death of the said Eliza A. Long, said land mentioned in said deed from Bush to them might pass to the children of Eliza A. Long in fee simple; and alleging that, as the other heirs had accepted said land in lieu of money, the plaintiff John M. Long was willing to do likewise, said legal title taking effect and vesting in him on the 16th day of March, 1868, the day of the decease of his mother, Eliza A. Long; that the plaintiff John M. Long, since the death of his mother and sister, for a valuable consideration sold and conveyed his interest (if to be treated as land instead of money) to said Charles W. Watson, by deed duly recorded, dated the 20th day of January, 1874; that said land was held only as a mere chattel for the use of said children of Eliza A. Long, subject to their acceptance, and not as realty, as there was nothing to bind said children to accept said land instead of money coming to them as provided by the will of John Hoge, deceased, which could not take effect, and enable them to demand same, until the death of Eliza A. Long, their mother, on the 16th day of March, 1868; and praying that if, in the opinion of the court, said interest was to be treated as land, and vested in fee on the 16th day of March, 1868, a decree for partition be rendered, giving one undivided third of said land to Charles W. Watson, according to

quality and quantity, but if, in the opinion of the court, it should be treated as money, praying that the court might decree a sale of said land, and that the money might be distributed as to equity might seem right. The defendant James F. Conrad answered the plaintiffs' bill, denying that the trustees violated their trust, or exceeded their powers as trustees, in the purchase of the land in the bill mentioned; denying the right of the plaintiff J. M. Long to disclaim the provisions of the deed, and claim an interest in money under the will; and alleging that the deed gave the children of Mrs. Eliza A. Long a vested remainder in the land, while they might not have been entitled to anything in money, and the same might have been consumed by their mother; setting forth the facts as to said J. M. Long having, on his own petition, become a bankrupt, and the transfer of his interest thereby to his assignee in bankruptcy, and the conveyances made in pursuance thereof, from said assignee to Ralston and Lewis, and from Ralston and Lewis to respondent J. F. Conrad, and alleging, further, that said J. M. Long, by said proceeding in bankruptcy, surrendered his interest in said land; and further claiming that, if there could be any force in the pretense that his interest should be in money in the hands of said trustees, still his interest in that would pass from him by force of the proceedings in bankruptcy; and also that he had held possession of the entire tract of land since his purchase, and, being thus sustained by his possession and the legal title, he is advised that his title thereto is complete, and he denies the right of the plaintiffs to relief in a court of equity. A. A. Lewis and E. Ralston also answered said bill, setting forth and exhibiting said proceeding in bankruptcy, and claiming title under said assignee; claiming that under said proceedings they got not only one-fourth of said land, but after the death of said Ann E., who died intestate and without issue prior to the 11th of October, 1867, said John M. Long was entitled to one-third of her fourth of said land, which interests passed to them by the deed from said assignee in bankruptcy, and that they purchased without notice of the provisions of the will of John Hoge, deceased, and without notice that said land was charged with any secret trust. Charles W. Watson and John M. Long replied specially to the answer of A. A. Lewis and E. Ralston, putting in issue the affirmative matter therein contained.

On the 21st day of March, 1891, the cause was heard, and the court decreed that the plaintiffs were entitled to one-third of the lands in the bill and exhibits mentioned, and that they were entitled to have partition thereof, and appointed commissioners to go upon the land, and partition the same by metes and bounds, giving one-third thereof, according to quantity and quality, to the plaintiffs, and two-thirds thereof to the chil-

dren and heirs at law of James F. Conrad, deceased, who had appeared in the cause by guardian ad litem. On the 8th day of July, 1891, the report of said commissioners was received, and, being unexcepted to, was confirmed; and the court decreed that the parties take and hold in severalty, by metes and bounds, as set out in said report and the plat accompanying the same, the respective tracts or parcels of land allotted to them by said commissioners, and the heirs at law of James F. Conrad, by their guardian ad litem, obtained this appeal. It is assigned as error that the court decreed the plaintiffs to be entitled to one-third of the land in the bill and exhibits mentioned; also, that it was error to decree the plaintiffs entitled to partition of the said land. Now, when we search for the intention of the testator, John Hoge, in framing the tenth and eleventh clauses of his will, it is manifest that he had two objects. One was to provide for the comfortable support and maintenance of his daughter Eliza A. Long during her life, and at the same time to protect what he thus appropriated from the improvidence and liabilities of his son-in-law Adam Long. In order to carry out this object, he devised and bequeathed to his executors certain personal and real estate in trust for the support of his said daughter, with power to sell and convey certain lands which were devised to them, holding the proceeds in trust for the purposes aforesaid, giving them power to loan money on interest when they thought it advisable, so that it might be kept safe and ready for the purposes aforesaid; and, if the whole fund placed in the hands of his executors as aforesaid was not all paid out and disposed of for the purpose aforesaid during the natural life of his said daughter, then the residue was to be paid unto her children, naming them. Now, I do not consider it very material, under the circumstances of this case, whether the property devised and bequeathed to said executors was land or money. It has been held in the case of *Harcum's Adm'r v. Hudnall*, 14 Grat. 369, that land devised to be sold is no longer land, but money, and in this case part of the property given to these executors was in the shape of bills and notes; and, in considering the case, let us regard it all as money, and by the terms of the will it was to be paid out and disposed of for the necessary support of his said daughter during her natural life. Now, while it is true this clause of the will does not authorize the executors to purchase real estate as a home for said Eliza A. Long, it is apparent that the money thus left to them was to be paid out and disposed of for the necessary support of said Eliza. This would necessarily involve considerable discretion on the part of said executors. The tract of land in controversy in this case was purchased by said executors as early as the 28th day of March, 1854, and the executors, in taking a deed for the same, were careful that

the same should show on its face that the purchase was made for the exclusive use and benefit of the said Eliza A. Long and her children that she then had, or might thereafter have, free from the control of the said Adam Long, and not liable for his debts then existing or thereafter to be contracted. Said Adam Long died in 1856, and Eliza A. lived until March, 1863, and during these 12 years of her widowhood it does not appear that she in any manner found fault with or repudiated the act of said executors in purchasing said real estate. 2 Perry, Trusts, § 849, states the doctrine thus: "If the cestui que trust concur in the breach of the trust, he is estopped from proceeding against the trustee. * * * A married woman may concur in a breach of trust in respect to estates settled to her separate use." And in section 850 the same author says: "So, a cestui que trust may be barred from relief by long acquiescence in a breach of the trust, though he did not originally concur in it." For anything that appears in the record, this must have been regarded as a judicious investment on the part of the said executors of \$750 of the money that came into their hands for the use of said Eliza. An undivided third of it appears to have been sold by the plaintiff John M. Long to his coplaintiff, Charles W. Watson, in 1874, for \$500; and, if the investment was an injudicious one, who had a right to object or complain but Eliza A. Long, the cestui que trust? Yet she quietly acquiesces during the entire 14 years of her life which followed the date of the said deed. After the death of said Eliza, her three surviving children might have objected to treating this investment as land; yet when this bill was filed, in January, 1877, by said John M. Long and Charles W. Watson, nearly nine years after the death of said Eliza A., in said bill it is charged that said executors had no authority to invest the money in realty, and, having so invested it, did not bind the children of said Eliza to take the land as their distributive share of the money in the hands of said executors at and after the death of said Eliza; and although the bill charges that said land is held only as a mere chattel for the use of said children of Eliza A. Long, subject to their acceptance, and not as realty, yet the bill alleges that on the 20th day of January, 1874, the plaintiff John M. Long and wife, by their deed of that date, conveyed all of their right, title, and interest in said tract or parcel of land, describing it, for the consideration of \$500, to his coplaintiff, Charles W. Watson. It further appears from the allegations of said bill that James Thomas Long, on the 15th day of December, 1869, and Margaret Jane Long, who married J. K. Bywater, on the 17th day of December, 1871, conveyed their interest in said land to James F. Conrad, all of them thus unequivocally electing to treat said investment as land, and acquiescing in and adopting the action of said executors in making said investment, which, from their

uniform and long-continued silence, must have been regarded as a judicious investment, which is further manifest from the fact that, so far as appears, it is all that remains of the property that went into the hands of said executors for the use of said Eliza A. Long during her life, and after her death for her children. If said executors, then, in making the investment in this tract of land, even committed a breach of trust, said Eliza A. Long, in her lifetime, for 14 years, and her children for nearly as many years after her death, must be held to have concurred in the breach, and are estopped from proceeding against the executors. Hill on Trustees, at top page 544, (side page 382), says: "A cestui que trust, being sui juris, who consents to or acquiesces in an investment by a trustee, cannot afterwards question its propriety;" citing *Brice v. Stokes*, 11 Ves. 319; *Langford v. Gascoyne*, Id. 333; *Booth v. Booth*, 1 Beav. 125, etc.

Let us next inquire whether D. M. Bailey, as assignee in bankruptcy of J. M. Long, in pursuance of a petition filed by said Long in the district court of the United States for the district of West Virginia on the 10th day of October, 1867, took any estate in said lands by virtue of said bankrupt proceedings. At the time said petition in bankruptcy was filed, together with the schedules, to wit, on the 10th day of October, 1867, Eliza A. Long was still in life, and so continued until the 16th day of March, 1868; and it will be seen, by reference to the order directing the sale of said interest, "It was ordered that D. M. Bailey, the assignee, do proceed to sell the interest of said bankrupt in the lands mentioned in his schedule at the time of filing his petition;" and whether we regard said property as personalty or realty, as the absolute property of said Eliza A. Long, under the ruling in *May v. Joynes*, 20 Grat. 692, and *Milhollen's Adm'r v. Rice*, 13 W. Va. 510, or only an estate for life in said Eliza A., with remainder to her children, the effect is the same with reference to the transfer of title to said assignee in bankruptcy. At the time of filing said petition in bankruptcy, no title, in either instance, had passed to John M. Long, and, as a matter of course, he could transfer none to his assignee in bankruptcy, and those claiming under said bankrupt sale acquired no title thereby.

Subsequent to the death of said Eliza A. Long, and after the said children had acquired title thereto by inheritance, the said children of said Eliza A., being sui juris, so far as appears from the record, having elected to treat said property as real estate, and the plaintiff J. M. Long having conveyed his undivided interest therein to the said Charles W. Watson, in my opinion, said Watson was and is entitled to partition of said lands. The decree complained of is therefore affirmed, with costs.

BRANNON, J., not sitting.

STATE v. MARTIN.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

**CRIMINAL LAW—TRIAL OF PLEA IN ABATEMENT—
ARREST OF JUDGMENT — DISQUALIFICATION OF
GRAND JUROR—EFFECT OF—AMENDING RETURN
OF SUMMONS.**

1. An issue to be determined by inspection of the record must be tried by the court, not by a jury.

2. On motion in arrest of judgment, the judgment cannot be arrested except for errors apparent in the record.

3. The incompetency or disqualification of a grand juror is no ground to abate or quash the indictment. Code, c. 157, § 12.

4. The circuit court has control over all proceedings had during the same term, or in the office during the preceding vacation. It may set aside any such proceedings, or correct any mistake therein, and make such order concerning the same as may be just. See Code, c. 125, § 60.

5. The sheriff or his deputy will be permitted to amend his return of process, mesne or final, so as to make it conform to the facts.

(Syllabus by the Court.)

Error to circuit court, Taylor county; Joseph T. Hoke, Judge.

G. M. Martin was convicted of selling intoxicating liquors unlawfully, and, a motion in arrest of judgment having been overruled, he brings error. Affirmed.

W. R. D. Dent, for plaintiff in error. T. S. Riley, Atty. Gen., for the State.

HOLT, J. At the April term, 1892, of the circuit court of Taylor county, the grand jury returned a true bill of an indictment against defendant, Martin, for selling unlawfully spirituous liquors. At the June term, 1892, defendant moved the court to quash the indictment. This motion the court properly overruled, the indictment being in proper form. At the April term, when the indictment was found, of the 16 members summoned by the sheriff only 12 were qualified to act. Thereupon, under section 4, c. 157, of the Code, the sheriff was directed to summon 4 others, and, pursuant to the order, he forthwith summoned George M. Whitescarver and three others; Mr. Whitescarver, who acted as foreman, being one of the jury commissioners who selected the list of jurors. The clerk took the list of 16 as returned by the sheriff, struck out the names of the 4 disqualified grand jurors, and substituted the names of the 4 summoned by the sheriff to take their places. As it stood, it appeared as if those on the corrected list had been summoned by the sheriff before the time. The sheriff, by leave of the court, corrected his return so as to make it correspond with the fact. In this there was no error. *Stone v. Wilson*, 10 Grat. 529; *Wardsworth v. Miller*, 4 Grat. 99. These facts defendant set forth in a plea in abatement, averring that the pretended grand jurors who found the indictment were not selected, drawn, summoned, or impaneled according to law, and therefore he prayed judgment of the in-

dictment that it might be quashed. At the September term, 1892, defendant tendered this plea in abatement, and the attorney for the state moved to reject the same. This motion should have been sustained, and the plea rejected, for the only material part was then shown by the record to be untrue; but the court permitted it to be filed, and the state took issue on it. The defendant then moved the court to have the issue on the plea tried by a jury; but the court refused, and proceeded itself to try the issue, and found that the material facts were not true. In this there was no error, for the material facts were matters of record, and therefore triable by the court, and not by a jury. Defendant then moved to quash the panel of the petit jurors drawn and in attendance at the September term, because George M. Whitescarver, who is one of the jury commissioners of the court, is the same George M. Whitescarver who was foreman of the grand jury which found the indictment; but the court overruled the motion, and properly: (1) Because being a jury commissioner does not disqualify him for serving on the grand jury; (2) because no presentment or indictment shall be abated on account of the incompetency or disqualification of any one or more of the grand jurors who found the same, (section 12, c. 157, Code,) for, if his being a jury commissioner disqualified him for serving on the grand jury, such disqualification did not affect the indictment found. Neither did his serving on the grand jury ipso facto oust him of his office of jury commissioner, if it could be made a good ground for such ouster. Defendant then pleaded not guilty, was tried by a jury, who found him guilty, and defendant moved in arrest of judgment. This motion the court, after taking time to consider, overruled, and properly, because judgment cannot be arrested except for errors apparent on the record, and, as we have already seen, no such errors appear. All these points and rulings being saved to defendant, he brought the case here by writ of error; and the matters arising upon the record being considered, and no error appearing, the judgment rendered by the circuit court is affirmed.

DENT, J., not sitting.

**HANEY v. PITTSBURGH, C., C. & ST. L.
RY. CO.**

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

**INJURIES TO EMPLOYE—FELLOW SERVANTS—VICE
PRINCIPAL—CONTRIBUTORY NEGLIGENCE.**

1. Where a collision is caused by the negligence of the conductor in failing to notice the signals displayed at a station, or by the negligence of the operator at the station in displaying improper signals, and by reason thereof a car collides with another standing on the track, where it had a right to be, with 40 or 50 of the railroad section hands on board, and one of

them jumps from the car to the ground to avoid the effects of the collision, and in so doing receives an injury which results in his death, he cannot be considered as being guilty of contributory negligence, and the company is liable for the damages thus sustained.

2. Neither the conductor of the train nor the operator at the station can be regarded as fellow servants of said section hand.

3. A conductor having the entire control and management of a railway train occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the vice principal of the corporation, for whose negligence it is responsible to subordinate servants.

4. If one is placed by the negligence of another in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence placed in such a position might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance in determining whether he was guilty of contributory negligence or not.

(Syllabus by the Court.)

Error to circuit court, Brooke county.

Action by Eleanor Haney, administratrix of the estate of Gregory Haney, deceased, against the Pittsburgh, Cincinnati, Chicago, & St. Louis Railway Company, to recover for the death of decedent. Plaintiff had judgment, and defendant brings error. Affirmed.

J. Dunbar, for plaintiff in error. H. C. Hervey and T. P. Spencer, for defendant in error.

ENGLISH, P. Gregory Haney, who was employed as a section hand by the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company on the 14th day of January, 1892, was with some 30 or 40 other hands, who were in the employ of the same company, on board of a construction train on the railroad of said company at or near Collier's station, in the county of Brooke and state of West Virginia, when another train of cars, which was an extra coal train, and known as "No. 6," ran into the block in which said first-named train was located at a speed of from 12 to 15 miles per hour, and collided with said first-named train, which is called "No. 3." About the time the collision occurred, several of the workmen jumped from the caboose of No. 3 to the ground, in order to avoid the effects of the collision, and among them was said Gregory Haney, who in some manner, which is not clearly apparent from the evidence, sustained an injury which resulted in a compound fracture of his leg. The presumption is that it was caused by jumping from the cars, as the evidence shows that the doors of the caboose were wide open, that said Haney was in the caboose immediately before the collision, and he was found, with his leg broken, on the ground near the side of the train immediately after the collision. This injury occurred on the 14th day of January, 1892, and, on the 24th day of February following, said Gregory Haney died from lockjaw, which the physician says was induced by several causes.

One was the injury; another was an exceedingly excitable and nervous temperament, and rheumatism. On the 30th day of August, 1892, Eleanor Haney, who had qualified as administratrix of said Gregory Haney, deceased, brought an action of trespass on the case in the circuit court of Brooke county against said railway company, laying the damage at \$10,000, for damage sustained by reason of the death of the said Gregory Haney. The plea of not guilty was interposed, issue was joined thereon, the evidence adduced, certain instructions were asked by both plaintiff and defendant, and the case was submitted to a jury, which resulted in a verdict for the plaintiff of \$4,500; and thereupon the defendant, by its attorneys, moved the court to set aside the verdict, and grant it a new trial, because the same was contrary to the law and the evidence, and the damages found by the jury were excessive; which motion was overruled by the court, and a judgment was rendered on the verdict; and the defendant, by its counsel, excepted, and tendered its bill of exceptions, which was made a part of the record; and from this ruling and judgment of the court this writ of error was obtained.

The first error assigned and relied on by the plaintiff in error is as to the action of the court in allowing rule 34, printed on the time card, to be read in evidence to the jury, which rule reads as follows: "Each train running after sunset, or when obscured by fog or other cause, must display the headlight in front, and two or more red lights in the rear. Yard engines must display two green lights instead of red, except when provided with a headlight on both front and rear." Now, in order that railroads may conduct the running of their trains safely and systematically, it is not only necessary that they should adopt rules for the governance of their employes, but, when so adopted and found to be salutary in their effect, they should be adhered to, and the negligence of their employes who have notice of these rules is frequently determined by their willful neglect and disobedience of the same. As to the relevancy of this particular rule, however, which was offered in evidence and objected to, the evidence shows that the accident which resulted in the injury complained of occurred very early in the morning, and also that the morning was foggy; so that the rule was relevant, as showing what was required to be done by the defendant in running its trains at such a time in the morning, and in weather of that character; and I cannot see that the defendant was prejudiced by the introduction of a rule which had been adopted by it manifestly for the protection of its property and the lives of its employes.

It is also assigned as error that the court permitted rules Nos. 3 and 4 to be read to the jury, although objected to by the defendant, which rules read as follows: "The head of each department must be conversant

with the rules, supply copies of them to his subordinates, see that they are understood, enforce obedience to them, and report to the proper officer all violations and the action taken thereon. (4) Every employe whose duties are in any way prescribed by these rules must always have a copy of them at hand when on duty, and must be conversant with every rule. He must render all the assistance in his power in carrying them out, and immediately report any infringement of them to the head of the department." The action of the court in allowing rule 224 to be introduced and read to the jury, against the objection of defendant, is also assigned as error, which rule reads as follows: "Freight conductors report to, and receive their instructions from, the train master, and must obey the orders of yard masters. The conductor is responsible for the movement, safety, and proper care of his train, and for the vigilance and conduct of the men employed thereon, and must report any misconduct or neglect of duty." It seems to me that no valid objection could be sustained to the introduction of these rules. The question is directly raised in the case as to whether the defendant was guilty of negligence in the management of its trains, and, in determining that question, the first question which presents itself is as to whether the officers to whom it has intrusted the management of its trains have complied with the rules prescribed for their governance by the defendant itself. It is thus we ascertain what said officers are required to do by the directors of the railroad, and, by comparing their conduct as shown by the testimony, we can ascertain whether they have complied with their prescribed duties, or have been negligent in their conduct, and thereby have endangered or destroyed the property and lives of others; and I see no error in allowing said rules to be read to the jury. See *Madden's Adm'r v. Railway Co.*, 28 W. Va. 610, fourth point of syllabus, where it was held by this court that "it is the duty of a railroad company to establish proper rules and regulations for its service, and, having adopted such rules, to conform to them."

The next error assigned is as to the action of the court in giving to the jury the instruction numbered 1 on behalf of the plaintiff, for the reason that there was no evidence in the case tending to justify the giving of the same. Said instruction No. 1 reads as follows: "Plaintiff's Instruction No. 1. If the jury believe from the evidence that Gregory Haney, while in the employ of the defendant company, was lawfully on a work train of the defendant, and that while on said train he was injured by a collision caused by the negligence of the conductor of the extra train attached to engine No. 6, said Gregory Haney being wholly without fault, or the means of preventing such negligence, or of avoiding its consequences, then the jury are instructed that the said conduct-

or was not the fellow servant of said Haney, within the rule which exempts the company from liability for the negligent acts of fellow servants or persons engaged in the common service, and the company should be held responsible for an injury to said Haney caused by the negligence of said conductor." This instruction, as we understand it, propounds the law as laid down by this court in the case of *Madden's Adm'r v. Railway Co.*, 28 W. Va. 610, point 5 of syllabus, and also in the case of *Daniel v. Railway Co.*, 36 W. Va. 397, 15 S. E. 162, point 1 of syllabus. As to the objection that there is no evidence in the case tending to justify the giving of the same, there surely is evidence showing that the plaintiff's decedent was in the employ of the defendant company, and that he was on said train No. 3 as a laborer, being transported to the place of his work in company with the road foreman. As to the conduct of the conductor on that occasion, in his own testimony, when asked in question 14, "When you passed the distance signal at C. O. tower, what did that signal indicate to your train?" answered, "It was partly down; it indicated notice to engineer to reduce speed immediately; to approach home signal under control; that the speed was reduced;" but, when asked to state if his train approached home signal under perfect control, answered, "Well, I can't just exactly say." When asked, "What was the position of the arm on the home semaphore signal when you approached?" replied, "I don't remember exactly;" and, when asked to state if he observed it at the time, answered he did not remember the position of the block; "I can't answer;" and to the question, "Under the rules of the company, state whether or not it was your duty as a conductor to observe the signals," replied, "Yes, sir." This testimony of the conductor himself would surely have a tendency to show negligence on the part of the conductor of No. 6, and, as we think, would warrant the instruction.

Instruction No. 3 was given at the instance of the plaintiff, and the action of the court in giving said instruction is also assigned as error by the plaintiff in error for the same reason. Said instruction No. 3 reads as follows: "If the jury believe from the evidence that Gregory Haney, while in the employ of the defendant company, was lawfully on a work train of the defendant, and that while on said train he was injured by a collision caused by the negligence of the operators in M. N. tower or C. O. tower, or either of them, failing to give the proper signals to engine No. 6, said Gregory Haney being wholly without fault, or the means of preventing such negligence, or of avoiding its consequences, then the jury are instructed that said Haney was not the fellow servant of said operators, or of either of them, within the rule which exempts the company from

liability for negligent acts of fellow servants or persons engaged in the common service, and the company should be held responsible for an injury to said Haney caused by the negligence of said operators, or either of them." Now, it is well known that the operators at the station who control the signals in this manner control the movement of the trains, and indicate the speed at which they are allowed to move on to the next block, and indicate whether the way is obstructed by another train or not; in short, these operators control the action of the conductors and engineers who manipulate the moving trains. The evidence clearly shows that by neglecting his duty, and violating the rules of the company, the operator exposed the wrong signal to No. 6 when it was approaching; and even if the conductor had been attending to his duties, and noticed the position of the signal, he would have been misled by the carelessness and negligence of the operator. And I think these instructions propound the law properly, unless, indeed, the said Gregory Haney was guilty of contributory negligence, and provided, further, that the negligence of the defendant was the proximate cause of the injury. The instruction, however, recites that the said Haney was wholly without fault, or the means of preventing such negligence, which would negative the evidence of contributory negligence; and the instructions also contemplate the injury as being the direct result of the negligence stated, so that I see no valid objection to them.

The action of the court in overruling the motion made by the defendant to set aside the verdict, and award it a new trial, is next assigned as error. Upon this question, in the case of *Miller v. Insurance Co.*, 12 W. Va. 116, this court held that a new trial asked on the ground that the verdict is contrary to the evidence ought to be granted only in a case of plain deviation from right and justice; not in a doubtful case, merely because the court, if on the jury, would have given a different verdict. Can we say that this was such a case? The accident was such as is termed among railroad men a "rear-end collision." Train No. 3, with 40 or 50 laborers in its caboose, on their way to their respective places of labor, had just pulled in to the block at Collier's station, and was standing on the track, and the conductor of No. 3 had started his flagman back to ward off danger. He had proceeded about 100 yards when he met train No. 6, coming in at a rate of speed of 12 or 15 miles an hour. The evidence shows that No. 3 passed No. 6 at the west end of Collier's yard, about two miles from where the collision occurred; so that the conductor of No. 6, if he paid any attention to what was transpiring, could not fail to know that No. 3 was going east in front of him, and, although he must have been aware that No. 3 was ahead of him, he

followed so closely after it, at a high rate of speed, that No. 3 had not been stopped more than a minute when the collision occurred, and, accordingly to his own statements in his testimony, he was so careless and negligent in regard to the character of the signals displayed that, when asked upon trial what they indicated when he approached the home semaphore signal, he was compelled to admit that he did not remember exactly, and, when asked if he observed the signal at the time, answered that he did not remember the position of the block, and could not answer. Yet this was the man who, under the rules adopted by the company for the government of its employes, had the control and management of the movements of said train No. 6. It is true that, if he had noticed the signal, he would have been misled by reason of the negligence on the part of the operator in exhibiting a signal which indicated a permission to train No. 6 to come into the block at a high rate of speed, and without any notice that the track was occupied; but, on the contrary, said operator had left the signal at such an angle as to indicate a clear track, and, with the signals indicating a clear track, the operator left his office, in violation of rule No. 204 adopted by said company. It is also shown that the road between the two towers M. N. and C. O. is a block; and one of the rules of the company provides that, when a train approaches a block station, white will be displayed if there is no train upon the block ahead; and rule No. 202 says white indicates that the block is clear, and gives permission to proceed. In this instance the operator at M. N. tower gave the white signal to train No. 6 when No. 3 was still on the block. It is clear, then, that both the conductor of train No. 6 and the operator were guilty of negligence in allowing train No. 6 to run into the block and collide with No. 3.

Were they, or either of them, fellow servants with the plaintiff's decedent, Gregory Haney, of such a character as to prevent a recovery in this case? In the recent case of *Daniels v. Railway Co.*, 15 S. E. 162, Holt, J., in discussing this question, collates the authorities bearing on the question. He says, among other things: "This brings us to the point involved, called the 'Ohio and Kentucky Doctrine,' to some extent adopted (by a divided court) by the supreme court of the United States in the *Ross Case*, found also in the English 'Employer's Liability Act,' and in the acts of some other states, and understood to be sanctioned and adopted in this state, especially in the *Madden Case*." The same English act enumerates these vice principals as follows: "Any person in the service of the employer who has the charge or control of any signal points, locomotive engine, or train upon a railroad." In the case of *Beuhring's Adm'r v. Railway Co.*, 16 S. E. 435, it is strongly intimated that a railroad engineer and a car numberer were

fellow servants; and some authorities are brought forward in support of that position. And the court, in the opinion prepared by Brannon, J., states that the engineer and car numberer were fellow servants; but it is also stated in the opinion that no negligence was shown on the part of the engineer, and for that reason the point did not fairly arise in the case. In the Ross Case, (referred to in the Daniel's Case,) which is reported in 112 U. S. 377, 5 Sup. Ct. 184, Justice Field says: "A conductor, having the entire control and management of a railway train, occupies a very different position from the brakeman, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative (vice principal) of the corporation, for whose negligence it is responsible to subordinate servants. * * * In no proper sense of the term is he the fellow servant with the fireman, the brakeman, the porters, and the engineers," and much more so with a section hand. One of the duties which a railroad company owes to its employees is to place careful and competent men in charge of its trains, who will conduct the same in such a manner as not to inflict injury and damage to those employed as laborers along its lines. In the case of Riley v. Railway Co., 27 W. Va. 146, this court held (point 2 of syllabus) that "whenever such company delegates to another the performance of a duty to its servants which it has impliedly contracted to perform itself, or which rests upon it as an absolute duty, it is liable for the manner in which that duty is performed by the middleman, whom it has selected as its agent, and to the extent of the discharge of these duties by the middleman he stands in the place of the company, but as to all other matters he is a mere co-servant." So also in the Madden Case, supra, it was held that where an engineer on one train was injured by the negligence of the conductor on the other train, running in opposite directions, the engineer was not the fellow servant of the conductor, and the company was held responsible. Let the injury complained of in this case, then, have resulted from the negligence of either the operator or the conductor, we must hold that the defendant was there acting through these agents, and either of them was the alter ego of the company, and that their negligence was the defendant's negligence.

Having arrived at this conclusion, the only remaining question we wish to consider is whether the plaintiff's decedent was guilty of contributory negligence. Looking to the evidence, we find that he was on board the caboose with 40 or 50 others, where he had a perfect right to be. How he got off when the collision came is not made clear by the evidence. He was found immediately afterwards, near the side of the car. He may have been thrown from the open door by the violence of the shock, or he may have jumped off. And, drawing the inference most fa-

vorable to the defendant, let us say he jumped off, and thereby received the injury which resulted eventually in his death. The question then is, did he, by jumping from the car under the circumstances, contribute to his own injury? In other words, was he guilty of such contributory negligence as to defeat the recovery in this case? It may be true that his action was induced by a mistaken apprehension, or that he was moved by an erring judgment; but it must not be forgotten that he was in a car with 50 others, a freight train was approaching at the rate of 12 or 15 miles an hour, and some one cried out there was a train coming, and to jump. The question is, what did self-preservation prompt? Was he to wait until the crash came, or was he to try and escape the shock, the scalding steam, and the flying splinters which are the usual accompaniment of such collisions. It is true that by remaining quiet he might have escaped injury as others did; but what was the natural impulse, and what would the great majority of men have done, however calm may have been their nervous temperament, under the same circumstances? There can be but one answer,—they would have made every effort to escape. Now, what does the law require of a man thus situated? Shearman & Redfield on the Law of Negligence, (volume 1, § 89,) under the heading, "Effect of Mistaken Judgment under Sudden Alarm," states the law as follows: "In judging of the care exercised by the plaintiff, reasonable allowance is always made for the circumstances of the case; and if the plaintiff is suddenly put into peril, without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although, if his mind had been clear, he ought to have done otherwise, especially if his peril is caused by the defendant's fault. If one is placed by the negligence of another in such a position that he is compelled to choose instantly, in the face of grave and apparent peril, between two hazards, and he makes such a choice as a person of ordinary prudence, placed in such a position, might make, the fact that, if he had chosen the other hazard, he would have escaped injury, is of no importance. When the question is one of mere inconvenience, and not actual danger, some moderate risk may be taken, if there is no obvious danger. But the plaintiff will be chargeable with contributory negligence if he runs the risk of an obvious and serious danger, merely to avoid inconvenience." In this connection it may be noted that Dr. Elliott states in his testimony that the plaintiff's decedent had an exceedingly excitable and nervous temperament, which may, to some extent, account for his preferring to jump from a car standing still than to run the risk attendant upon the impending collision. Patterson, in his work on Railway Accident Law, at page

376, says: "It is not contributory negligence in a servant to jump from a moving train in order to avoid an apparent danger, such as an imminent collision;" citing *Banking Co. v. Rhodes*, 56 Ga. 645, in which case the court held that "where a baggage master upon a train, in imminent danger of collision, jumps therefrom, it is no defense to an action for injuries sustained that the conductor ordered him to jump. Where a collision is inevitable, such action becomes one of reasonable precaution. Such an employee assumes the risks necessarily incident to his occupation, but not such as result from the negligence of his coemployees," (unless it be the negligence of a fellow servant.) In the case of *Banking Co. v. Roach*, 64 Ga. 635, point 2 of syllabus, it was held that, "an engineer having jumped from his engine, and been killed, and the question being whether or not he was without fault, the necessity for jumping, his ability to jump, and the safety with which he could do so are all for the consideration of the jury." And so we think, subject, however, to the instructions of the court; the question involved being a mixed one of law and fact. Our conclusion, however, is that, under the circumstances, Gregory Haney was not chargeable with contributory negligence.

One more question: Were the damages ascertained by the jury (\$4,500) excessive, or so excessive as to require the court to interfere with the verdict? Chapter 103 of our Code, § 6, which treats of actions for injuries, provides that "in every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars," etc., as a matter of course, each case must be controlled by its own circumstances. In the case of *Borland v. Barrett*, 76 Va. 137, *Staples, J.*, delivering the opinion of the court, says: "The wisdom of the law has constituted the jury, and not the court, the proper tribunal for the assessment of damages in cases like the present; and their verdict will not be disturbed unless it shows that the jury were actuated by passion, prejudice, or undue influence, or unless the amount is grossly excessive upon any just view of the evidence which might have been taken by the jury. No rule of law is perhaps more firmly established than this, both by the English and American cases,"—citing numerous authorities. It is true that in cases like the one at bar the damages are merely compensatory, while the case in which the above decision was rendered was an assault and battery case, in which vindictive damages might be given; yet, in my opinion, the above clause from the opinion of Judge *Staples* propounds correctly the law. So also in the case of *Zinc Co. v. Black's Adm'r*, 88 Va. 303, 13 S. E. 452, a case in which an employe was killed by the caving in of a bank by reason of the negligence of the defendant. Upon the question of excessive damages, the court held that, "whilst, under Code, § 3392,

the question of a new trial, where the damages are too small or too large, is under the control of the court, yet the verdict will not be disturbed, unless it shows the jury were actuated by passion, prejudice, or undue influence;" and it was held error, under the circumstances, to set aside a verdict of \$10,000 as excessive. In the case of *Johnson v. Railroad Co.*, 25 W. Va. 571, this court held that negligence was in most cases a mixed question of law and fact, and generally what particular facts constitute negligence is a question for the determination of the jury, from all the evidence before it bearing on the subject, rather than a question of law for the court. See *Washington v. Railroad Co.*, 17 W. Va. 214. Under the circumstances of this case, looked upon in the light of the authorities above cited, the judgment complained of must be affirmed, with costs and damages.

CRIM v. HARMON, (RUHL et al., Interveners.)

(Supreme Court of Appeals of West Virginia. Dec. 6, 1893.)

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—SUPPLEMENTAL AFFIDAVIT—WHO MAY INTERVENE.

1. A case in which the law of attachment is discussed with reference to the affidavit, stating: (1) The nature of the plaintiff's claim. (2) The amount of the claim at the least; that is, the amount due after deducting all credits and proper counterclaims. (3) The amount the plaintiff is "justly" entitled to recover; that is, justly, not only in regard to the absent debtor, but justly in regard to other creditors and persons interested.

2. The supplemental affidavit allowed by the latter part of clause 8, § 1, c. 106. See Code, (Ed. 1891.)

3. A mere creditor at large of the absconding debtor is not a person interested in disputing plaintiff's claim, within the meaning of the term as used in section 23, c. 106, Code.

(Syllabus by the Court.)

Appeal from circuit court, Barbour county; Joseph T. Hoke, Judge.

Action by J. N. B. Crim against C. J. Harmon, defendant, and Ruhl & Koblegard, interveners. From a decree for plaintiff, interveners appeal. Affirmed.

J. Hop. Woods, for appellants. M. Peck, for appellee.

HOLT, J. This is a suit in equity, with attachment, brought in Barbour circuit court on 26th October, 1891, by plaintiff, Crim, against defendant, Harmon, for a negotiable note for \$918.07, dated July 28, 1891, payable at Tygart's Valley Bank 12 months after date. The affidavit gives the nature of the plaintiff's claim, and its amount, but it does not state "the amount at the least which the affiant believes the plaintiff is justly entitled to recover." Among the grounds for attachment enumerated by the statute, (section 1, c. 106,) the affidavit sets out Nos. 2, 3, 5, and 6, not including No. 1, which is based on nonresidence; also, certain material facts re-

lied upon by him to show the existence of the grounds upon which the application for the attachment is based. On February 15, 1892, without objection made, but by leave of the court, (see latter part of clause 8, § 1, c. 106, p. 742, Code, Ed. 1891,) he filed a supplemental affidavit. Appellants, Ruhl & Koblegard, claimed to be attaching creditors of defendant, Harmon, by attachment sued out before a justice on 29th October, 1891, three days later. Appellants, claiming to be thus interested, filed their petition on February 23, 1892, by leave of the court, disputing the validity of the plaintiff's attachment. On May 28, 1892, plaintiff, Crim, defendant in the petition of the interveners, Ruhl & Koblegard, demurred to the petition, which the court sustained, giving petitioners leave to amend. Plaintiff, Crim, answered the original and amended petition, denying its sufficiency, and that petitioners were the owners, in any way, of the Cumberland Milling Company claim for \$296.92, which was one of the two claims they set up against defendant, Harmon, the other being for \$56.78 in their own name. The court had sold the attached property, and distributed all the proceeds among the attaching creditors of Harmon, except \$400, which it held to await the contest between plaintiff, Crim, and petitioners. On the 23d day of December, 1892, the court heard the chancery cause of Crim v. Harmon, and the collateral petition of appellants, and pronounced a final decree, holding that there was no question of fact raised by the petition, proper for a jury; that plaintiff's attachment was valid from the filing of his amended and supplemental affidavit, on February 15, 1892; that petitioners failed to show any prior or equal claim to the fund; ordered their petition to be dismissed, and the sum of \$400, in the hands of the receiver, to the credit of the cause, to be paid over to plaintiff, Crim, as a credit on his claim. From this the petitioners, Ruhl & Koblegard, have obtained this appeal.

The first question presented by the record, and argued by the counsel, is, was the attachment of J. N. B. Crim, the plaintiff, a valid one? And in this case this depends on two questions: (1) Was the original affidavit so defective as to require the attachment to be quashed, on motion of some one who had a right to make it? (2) If defective and insufficient, was it cured and made good by the supplemental affidavit, taken as such, or was the supplemental affidavit good, as an original one, from the time it was permitted to be filed?

That part of the statute in question (see section 1, c. 106, p. 741, Code, Ed. 1891) reads as follows: "When an action at law or suit in equity is about to be or is instituted, the plaintiff at the commencement of the action or suit or at any time thereafter and before judgment, may have an order of attachment against the property of the defendant by filing with the clerk of the court * * *

his own affidavit or that of some credible person, stating (1) nature of the plaintiff's claim, (2) and the amount at the least, (3) which the plaintiff is justly entitled to recover. * * * See Hutch. Treat. § 1133; Ruhl v. Rogers, 29 W. Va. 779, 781, 2 S. E. 798. This is a plain, concise, and simple form of written oath, that he who runs may read. The appellee contends that his affidavit is good, although he has left out the term "justly." The argument on behalf of appellee is: "The law entitles a party to recover only that which is just. Affiant says that, by law, he is entitled to recover this claim, as stated. Therefore, he has said, by necessary implication, that he is justly entitled to recover it."

But this would soon involve the courts in the question as to what words of the statutory affidavit can be left out as unmeaning, or as already contained in other words by necessary implication, or what other words can be substituted as meaning the same thing; and to that extent their attention would be withdrawn from the merits of the case, and their time consumed in deciding such subtle questions as to words in the statute without meaning, words whose meaning, by necessary implication, is contained in other words; and synonymous words that may be safely substituted. And all this to enable persons to draft the affidavit without reading the statute. Public policy and general convenience forbid that any such perplexing burden should be cast upon the courts.

2. The history of the statute forbids any such loose construction. The formula for the affidavit is the result of 75 years of legislative consideration, passing through three revisions,—that of 1819, 1849, and 1868,—and it has been brought together, and methodized, shortened, and simplified, until that part has no superfluous or unmeaning words in it. Attention has thus been repeatedly directed to the terms "at the least," "just," "justice," "justly," for they have been substituted for each other; but instead of being left out, as idle or unmeaning, they have been introduced where they were not to be found before. See 1 Rev. Code 1819, c. 123, p. 474; Code 1849, (Ed. 1860,) p. 645, c. 151; Report of Revisors of Code of 1849, p. 753, and note; Code 1868, p. 553, c. 106; Id. c. 50, § 193; Acts 1882, c. 158, p. 514; Code, (Ed. 1887,) p. 722; Id. (Ed. 1891,) p. 741.

3. Such loose construction of this statute is also wrong, and on principle, because attachments constitute an extraordinary remedy,—harsh towards the defendant himself, and harsh in its operation towards the other creditors of the defendant, over whom the attaching creditor attains priority. It is liable to great abuse, and has often been greatly abused. The proceeding, therefore, is closely watched, and is never sustained unless all the requirements of the law have been complied with. *Clafin v. Steenbock*, 18 Grat. 854; 4 Minor, Inst. pt. 1, p. 266. It has its origin in one of the immemorial customs of

the city of London, and has been carried in to all common-law countries, expanded and adapted to the circumstances, until it has become, not only useful, but indispensable, and should not be discouraged by tolerating its abuse, but rather encouraged and advanced, within its legitimate scope; and to this end it is not unimportant that no such relaxations be tolerated as tend to raise the class of questions here presented, of omitting from the affidavit words as unmeaning, or substituting for others their supposed equivalents; for there can be no valid writ or order of attachment without a sufficient affidavit, and no affidavit safely sufficient which, in language and scope of meaning, departs from the oath prescribed by the statute. The common sense and convenient rule, therefore, is to take it as we find it, and not consume the time of the courts in verbal subtleties as to what word is the equivalent of another, and what word includes another by necessary implication. The case of *Magrath v. Hardy*, 33 E. C. L. 974, was tried in the court of C. P. in 1838, in which the question arose, what was this custom of London, and how was it to be shown? Ashley, one of the attorneys of the lord mayor's court of London, of 25 years' experience as a practitioner of that court, was called as a witness by plaintiff, and he gave a full statement of the practice and proceedings by foreign attachment. It is significant, in its bearing on the term "at least," that in that case the demand was £1,000, but it was sworn to as £500 and upwards. See *Locke, Attachm.* 79, *Law Lib.* 56, where the affidavit says, "is justly and truly indebted in a certain sum [naming it as the sum due at the least] and upwards." See argument of counsel in *Thompson v. Towson*, (Md. 1772,) 1 Har. & McH. 504; *Evans v. Tucker*, (1883,) 59 Tex. 249. These qualifying terms prescribed by the statute are not idle and useless. First. An apparent indebtedness may be, in and of itself, too great, or not properly reduced by credits or proper counterclaims. It must be sworn to as the sum due "at the least." Second. Plaintiff's claim may be unjust, as against the absent debtor, or it may be fraudulent and collusive in his favor, as against other creditors. Therefore, the affiant must swear that he is "justly" entitled to recover with reference to others interested, as well as the absent debtor. See *Worthington v. Cary*, (1858,) 1 Metc. (Ky.) 470; *Bailey v. Beadles*, (1870,) 7 Bush, 383; *Ludlow v. Ramsey*, 11 Wall. 581; *Wilkins v. Tourtellott*, 28 Kan. 825.

On the question that the affidavit must state the amount of the claim over and above all set-offs or counterclaims, or, in this state, the minimum amount, by the use of the term "at the least," see *Morrison v. Ream*, 1 Pin. 244; *Lyon v. Blakesly*, 19 Hun, 299; *Ruppert v. Haug*, 87 N. Y. 141; *Whitney v. Brunette*, 15 Wis. 61; *Wilson v. Arnold*, 5 Mich. 98; 1 Wade, *Attachm.* § 66. See, also, *Endel v. Leibrock*, (1877,) 33 Ohio St. 254-

267; 2 Bart. Law Pr. (2d Ed.) § 221, p. 942. Hutchinson, in his *West Virginia Treatise*, we may infer, takes the same view from the tenor of our cases. *Hutch. Treat.* c. 60, § 1127, p. 778; 4 Minor, *Inst.* pt. 1, p. 366. Our conclusion, therefore, is, from our own, as well as other authorities on this point, that our statute authorizes an attachment as ancillary to the suit, but requires an affidavit to state (1) the nature of his claim; (2) the amount, at the least, (3) which plaintiff is justly entitled to recover, in the language of the statute, or its equivalent, not simply to show, *prima facie*, the existence, the nature, and the apparent amount of the claim, but that he shall also have the fear of perjury before his eyes, on the point of putting the amount of his claim at its minimum amount, and not leave out credits and proper counterclaims, and, on the point that it is just,—*bona fide*,—that he should recover it; that it is not only *bona fide* as to others, but also as to the creditor who is not present to contest the claim; that he shall not, on his corporate oath, omit or forget to make it just in these particulars, giving the nature of his claim, and not merely its apparent amount, but the least amount,—not only what, in good faith to the debtor, but to others, he is entitled to recover,—"justly entitled to recover." As a practical illustration on this point, let us suppose plaintiff makes and files an affidavit in the words of the statute, and willfully omits an important credit, or suppose it turns out that his claim is a fraud trumped up against the debtor, or a mere contrivance to shelter or protect him from his other creditors. Is it open to question that he is guilty of perjury,—of perjury as distinguished in our statute (section 1, c. 147, Code) from false swearing? How can the term "at the least," indicating a cautious minimum after making all proper deductings, be omitted as immaterial, or as already implied, or the term "justly," comprehending, as it does, honesty and good faith to others, as well as to the debtor, in the statement of what he is entitled to recover, be omitted for the like reason? Can we say that these terms may be left out, or, if needed, are to be found as necessary implications from the words, or to be gathered by inference from the affidavit as a whole, supplemented, if need be, by averments in the pleadings? An indictment for perjury would fare badly, if that, as the gravamen, had to be hunted out and pieced together from such necessary implications and outside averments,—and yet any one may see that the sworn, written statement of these two things is the gist of the whole matter.

An amended or supplemental affidavit containing the word "justly" was filed during the progress of the suit. The court below proceeded on the theory that plaintiff's affidavit filed on the 15th day of February, 1892, charging, among other things, that defendant, Harmon, was a nonresident of the state,

—a ground not needing the averment of any fact to support it,—was from that date as a new affidavit in support of the pending attachment, or rather that on that ground it could be treated as an attachment from that date in the pending suit, for the statute authorizes an attachment at any time after the commencement of the action, or suit before judgment. This presents a different case from an amendment proper of the original affidavit, and may be good, as it would not be taken as a portion of the original, where it did not affect the rights or lien of any other prior attachment creditor or other person, as seems to have been the case in this instance. There are many cases, however, in which the original affidavit may be amended, such as mere clerical mistakes, and certain defects in form. The accidental omission of the officer who administered the oath to sign it at the proper time, when the affidavit is in proper form, and was actually made, will not vitiate the affidavit, (*Bank v. Gettinger*, 4 W. Va. 305,) or, at any time, to correct a mere clerical mistake, (*Anderson v. Coal Co.*, 12 W. Va. 526.) For a discussion of the question, and full collation of cases, see *Barber v. Swan*, 61 Amer. Dec. 124, (from 4 G. Greene, 352.) In most of the states it is regulated by statute, and as yet we have none on the subject. See *Drake*, Attachm. (8th Ed.) § 87 et seq.; 1 *Wade*, Attachm. § 56; *Wap. Attachm.* 101-107; 1 *Amer. & Eng. Enc. Law*, 907. In what cases, how, and to what extent, this cure by supplemental affidavit may be applied, is now prescribed by statute. See *Code*, (Ed. 1891,) p. 742, latter part of clause 8, § 1, c. 106, which came in by amendment made in 1887. It relates to the sufficiency of the material facts relied upon and necessary, in all cases of domestic attachment, to show the existence of the grounds upon which the application for the attachment is based, the evidential facts from which, if true, the court can say, as a matter of law, that the particular ground for attachment, *prima facie*, exists. It reads as follows: "But, upon objection to the sufficiency of such facts, the affiant shall have the right, within such time, not exceeding 10 days, as may be prescribed by the court, in which the action or suit is pending, to file a supplemental affidavit, stating any other facts which may have come to his knowledge since the filing of the original affidavit, and which are relied on to show the existence of such grounds, and, when filed, such supplemental affidavit shall be taken as a portion of the original." This should be so construed as to advance the remedy, and suppress the mischief intended to be remedied. By its language it is made to embrace suits in equity, as well as actions at law. Its first effect, so far as the evidential facts of the ground of attachment are concerned, would seem to be to render such affidavits not void, but only voidable by a direct proceeding to have it set aside. The material evidential facts re-

lied upon to make, in law, a *prima facie* case of fraud, or other ground of attachment, cannot, in the nature of the thing required, be made the subject of uniform rule. Hence, the justice and importance of permitting that part of the affidavit to be supplemented in proper time and mode. And I should think that it is not necessary for the affiant to wait for objection to be made. He may, in a proper case, by permission of the court, anticipate, as was done in this case, such objection, for the one includes the other, to the extent that the subsequent objector cannot complain that the affiant, by anticipation, took away from him such ground of complaint. Such additional facts with which those in the original affidavit are thus supplemented must make it sufficient in law on this point; otherwise, it is still open to objection and abatement. But he must state that such additional facts have come to his knowledge since the filing of the original affidavit; otherwise, they would not be supplementary, and because the statute so prescribes, for the purpose of making the affiant state in the original all the material facts then known or remembered. The supplemental affidavit filed in this case, and objected to, contains no such statement, but attempts to amend on a wholly different and foreign subject, *viz.* that plaintiff is justly entitled to recover, etc., a subject not within the language or meaning of the law permitting the supplementary affidavit. The supplementary affidavit introduces for the first time the ground for attachment that defendant, *Harmon*, is a nonresident of this state, which does not need the statement of any other or evidential facts to show its existence, and if it had been good in other respects, following the short, plain, and simple formula prescribed by the statute, might have been made the basis of a new order of attachment, to be made effective from that time by leave of the court. This seems, as stated above, to have been the view taken by the court.

But the vital question remains, do appellants show themselves to be persons interested, within the meaning of the statute, (section 23, c. 106,) which permits any person interested to file his petition at any time before the property attached as the estate of the defendant is sold under the decree or judgment; or, if the proceeds of sale have not been paid over to the plaintiff or his assigns, to file his petition within a year after such sale, disputing the validity of the plaintiff's attachment thereon, or stating a claim thereto, or an interest in or lien on the same, under any other attachment or otherwise. In the original petition disputing the validity of plaintiff's attachment, their own claim is for \$56.93, as to which, by itself, this court would have no jurisdiction, being under \$100. As to the claim of \$296.62 against defendant, *Harmon*, in the name of the *Cumberland Milling Company*, there is no evidence in the record, of any kind, that petitioners have

any interest in or title of any kind, except that they say in their petition that they are now the owners of both of said claims; but the Cumberland Milling Company are not parties to the petition or the suit as plaintiffs or defendants, but on the contrary the affidavit on the account made October 5, 1892, by John W. Cook, treasurer and superintendent of the Cumberland Milling Company, shows or tends to show that the claim then belonged to the company. But, apart from this, petitioners, by their petition and exhibits filed therewith, show themselves to be mere creditors at large of defendant, Harmon. These exhibits profess to be summons and attachments against defendant, Harmon, and his estate, issued November 6, 1891, by a justice of Barbour county, returned as levied October 29, 1891, on the personal property, goods, and chattels of C. G. Harmon of Belington, Barbour county, W. Va. A list of the property levied upon is filed with the attachment of J. N. B. Crim against said Harmon, "now pending in the circuit court of Barbour county, which is referred to, and made part of the said ——" There was no affidavit for the attachment. Summons was awarded November 6, 1891, in each case, against defendant, Harmon, returnable same day, but never returned, whereupon the justice rendered judgments. All this, of course, amounts to nothing, leaving them still general creditors of defendant, Harmon, so that the demurrer of plaintiff, Crim, to the petition, was properly sustained. In the amended petition there is no evidence of any kind that petitioners are owners, of any kind or in any way, of the claim in the name of the Cumberland Milling Company, but the exhibit tends to show the contrary. The milling company is not before the court, and the answer of Crim to the amended petition says that neither of said petitions is sufficient in law to entitle said petitioners to any consideration at the hands of the court; that no pretense is made to ownership or interest in the personal property sold under the attachments; and that petitioners are not, and never were, the owners of the pretended debt in the name of the Cumberland Milling Company. And by the record it still appears, after the filing of the amended petition, that Ruhl, Koblegard & Co. were only creditors at large of defendant, Harmon, and that only as to the account of \$56.87 in their own name, without showing a shadow of a right, legal or equitable, by pleadings or otherwise, to the larger claim made up in the name of the Cumberland Milling Company. It will be time enough to settle the rights of the milling company when they see fit to apply or intervene; and as to their own claim of \$56.87, if they stand in any other attitude to the fund in controversy than as creditors at large of defendant, Harmon, the matter in controversy is of less value and amount than \$100, so that this court, on that point, would have no jurisdiction. Decree complained of affirmed.

McCRUM et al. v. LEE et al.

OFFUTT v. McCrum et al.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

INJUNCTION—PLEADINGS—AMENDING PLEADINGS—
NEW MATTER—WRONGFUL REMOVAL OF TRUST
PROPERTY.

1. A trust creditor and the trustee, to whom the property had been turned over by the trust debtor to sell, file a bill of injunction to restrain a third party from wrongfully removing the trust property out of the state, but do not pray for general relief. *Held*, if the plaintiffs desire any relief proper to be given in the case as made, other than that specifically prayed for, the bill must contain a prayer for general relief, but such general prayer may be added by amendment or amended bill.

2. In such case plaintiffs may, by amended bill or supplemental, as may be proper, allege new facts, and make new parties defendant, showing the necessity for taking accounts and for the aid of the court in safely and properly executing his duties as trustee, adding a prayer for the taking of such accounts, and for the aid of the court in administering the trust. *Held*, such amendments are not improper, nor are they within the meaning of the rule which forbids the introduction of such new matter as constitutes, in substance, a new bill.

3. Against a party defendant who has wrongfully removed out of the state all or a part of the trust property, the court may make such presumptions, and draw such inferences, as the case admits of, and treat such defendant as one who shall not profit by such wrong. (Syllabus by the Court.)

Appeal from circuit court, Tucker county; William T. Ice, Judge.

Action by L. L. McCrum and others against J. W. Lee and others, and an action by Daniel E. Offutt against L. L. McCrum and others. The two cases were consolidated, and tried together. There was decree for McCrum, and Offutt appeals. Affirmed.

A. B. Parsons, for appellant. W. B. Maxwell, for appellees.

HOLT, J. These two cases are bills of injunction brought in Tucker county,—the first by L. L. McCrum, trust creditor, and Page R. McCrum, trustee, against J. W. Lee and others, trust debtors, and D. E. Offutt, invoking the aid of the court in selling the property, and to enjoin its removal out of this state; the second was brought by Daniel E. Offutt, mortgagor of the same property by mortgage executed in Garrett county, state of Maryland, where he resided, against the McCrums, J. W. Lee, and others, settling up his mortgage, with actual notice on the part of the McCrums when the deed of trust was given, and praying an injunction to restrain them from selling under the deed of trust. The same exhibits were filed, and the same depositions were taken to be used as evidence, in both cases, and such proceedings were had that the two causes came on to be heard together on July 10, 1890, when the court pronounced a decree whereby it continued the first-named cause for future consideration, and all questions thereby presented were reserved for the future order of

the court; and the court, then proceeding to ascertain the rights of the parties in the second cause, adjudged them to be for defendants, and ordered and decreed that plaintiff Offutt's injunction be dissolved, and his bill dismissed, with costs. Plaintiffs McCrums' original bill charged defendant Offutt and the Lees with wrongfully, unlawfully, and in the nighttime removing, and attempting to remove, the trust property out of their possession and control, and out of the state, and beyond the jurisdiction of the court, praying specifically for an injunction against such removal, but not for general relief. The judge in vacation granted the injunction prayed for on February 2, 1887, and on the next day it was perfected by the giving of the bond required. What is called the "Farquhar Steam Sawmill" was, as events turned out, the only one in controversy, and it was all removed beyond the state, out of reach of the trustee, except the boiler, which his injunction was in time to stop within the state, and this he advertised to sell on February 21, 1887. On the first Monday in March, Offutt filed at rules his demurrer and answer, in which he set out his own claim to the mill in question by virtue of a Maryland mortgage to him from the defendant Lee, dated December 29, 1885, older in time and prior in equity to the West Virginia deed of trust, and that the McCrums took their deed of trust with actual notice thereof. On December 22, 1888, the cause of McCrum was remanded to rules, with leave to amend, etc., and mature the same for hearing, and the plaintiffs then filed an amended and supplemental bill, bringing in Emily J. Lee as a defendant, the wife of defendant J. W. Lee, as it appeared by Offutt's answer and the evidence thus far that she claimed the mill in question as her separate property, and was a joint maker of the note of \$850 secured by the deed of trust; also, charging that, since the filing of the original bill, defendant Offutt had made his whole mortgage debt on this mill by sale of other property, real and personal, in Maryland, made by virtue of other mortgages, leaving a surplus for which he should be compelled to account. In this bill they prayed for general relief, specifically for the relief prayed in the original bill, for sale of property under the deed of trust, or, if the separate property of Mrs. Lee, that in that event it might be sold as hers, to satisfy said debt of plaintiff L. L. McCrum against her. At the hearing of the two causes together, on July 10, 1890, it was manifest from the pleadings and evidence that no safe and proper decree could be made in the cause without having certain facts ascertained, and accounts taken by a commissioner; and thereupon plaintiffs, by leave of the court, filed their second amended bill, the only material addition being a specific prayer for an account of liens on the mill, with their amounts and priorities.

and at the same time, on December 1, 1890, the cause was referred to Commissioner Adams, who was directed to ascertain and report as follows: The value of the mill at the time a part of it was removed from Pendleton run into the state of Maryland; the liens thereon claimed by Offutt and by McCrum, the amounts, priorities, and to whom owing; also, any credit defendant Offutt should allow upon his mortgage on the mill in question by reason of the sales made by him of the property embraced therein, other than the mill in question, sold by him in Maryland; who was the purchaser of the property sold under such mortgages, or either of them, and the amount, if anything, yet due D. E. Offutt on such mortgages, and make and report such special statements as either party may require, or himself deem pertinent and proper; and Trustee Page R. McCrum was ordered to sell the boiler on six months' credit, and report, etc. On March 4, 1891, Page R. McCrum, trustee, reported the sale of the boiler in pursuance of the order, and the purchase thereof at the price of \$100. Commissioner Adams duly opened the taking of accounts, as directed, taking some additional testimony on some material questions of fact, the ascertainment of which was material and pertinent to the matters in hand. The commissioner completed his report, adding an alternative statement, at the request of Offutt's counsel, representing his view of what the report should have been. He retained it for the inspection and examination of counsel and parties. Counsel for Offutt excepted to the report, pointing out three grounds of exceptions: (1) That Offutt should have had a first lien on the mill, etc., for \$1,335.45. (2) Offutt should have been credited with \$669.50, and \$238.73, amount of debt and costs of the Pearre mortgage, as first lien on the real and personal property of the debtor, J. W. Lee. (3) That a court of competent jurisdiction in Garrett county, state of Maryland, had made a settlement of the transactions of said Offutt as administrator of Peter Martin, deceased, and that there was found due Offutt, as such administrator, and unpaid to him on the mortgage on the mill property in controversy, as of 19th March, 1887, the sum of \$1,009.26, and such sum, with interest brought down to date, as in alternate statement, was the correct amount due Offutt, and constituted a lien on the mill in controversy. Counsel for plaintiffs excepted to the alternate statement as shown to be incorrect by the statement made and adopted as correct by the commissioner. With his report the commissioner returned the exceptions without any remarks thereon, and the cause came on to be finally heard on the 1st day of December, 1891, upon the papers formerly read, depositions, report of sale of Trustee P. R. McCrum, and the report of Commissioner Adams, and exceptions and argument of counsel. The court

proceeded to pronounce the decree complained of, stating specifically the grounds thereof, adopting in express words the necessary implications from the commissioner's report: "The court is of opinion, from the pleadings and proofs, that the defendant D. E. Offutt improperly and illegally removed the mill in controversy out of this state, and beyond the jurisdiction of the courts, in fraud of the rights of the plaintiffs by virtue of their deed of trust on the mill; that Offutt should be required to account for the value of the mill in controversy as it stood in this state just before its removal by him into the state of Maryland; and after crediting his debts with the net amount of the proceeds of sale of the property sold by him in the state of Maryland, (other than the proceeds of the sale of the mill,) the said Offutt is entitled to have the residue of his debt, viz. \$341.81, first paid out of the value of said mill, and plaintiff L. L. McCrum is entitled, by virtue of his deed of trust, to payment thereon of the residue of the value of the mill as it stood in this state before removal, and to recover of Offutt the residue of such value as found by the commissioner, viz. \$1,270, credited by the gross proceeds of the sale of the boiler, viz. \$100;" and then the court pronounced against D. E. Offutt, in favor of L. L. McCrum, a personal decree for \$713.34, thus ascertained by the commissioner, and as reduced by the court, with interest from August 11, 1891, with leave to sue out execution, etc. From this decree appellant, D. E. Offutt, obtained this appeal on January 5, 1892, and an appeal from the decree of July 10, 1890, dismissing the second-named cause, on January 30, 1892.

In the first-named cause, of *McCrum v. Lee et al.*, (Offutt, appellant,) the following grounds of error are assigned: (1) The court erred in not sustaining the demurrer to the original bill, amended bill, and second amended bill, and dismissing each of them; (2) in entering the decree in this cause referring it to a commissioner; (3) in not sustaining the defendants' exceptions to Commissioner Adams' report; (4) in entering the final decree against D. E. Offutt. In the second-named cause, of *Daniel E. Offutt against L. L. McCrum and others*, appellant, Offutt, assigned the following grounds of error: (1) The court erred in dissolving petitioner's injunction; (2) in dismissing plaintiff's bill at his costs; (3) under the prayer of said bill, and the evidence, the court erred in not decreeing a sale of the boiler, and perpetuating petitioner's injunction. The two cases were heard together by the court below, and have been submitted together in this court on one set of briefs. The pleadings and proofs are the same down to the hearing and dismissal of the second-named cause, of *Offutt v. McCrum*. It might have been better to have retained this latter cause until the final hear-

ing of the first-named cause, but, in the view we take of the two, there was no substantial error in such dismissal, because McCrum's suit was pending against Offutt when this suit was brought; and the relief sought could have been more fittingly and properly applied for in that suit, especially as that bill, in the same court, charged him with wrongfully removing the mill in controversy out of the state and beyond the jurisdiction of the court. He should at least have answered in that case first. He did answer in March, 1887, setting out his defense and claim fully,—as fully as it is set out in his original bill of injunction; and he could have prayed, or at any time moved, that the boiler or mill should be sold under the direction of the court, and the proceeds paid in to the credit of the cause, to go ultimately to the one held to be entitled. The truth is, he had no ground for a cross bill, because the facts which he set up in his original bill, as well as in his answer, constituted matter of defense, tending to destroy and rebut, if true, plaintiff's cause of suit, and not showing any reason why the court should deprive him of a right or claim which he is conceded to have. In either view, section 35, c. 125, Code, gave him a remedy by answer, which was virtually saved to him to the end.

This bill of injunction was brought in D. E. Offutt's own name as plaintiff, and not in his name as administrator of Peter Martin, deceased. The claim on which he sued was a debt of \$1,250, evidenced by four promissory notes executed to him as such administrator, and secured by mortgage on the mill in dispute, which mill Martin died possessed of, and which came to Offutt to be administered, but Offutt sold the mill, and took the notes and mortgage. It is true that in a proper case these notes and mortgage, having this earmark, might be followed as assets in equity belonging to the estate, but in law the sale of the mill was a technical conversion, and the legal title to the notes and mortgage was in Offutt personally, and not in him as administrator, that addition being an earmark appropriately added to show that it was for property which had belonged to the intestate, and that the proceeds of sale were to be accounted for to his estate. In such case the suit was properly in his own name. It is true, under our law, if these notes had been executed to Peter Martin, and had come to plaintiff to be administered, then the suit would have been in his name as administrator, and his qualification as such in this state would have been a necessary requisite to the maintenance of the suit in that character, such inconvenience not having yet been remedied in this state by statute. In this case there is no error to the injury of appellant, and the decree dismissing his bill is affirmed.

The merits of the controversy—for it is

virtually one—are to be found in the record of *McCrum v. Lee*, in which defendant Offutt is the only appellant. First error assigned,—that the court erred in overruling defendants' demurrer to original and amended bills. Nothing is more common, and nothing is better settled, than the right, and in a proper case the duty, of a trustee to invoke the aid and direction of a court of equity in the execution of his trust. It is true, chapter 72, § 6, of the Code, prescribes the proceedings, including sale under deeds of trust; but that does not forbid, but in a proper case impliedly requires, the trustee to go into a court of equity if he needs a guaranty of safety and protection for himself, and wishes to discharge properly the duties he may owe to the debtor as well as to the creditor. As, for example, where the deed of trust is of long standing, various payments have been made, and the true balance is not known, and cannot be safely and readily ascertained; where there are successive liens or incumbrances, with balances unknown, sundry creditors, with shares or interests not defined, conflicting claims to the proceeds of sale,—in these and like cases it is often eminently proper and promotive of justice that the trust or mortgage should be executed or foreclosed in a court of equity, where the accounts of all the parties in interest can be readily adjusted, the trust fund equitably distributed, and the trustee enabled to proceed safely as well as properly in the discharge of his duties. See *Jones, Chat. Mortg.* § 779; *Hammers v. Dole*, 61 Ill. 307; *Dupuy v. Gibson*, 38 Ill. 197. This was but the common case of a trustee and trust creditor, who filed a bill of injunction to enjoin and restrain the defendants from wrongfully removing the trust property out of the state, as the law authorizes to be done, (see Code, c. 133, § 8,) and thus hindering or preventing the due execution of the duties of the one as trustee, and the enforcement of the rights of the other as a trust creditor.

It is true that if the plaintiffs desire any relief proper to be given in the case as made, other than the relief specifically prayed for, the bill must contain a prayer for general relief, but this can be added by amendment, as was afterwards properly done in this case. The plaintiffs may properly add new parties, as was done in this case, by making Emily J. Lee a defendant, as she was found to be a joint maker of one of the trust debts, and may, by amended bill or supplemental bill, as the case may require, allege new facts, as was done in this case, where plaintiffs in that way bring in the facts that D. E. Offutt, out of the proceeds of sale of certain real and personal estate, made by him by virtue of certain mortgages executed to him, had, since the original bill had been filed, received the full amounts of the debts due him, and had in his hands several hundred dollars surplus for

which he should be compelled to account, and, if the mill should be held to be the separate estate of Emily J. Lee, that it might be sold to pay that note secured by the trust deed, which she owed as joint maker with her husband to plaintiff L. L. McCrum. This and the evidence showed the necessity of taking the accounts directed by the court, and the propriety, but perhaps not the necessity, of permitting plaintiffs to amend by praying that such accounts may be taken. All this was properly charged and done, in order that complete justice might be done to all parties, and the controversy ended. Such amendments were not improper. They did not make a new case, within the meaning of the rule which forbids the introduction of new matter constituting in substance a new bill, and the demurrers were properly overruled. With this view of the pleadings, the evidence in the cause made the taking of the accounts directed by the court eminently proper, and this disposes of appellant's second assignment of error.

The third and fourth assignments of error depend in large part upon the facts, and may be considered together. On the 29th day of September, 1885, defendant Daniel E. Offutt sold to defendant Emily J. Lee, or to her husband, defendant John W. Lee, in Garrett county, state of Maryland, a steam sawmill, fixtures, and appurtenances manufactured by Arthur B. Farquhar, belonging to the estate of his intestate, Peter Martin, and took a mortgage on the mill and certain real estate of Mrs. Lee to secure the payment of \$1,250, the unpaid purchase money. It does not appear by this record that it was ever recorded in Garrett county, but it was recorded in Tucker county, W. Va., on January 26, 1887. On or about the 10th day of August, 1886, defendant John W. Lee removed this mill to Tucker county, W. Va., and set it up for sawing at Pendleton run, near the town of Davis; defendant Offutt says without his consent, but the evidence clearly shows that it was at least with his knowledge. On the 30th of November, 1886, John W. Lee, who was in possession claiming to be the owner, executed to plaintiff Page R. McCrum, trustee, a deed of trust on the mill to secure to plaintiff L. L. McCrum the payment of two notes executed to him,—one for \$850 by John W. Lee, the husband, Emily J. Lee, the wife, and G. J. Lee, the son. The wife refused to join in the trust deed, but it was admitted to record December 1, 1886. When they took this deed of trust, L. L. McCrum, the creditor, had notice of Offutt's mortgage. On the land mentioned in this mortgage,—150 acres and 50 acres situate in Garrett county.—John W. Lee and Emily J., his wife, had executed to George A. Pearre a mortgage on February 7, 1883, to secure the payment of \$650. This mortgage was admitted to record on the 10th of February, 1883, on this same land and certain personal property, but not including the mill. J. W. Lee and wife,

on August 21, 1886, executed to Offutt another mortgage to secure the payment of \$700, due in 12 months. This was admitted to record on August 31, 1886. About the — of February, 1887, defendant Offutt hired a car of the West Virginia Central & Pittsburgh Railway Company, sent the car into the immediate vicinity of the mill late in the evening, and during that night defendant Lee and others, at the instance and direction of appellant, took down and loaded on the car all the mill except the boiler, and shipped it out of this state, into the state of Maryland, consigned to appellant. The mill, at that time, had been turned over to Trustee McCrum, and an inventory had been made for the purpose of selling under the trust deed, the sale having been advertised. On the 19th March, 1887, in Garrett county, Md., and after he had filed his answer in plaintiffs' suit, defendant Offutt sold the mill, except the boiler, for \$300. The mill where it was set on Pendleton run, before it was dismantled and removed, was worth \$1,500. Plaintiff McCrum would have given the amount of his trust debt, about \$1,400, for it. It was known as "J. W. Lee's Mill," and if, in fact, it belonged or had belonged to his wife, Mrs. Emily J. Lee, she permitted her husband to remove it out of the state of Maryland, and set it up and run it in this state, in his own name and as his mill; his claim of ownership being recognized, as well as permitted, by her, his authority as owner in every way being apparently full and complete. She also, according to her testimony, participated in the removal of the mill out of this state. The court, in its final decree of the 1st of December, 1891, applied to the case the principle that "no man shall take advantage of his own wrong," and the further rule of evidence contained therein, of presuming against the spoliator everything fairly deducible from his conduct in the transaction. He caused the mill, then in the control of the trustee for the purpose of enabling him to discharge his duty by selling it, to be taken down in the nighttime, and shipped out of the state, and beyond the jurisdiction of the court, in fraud of the rights of the trust creditor; and after plaintiffs' injunction forbidding the removal by him, and after his own injunction against the trustee forbidding the sale of the sawmill and fixtures, or any part thereof, he sold the mill himself in the state of Maryland for \$300, at a cost and expense of sale of \$102.40, leaving the net sum of \$197.60, which he credited on his mortgage; thus leaving on his mortgage debt, at that time, a balance of \$811.66, and thus reducing what ought to have been the proceeds of sale—\$1,270 or \$1,500—to \$300. The commissioner, out of abundant caution, adopted \$1,270, and the court confirmed it; so that from the evidence, in the opinion of the commissioner and of the court, the loss entailed upon the trust fund by his improper and illegal con-

duct amounted to \$970. The court ascertained this amount by a very moderate and cautious application of the presumption in odium spoliatoris. But, if let alone, this entailed no loss on him, for he had in his mortgage other security, viz. the 209 acres of land in Garrett county, Md., more than sufficient to make him whole; but this would deprive the trust creditor of his right to have the securities marshaled according to the well-known rule which prevails in both states,—that a court of equity, in a proper case, will compel a creditor having a lien on two parcels of property so to enforce it as not to injure the rights of him who has a lien on but one of them. *Aldrich v. Cooper*, 2 White & T. Lead. Cas. Eq. (4th Ed.) pt. 1, p. 255; *Stephenson v. Taverners*, 9 Grat. 398; *Alston v. Munford*, 1 Brock. 266; *Wiley v. Mahood*, 10 W. Va. 207; *Bank v. Wilson*, 25 W. Va. 242; 2 Bart. Ch. Pr. § 278; 1 Bart. Ch. Pr. § 92. The court seeing that, without prejudice to the rights of any innocent third party, it could safely undo the advantage which Offutt had tried to gain, which, if let alone, could not result in loss to him, but would result in loss to L. L. McCrum, the trust creditor, to the extent of \$823.19 at least, pronounced a decree against him, in favor of L. L. McCrum, for that amount, with interest from August 11, 1891, till paid, with leave to sue out execution, etc. In this there is no error of which appellant has any right to complain. As to Mrs. Emily J. Lee, she does not appeal, and must, by this court, be held not to have been the owner of the mill. As to the method and process by which the court worked out and reached this result, that is immaterial, for the amount decreed might have been greater. It could not well have been less, and it leaves the trust debt still unsatisfied. This principle of law applied by the court—that no man shall take advantage from and by reason of his own wrong—is manifestly reasonable and necessary, and none is of more frequent application in the various branches of the law. It lies at the foundation of the law of fraud and estoppel in pais, and comprehends other maxims of practical importance; as, for example, the one that a right of action cannot arise out of fraud, and that all fair inferences may be drawn in odium spoliatoris. See *Co. Litt.* 148b; *Broom, Leg. Max.* 279, and cases cited where it has been applied. As to the other maxim, *Armory v. Delamirie*, 1 Strange, 504, 1 Smith, Lead. Cas. 631; *Best, Ev.* § 411. If appellant had left it within the power of the court, or, after his own suit was brought, had put it in the power of the court, to sell the trust property and administer the trust fund, the court would have sold the mill, and out of the proceeds paid his first mortgage, but would have required him, after paying off the senior *Pearre* mortgage, of \$650, on the Maryland land, and paying off his second mortgage, of \$700, on the land and other personal property, which

property sold for \$546.95, and the land for \$1,200, to have paid over to the trust creditor the amount received from this source over and above what was sufficient to satisfy in full his two mortgages on the land; and this, even according to the sale actually made, would have been but a trifle less than the sum decreed against him, taking the mill as worth \$1,270 before he removed it, so that the leaving out of the Pearre mortgage by the commissioner in making up his account was only a different method of arriving at substantially the same result. There is therefore no substantial error in the decrees complained of, and each is affirmed.

VOSS et al. v. KING.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1893.)

LANDLORD AND TENANT—DENIAL OF LANDLORD'S TITLE—HOLDING OVER—CONFLICTING EVIDENCE.

1. In an action by a landlord against his tenant, whether the action be debt, assumpsit, covenant, or unlawful detainer, where neither fraud or mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord.

2. A tenant for years, who holds over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord.

3. Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the terms of the original demise.

4. The fact that during the tenancy the title of the landlord has been forfeited for the nonpayment of taxes on the land in controversy constitutes no valid defense to an action of unlawful detainer, brought to dispossess the tenant, as the plaintiff is entitled to be placed in statu quo, unless, perhaps, the tenant has made a distinct disclaimer, and has been holding adversely for more than three years, or can sustain some other valid defense.

5. This court cannot interfere with the verdict of a jury under such circumstances that we are not able to say that, by excluding all the parol evidence of the exceptor in conflict with that of the plaintiff, the verdict was not warranted by the evidence.

(Syllabus by the Court.)

Error to circuit court, Randolph county.

Action by Joseph H. Voss and others against Patrick King to recover land. Plaintiffs had judgment, and defendant brings error. Affirmed.

For report on former appeal, see 10 S. E. 402.

John Brannon and Samuel Woods, for plaintiff in error. C. W. Russell, for defendants in error.

ENGLISH, P. On the 14th day of December, 1886, an action of unlawful detainer was brought in the circuit court of Randolph county by Joseph H. Voss, Susan G. Elder, and Sophy S. Shennard, an infant, who sued by her next friend, Frederick Shennard, against one Patrick King, for the

recovery of the possession of a certain tract of land situate in the district of Roaring Creek, in said county of Randolph, described by metes and bounds in the summons, and alleged to contain 1,000 acres, and being the same tract of land upon which said Patrick King then resided. The plea of not guilty was interposed, and on the 19th day of September, 1887, the case was submitted to a jury, and, after a portion of the evidence was heard, the plaintiffs took a nonsuit. On the 23d day of September, 1887, upon motion of the plaintiffs, the nonsuit was set aside, and on the 24th day of May, 1888, the case was submitted to another jury, and resulted in a verdict in favor of the plaintiffs, finding that the defendant unlawfully withheld from the plaintiffs that part of the land in the summons mentioned, being about 207¾ acres, shown upon a plat filed in the case, made by Nicholas Marsteller, surveyor, and beginning at the gum in the summons mentioned, indicated on said plat by the letter A, running south, 19 west, 189 poles, to a chestnut, oak and gum, indicated on said plat by the letter H; thence north, 71 west, 176 poles, to a maple, indicated on said plat by the letter I; thence north, 19 east, 189 poles, to a maple, indicated on said plat by the letter J; thence south, 71 east, 176 poles, to the gum first mentioned above,—except so much of said land, being about 7½ or 8 acres, as is resided upon and occupied by one Michael King, lying northwest of said gum, and next to the line running from said gum to the maple last above mentioned; said land being at, around, and west of Michael King's, and adjoining the fence of Patrick King, the defendant, and cut off from said Patrick King's by a fence. A motion to set aside the verdict was made by the defendant, which was overruled by the court, and defendant excepted, and a writ of error was taken to this court, and on the 20th day of November, 1889, the judgment rendered upon said verdict was reversed, the verdict set aside, and the cause was remanded for a new trial. On the 6th day of May, 1891, the said case was again submitted to a jury, in the circuit court of Randolph county, which, on the 9th day of May, 1891, resulted in a verdict for the plaintiffs. A motion was made to set aside the verdict, and to grant the defendant a new trial, which was overruled, and the defendant excepted, and judgment was rendered upon said verdict, and the defendant obtained this writ of error.

During the trial the plaintiffs, by their counsel, moved the court to give to the jury several instructions, which are marked, respectively, Nos. 2, 3, 4, 5, 7, and 8, to the giving of which instructions the defendant objected, and his objection was overruled by the court. Said instructions read as follows: "Instruction No. 2. If the jury believe from the evidence that the defendant, King, hav-

ing learned of the forfeiture of claimant's title several years before the expiring of his lease, after such information, acknowledged himself to be the agent of plaintiffs, as their tenant, they are not to regard the forfeiture as having any effect on plaintiffs' title, unless they believe that subsequently to all such acknowledgments he made an open, consistent, and continuous disclaimer and adverse claims. Instruction No. 3. That if the jury, from the evidence, do not believe that the defendant, King, disclaimed holding under the plaintiffs in or about 1876, and do not believe from the evidence that plaintiffs' title was subsequently to the running out of the lease destroyed, so as to put it out of the power of the plaintiffs to recover it by redemption, they are not to regard the sales of the state as excusing the defendant from restoring the possession to the plaintiffs. Instruction No. 4. If the jury believe from the evidence that the defendant practiced a system of deceit towards the plaintiffs, or their agents, with regard to the lands in question, acknowledging their title, while acknowledging that of an adverse claimant, disclaiming their title to one agent, and acknowledging it to his successors and to other persons, for the purpose of maintaining his possession, and without taking the risk of an open, consistent, and continuous disclaimer and adverse claim, they are to regard his disclaimer as having no effect whatever. Instruction No. 5. If the jury do not believe that the defendant, King, disclaimed holding under the plaintiffs in 1876, or thereabouts, they are to disregard the evidence tending to show that the plaintiffs' title was forfeited." "Instruction No. 7. If the jury believe from the evidence that the orders of the board of supervisors of Randolph county do not show that the sheriff of said county returned to said board of supervisors a list of land returned delinquent by him for the nonpayment of the taxes thereon for the year 1865, then any sale made of the lands of said county for the year 1865 for the delinquent taxes thereon would be void, and no forfeiture of the land for that reason did occur for that year. Instruction No. 8. If the jury believe from the evidence that the delinquent lists of the land of Randolph county returned by the sheriff thereof for the nonpayment of the taxes thereon for the year 1866 did not have an affidavit of the sheriff thereto, then any sale made by the sheriff of said county of the land so returned delinquent for such delinquency is void, and no forfeiture of the title to the land by reason of such sale could occur for that year." The defendant, by his counsel, moved the court to give the jury the following instruction, marked No. 3: "Instruction No. 3. If the jury find from the evidence that the 207 or 208 acres mentioned in the agreement of lease made between the defendant and said David Goff, as agent for the ancestors of the plaintiffs,

is a part of the 1,000 acres mentioned and described in the summons in this cause, and that the said 1,000 acres was sold by the sheriff for taxes delinquent thereon for the years 1863, 1864, 1865, and 1866, and was purchased by the sheriff for and on behalf of the state in the year 1871, and not redeemed, and that the said taxes for the nonpayment of which said land was returned delinquent were not paid for either or any of said years before such sale, then the title to said land became vested in the state,"—to the giving of which instruction the plaintiffs, by their counsel, objected, which objection was sustained, and the court refused to give said instruction. Now, as several of these instructions refer to the question as to when this disclaimer of a tenancy under the plaintiffs was made by the defendant, it may be well enough to discuss first the question of limitation.

Our statute (Code, 1891, p. 698, c. 89, § 3) provides that "if it appear that the plaintiff was forcibly or unlawfully turned out of possession, or that it was unlawfully detained from him, unless it also appear that the defendant has held or detained the possession for three years before the date of the summons, the verdict shall be for the plaintiff," etc. Barton, in his Law Practice, (volume 2, p. 1166,) says, in speaking of the action of unlawful detainer: "Under the plea of 'Not guilty' almost every defense may be made, and since, to sustain the action, the obligation is upon the plaintiff to prove that the defendant has not unlawfully held possession of the land for three years or more before the commencement of the suit, it follows that the plea of 'Not guilty' puts in issue the question of the limitation to the action." And, while it is true that upon this question the burden of proof is on the plaintiffs, yet, when we look to the testimony, we find it conflicting as to the manner in which the defendant was holding the land from the date of the expiration of his lease up to the time of the institution of this suit. These questions of fact were submitted to the jury, and, in order that they should find for the plaintiffs, they must have found that the adverse holding of the defendant had not continued for more than three years before the date of the summons.

As to instruction No. 2 asked for by the plaintiffs, I do not regard the forfeiture of the plaintiffs' title as a very material question as between the plaintiffs and the defendant, as he appears to have been claiming under them, and it surely should not have any effect upon the issue presented by the pleadings in this case, unless, after the defendant learned of said forfeiture, and ceased to hold under a lease from the plaintiffs, he made an open, consistent, and continuous disclaimer. If, as the evidence tends to show, he claimed to hold under both Voss and Smith part of the time, and at other times under neither, or rather not under the

Voss title, we could not regard such disclaimer as being adverse to the Voss title, and we see no objection to the said instruction No. 2.

As to instruction No. 4, I can see no valid objection to it, as between the plaintiffs and the defendant. The fact that the lands in controversy were forfeited to the state certainly would not confer upon the defendant any right to retain the possession of them, or excuse him from returning the possession. He derived the right to the possession from the plaintiffs, and a temporary loss of title on the part of the plaintiffs would surely confer no right to the possession upon the defendant.

As to instruction No. 4, it is in substance the same as No. 2, and submits to the jury the determination of the facts in regard to the character of the disclaimer of possession under the plaintiffs, which facts are necessarily involved in coming to a proper conclusion as to whether the defendant continued to hold under the plaintiffs, or whether he in good faith claimed to hold adversely, openly, and continuously, and the instruction appears, under the circumstances of the case, to have been proper.

Instruction No. 5 was not objectionable, for the reason that the defendant was not in any manner interested in the forfeiture of the land, as it conferred on him no better right to hold the possession; and especially is that so if he made no disclaimer, but continued to hold subject to the rights of the plaintiffs.

Instructions No. 7 and 8 pertain to the regularity of the proceedings pertaining to the forfeiture of the lands in controversy, and the defendant, having no right to redeem, has no right to question the title of the party under whom he claimed, until he had shown a proper disclaimer and some title to the possession in himself. I cannot perceive that the defendant was prejudiced by said instructions Nos. 7 and 8 being given to the jury, and the same may be said of instruction No. 3.

Instruction No. 3, asked by the defendant, as we think, was properly rejected, for the reason that, under the circumstances of this case, it was immaterial, and was calculated to mislead the jury. Again, the instruction is too general, and the conclusion deduced in it from the statement of facts is not a necessary sequence. It is not every sale made by a sheriff for the taxes delinquent thereon, and purchased by the sheriff for the state, although not redeemed within the year, that confers title upon the state, since the proceeding is under the statute, and irregularities often occur that prevent the title from passing, and again savings are provided for persons laboring under disabilities, who are often allowed to redeem years after the sale has been made. When this case was before this court at a former time, (33 W. Va. 236, 10 S. E. 402,) it was held that in an action by the landlord against his tenant, whether the

action be debt, assumpsit, covenant, or unlawful detainer, where neither fraud or mistake is shown in the procurement of the lease, no proof of title is required by the landlord, for in such case the tenant is estopped from denying the title of his landlord. Taylor on Landlord and Tenant (volume 1, § 22) says: "A tenant for years, who holds over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a trespasser or a tenant, at the option of the landlord. Very slight acts on the part of the landlord, or a short lapse of time, are sufficient to conclude his election, and make the occupant his tenant. But the tenant has no such election; his mere continuance in possession fixes him as tenant for another year, if the landlord thinks proper to insist upon it." And at section 525, vol. 2, the same author says: "Where the landlord suffers the tenant to remain in possession after the expiration of the original tenancy, the law presumes the holding to be upon the terms of the original demise," etc.

As is shown by bill of exceptions No. 1, the defendant moved the court to set aside the verdict of the jury rendered in this cause, and award him a new trial, because the verdict was contrary to the law and the evidence, which motion was overruled, an exception was taken, and all of the evidence was set out in a bill of exceptions. It appears that the lease under which the defendant held the property in controversy from the plaintiffs expired on the 1st day of April, 1876, and it is claimed by counsel for the defendant that the defendant, some time in the month of October following, when asked by plaintiffs to renew said lease for the further period of five years, declined, and told Goff, the agent of plaintiffs: "No; I will not take any more leases under the Vosses. I was told the land was not theirs, and therefore I will not take." Now, this question of disclaimer on the part of the defendant is very material upon the question as to whether more than three years had elapsed after such disclaimer before the date of the summons, and it is insisted by counsel for the defendant that after this disclaimer nine years elapsed without the defendant in any manner recognizing the relation of landlord and tenant between him and the plaintiffs. Whether the defendant is correct or not in this assertion is a question which was submitted to the jury, and has been ascertained and settled by them against the defendant. Upon this point the testimony was conflicting, and this court has held in the case of *Tompkins v. Kanawha Board*, 21 W. Va. 225, that, "there being conflicting evidence on well-established principles that the judgment will not be reversed, verdict set aside, and new trial granted."

The next bill of exceptions relates to the action of the court in allowing a copy of the record of the proceedings upon a warrant

of unlawful detainer brought by Benjamin F. Voss and Robert F. Voss against the defendant, Patrick King, to be read in evidence to the jury, against the objection of the defendant, in which case a judgment appears to have been rendered for the plaintiffs on the 25th day of August, 1869, and the lease from B. F. Voss to the defendant, Patrick King, bears date on the 18th day of July, 1870, less than a year after said judgment was rendered, so that this record and judgment may have been relevant, as showing that the plaintiffs were entitled to the possession of the land at the time the lease was taken from them by the defendant, Patrick King, in July, 1870; but, if the record proved nothing, I cannot see that the defendant was prejudiced by its introduction. Our statute provides (section 4, c. 89, of the Code) that "no such judgment shall bar any action of trespass or ejectment between the same parties, nor shall any such verdict be conclusive, in any such future action, of the facts therein found." *Moncure, J.*, in delivering the opinion of the court in *Olinger v. Shepherd*, 12 Gratt. 472, says: "That the defendant in an action of forcible entry cannot defend himself by showing that the land in controversy is a part of the public domain has been decided in *Alabama* (*Cunningham v. Green*, 3 Ala. 127) and in *Tennessee*, (*Pettyjohn v. Akers*, 6 Yerg. 448), and I am not aware that the contrary has been decided anywhere. I can see no reason for a different rule in regard to public and private lands. There is the same reason for the protection of the actual possession against unlawful invasion in both cases. The plaintiff in the action is not suing for damages, but to have possession restored to him; and when he shows that he has been turned out of possession forcibly, or by one having no right to do so, he has made out his right to restitution, which cannot be defeated by any evidence in regard to the title or right of possession. The judgment has only the effect of placing the parties in statu quo. It settles nothing, even between them, in regard to the title or right of possession."

Again, as to the receipt signed "John M. Phares, S. R. C.," dated October 22, 1864, to Benjamin F. and Robert F. Voss, for \$5.24, for the redemption of 1,000 acres of land returned delinquent for the years 1863 and 1864 by the sheriff of Randolph county, while, in my view of the case, I do not regard it as material, yet I cannot see that the defendant was in any manner prejudiced by its introduction.

In view of the fact, then, that in a suit of this character the right to the possession is alone in question, and evidence in regard to the title is only material as an incident tending to show in whom the right to the possession exists, and the defendant in this case having failed to show that the lands in controversy were regularly forfeited and

necessarily irredeemable, and the defendant being presumed to continue his holding under the terms of the original demise, and the evidence in regard to his disclaimer being conflicting, and the fact having been settled against him by the finding of the jury, the judgment of the circuit court must be affirmed, with costs.

PAXTON v. PAXTON et al.

(Supreme Court of Appeals of West Virginia.
Dec. 7, 1893.)

COMPETENCY OF WITNESS — TRANSACTIONS WITH
DECEDENTS—EQUITY PLEADING—WAIVER OF DEFECTS—LACHES

1. A party, grantor and debtor, executing a deed of trust to secure a creditor, is incompetent to testify that it was procured from him by false representation of the trustee, both trustee and creditor being dead.

2. Under sections 35, 36, c. 125, Code, where an answer contains matter for affirmative relief, and no reply in writing is filed, but a general replication is entered, and the cause has been fully heard on such pleadings and proof, if the record shows that it is not such a case as would, before the passage of said sections, have made a cross bill necessary in order to give the defendant the relief sought by his answer, the decree will not be reversed for want of a reply in writing.

3. When, in such a case, defendant has taken depositions, and there has been a full and fair hearing on the merits, and substantial justice has been done, though there may be informality in not filing such reply, the decree will not be reversed for that cause.

4. Laches may be relied upon by a demurrer where the pleading demurred to shows the facts on which the defense of laches rests.

5. A grantor in a deed delivered to the grantee gives evidence after the death of grantee against his heirs that the deed was delivered upon a condition on the nonperformance of which by the grantee it was to be redelivered to grantor. The evidence is incompetent, both because the grantee is a party to the suit and interested.

(Syllabus by the Court.)

Appeal from circuit court, Clay county; Virgil A. Armstrong, Judge.

Action by Hays A. Paxton against William Paxton and others for partition. From a decree agreeable to the petition, George W. Paxton and Thomas Samples appeal. Affirmed.

Cyrus Hall and Okey Johnson, for appellants. W. A. McCorkle, J. F. Brown, and T. B. Swann, for appellees.

BRANNON, J. Hays A. Paxton, in his lifetime, brought a suit, which was afterwards revived in the names of his representatives, having for its objects the partition among the heirs of his father, Thomas Paxton, of a tract of land in Clay county. The said Thomas Paxton had nine children, so that the land was divisible into nine shares, though several had sold to coheirs. The only persons contesting the partition on the basis of such heirship were George W. Paxton and Thomas Samples, who claimed to be joint owners

of the whole, and denied that the land was partible, as belonging to Thomas Paxton's estate, among his heirs. A decree for such partition having been rendered by the Clay county circuit court, George W. Paxton and Samples took this appeal.

The bill alleges that Thomas Paxton had a debt against George W. Paxton and Thomas Samples, made up of 10 bonds for \$150 each; and that they executed a deed of trust to John Paxton, trustee, to secure it upon said land; and that, under said deed of trust, the trustee, after the death of Thomas Paxton, sold the land; and that William Paxton, who was administrator of Thomas Paxton, and also a child and heir, purchased it for the benefit of all the heirs, and conveyed it by deed to said heirs. This land was conveyed in 1855 by William Vinyard to George W. Paxton and Thomas Samples. George W. Paxton was a son, and Samples a son-in-law, of Thomas Paxton. It is clear that Thomas Paxton paid for this land by the conveyance to Vinyard of lots in Spencer, and it is claimed that George W. Paxton and Samples held it in trust for Thomas Paxton, and much matter is brought into the case relative to that feature; but I discard it as irrelevant, since later the deed of trust was given, and the parties treated it as the property of George W. Paxton and Samples for the purposes of that deed of trust; and, besides, the case made by the bill is such, and the title to the land is traced to that deed of trust, and the right to partition is based, not on a trust in the original conveyance from Vinyard, but from the deed of trust. The whole case turns on the question whether George W. Paxton and Thomas Samples gave that deed of trust. They deny it. Let us look at some of the circumstances pertinent to this decisive question. The bonds of George W. Paxton and Thomas Samples to Thomas Paxton are produced, bearing the same date with the deed of trust, 21st March, 1855. They are described in the deed of trust. That is a circumstance favoring the genuineness of the deed of trust. The obligors in said bonds admit they made them. George W. Samples says they had no relation to the purchase of the land, intending thereby to repel the idea that he and Samples had purchased of Thomas Paxton, alleged by some as the explanation of the bonds. What if they had no relation to the land, if secured by deed of trust? No matter whether it was for purchase of the land or not. William Paxton states that he saw this deed of trust, had it in his possession, and the signatures were in the handwriting of George W. Paxton and Thomas Samples, and that they both told him at different times that they had signed the deed of trust and bonds. Amanda E. Parks states that she heard a conversation between George W. Paxton and the wife of Samples, in which Paxton asked Mrs. Samples why her husband had signed the deed of trust and bonds,

when she asked him why he himself had signed them, and he replied that it did not matter why he had signed them; and also heard Hays Paxton advise him to drop this litigation, as he had signed the deed of trust and bonds for the land, and George W. Paxton said it did not matter about his signing them. Against this evidence showing that George W. Paxton executed the deed of trust, there is none save that of himself, and it is overruled in weight by two witnesses, and, besides, is inadmissible,—Thomas Paxton being dead,—by Code, c. 130, § 23.

Another strong circumstance against George W. Paxton's claim is that by deed of October 14, 1874, he conveyed to Hays A. Paxton all his right in "one undivided ninth part of 1,400 acres," conveyed to him and Samples by Vinyard. Now, as heir, he would own one undivided ninth; just that. It is a circumstance that he claimed then only that. Several witnesses say that he afterwards said he owned no interest in the land, as he had sold all his interest to his brother Hays. Again, if he owned half, why did he pay just one-ninth of the taxes on the land for the year 1869 and a number of years thereafter, as he did? George W. Paxton, in his first answer, admitting the bonds mentioned in the trust, set up a debt of at least \$600 against his father, but in a subsequent answer says it was inserted in the answer without his knowledge, and that his father owed him nothing. His plans had changed. In addition to the above evidence of William Paxton as to the signature of Samples to the deed of trust, and his admission of its execution, there is abundant other evidence to prove it as to Samples. He said in presence of Amanda E. Parks that he had signed and acknowledged the deed of trust. In fact he does not deny, but admits, in his answer, and in his labored evidence, that he did sign it. But he says that he was a soldier, and when at home on furlough, in 1864, John Paxton presented a paper to him to sign, which he did not himself read, Paxton representing that it would "put the land to rights" if anything happened to Samples in the army; and he signed it, as he thought, to secure his wife the land, if he should be killed in the war; that George W. Paxton would cheat him out of his share, and he signed it to save the land. This story is very unlikely. He had a deed on record from Vinyard conferring on him half of the land. How could his wife lose her interest should he be killed? How could George W. Paxton get the whole of the land? Why did he sign a paper without reading it? He then, in the same deposition, says, "I did not see, hear, or know of such a paper being in existence before March 3, 1866." But he knew its contents that day, and why did he on that day appear before the recorder of Clay county, and solemnly acknowledge it? He does not pretend that it was then misrepresented, or that he did not know its contents. He surely

had opportunity to know them. Again, John Paxton is dead, and the plaintiff and other heirs claim under him as alienees, and Samples gives this evidence being a party to the suit in his own interest against such alienees. It may be inadmissible, too, because Thomas Paxton is dead, the question being whether Samples made a deed of trust to him. The deed importing that he did, allowing Samples to state that he made it to John Paxton under false representations tends to show he did not execute it to Thomas Paxton, the deed of trust creditor. If Thomas Paxton were alive, he could speak on the question, and deny that Samples made the deed to the trustee; and, as he is dead, the law may exclude Samples. The trust purports to have been made with the creditor as an express party. This evidence tends to show it was not. The test is, does the testimony tend to prove what the transaction was? *Owens v. Owens*, 14 W. Va. 95; *Anderson v. Cranmer*, opinion, 11 W. Va. 576; *Robinson v. James*, 29 W. Va. 224, 11 S. E. 920. But this is not important. In addition, Thomas Samples has done acts utterly inconsistent with any idea that he owned one-half the land, and consistent only with the theory—the true theory—that there was a deed of trust, under which the trustee sold on May 6, 1865, and it was purchased for the benefit of all the nine heirs by William Paxton, and Samples' wife was entitled to one-ninth as an heir.

In this suit Samples and wife filed an answer fully recognizing the common ownership by all the heirs, alleging that Thomas Paxton had in his lifetime set apart to Mrs. Samples a specific lot of 224 acres out of the land, and placed her in possession, which she had held for 27 years; and praying that they be confirmed in the separate ownership of the lot in the partition. Samples and wife both signed this answer. This answer, I see, too, definitely alleges that certain of the heirs had executed a deed conveying to Virginia Samples this lot, and exhibits it, and asks that this lot be confirmed to her. And this deed recites that the lot is part of the land to partition which this suit was brought, it being lot 5 in the "1,400-acre tract owned by the heirs of Thomas Paxton, deceased." And in 1882, Samples and his wife united with others in a deed conveying to America Simmons a specific defined lot, she being an heir, containing a recital that it was "lot No. 4 in the division of a survey of 1,400 acres, Thomas Paxton's land." From these deeds and other evidence it appears that Thomas Paxton, regarding the land as virtually his, laid it into lots, and gave several children several holdings, and they lived on them, and made improvements, for more than a quarter of a century; and some of them died on them, and perhaps were there buried. Samples recognized this partition by his solemn deed. Samples asked no more for years and years. What malign influence

moved him, in 1891, to ignore all he had done years ago by filing an answer denying the deed of trust, and claiming that he and George W. Paxton owned still the whole tract, and seeking to exclude other heirs from their just share in the common patrimony? What moved him in his evidence, while admitting that he had employed the attorney signing the first answer, to repudiate his work, and say he had not read the answer, or heard it read? Strange that the attorney should have inserted the details of claim to the specific lot, and ignored his client's ownership of half this valuable land, without the assent of his client. And the various heirs paid taxes for a number of years from 1869 up, according to their interests in the land, Samples paying only on one share. And I notice that his second answer says that in 1883 he made a deed for a lot to another heir, William Paxton, as also one to Simmons and wife, but they were procured by fraud; but wherein the fraud was he does not inform us, contenting himself with mere generality.

The answers allege, generally, a want of consideration of the bonds. If so, it would affect the deed of trust; but George W. Paxton and Samples furnish the only evidence on this score,—that they were accommodation bonds intended to secure a loan, but not used. They cannot give this evidence against the dead man's estate. And, besides, other evidence of their declarations repels it. Thus, on the merits, the pretensions of George W. Paxton and Samples are without foundation and against justice. One reading the case is impressed with wonder that sensible men could present a case so filled with inconsistent acts, and so palpably untenable, and ask a court of justice to sustain it. Animadversion more severe might be made upon their conduct, but it would answer no purpose. Counsel, seeing that the substance is against his client, evidently relies with chief dependence upon the point that the answers of the defendants contain new matter calling for affirmative relief, and that, as there was no special reply, a decree giving them the whole land upon an unjust cause should have been rendered, taking away from brothers and sisters their shares confirmed by 30 years' possession, a possession so long that all have grown gray within it, and others have died, leaving children behind them. But this contention is not good. These answers are purely the common answers of defense or traverse of the matter of the bill, not cross bills. The bill alleges the execution of the bonds and deed of trust, and the sale under it, the purchase by one of the heirs for all, and thus states title of the parties entitling them to partition. The answers simply assert that the deed of trust was forged, so far as George W. Paxton is concerned, and procured by fraud, so far as Samples is concerned. This is merely matter of defense. It is not enough to call for a special reply that the answer contains new matter, but it

is only when the new matter, in its nature as applied to the case, calls for affirmative relief against some of the parties, and is not simply matter of defense of the case made by the plaintiff. *Smith v. Turley*, 32 W. Va. 14, 9 S. E. 46, and cases cited. Now, what relief do these answers call for? Simply a denial of the partition, and dismissal of the bill and rescission. A dismissal would forever preclude the claim of plaintiff to the land under that title without cancellation. Who would say that under ordinary chancery practice, before the enactment of sections 35, 36, of chapter 125 of the Code, these defendants could not resist the plaintiffs' suit by an ordinary answer containing the matter contained in these answers? No one, I assume. Then these answers are to be regarded only answers of ordinary defense matter, and not as containing new matter calling for affirmative relief under said statute. I think *Cunningham v. Hedrick*, [23 W. Va. 579,] and the lucid opinion by Judge Johnson, will sustain this position. It holds that before said statute, while it was proper and in accordance with strict rules of pleading when a bill to enforce a vendor's lien was filed, if the defendant wished to rescind the contract because the defendant was of unsound mind, or that it was procured by fraud, to file a cross bill, yet where the record showed that relief could as well be given upon bill, answer, and proofs as if a cross bill had been filed, its filing would be dispensed with, as it would be mere formality to file it; and that, under the operation of said statute, where the answer contains material allegations constituting a claim for affirmative relief, and no reply in writing is filed, but only a general replication, and the cause has been heard on the pleadings thus made and the proofs, if the record shows it is not such a case as would, before the statute, demand a cross bill to give the defendant the relief sought, the decree will not be reversed because no reply in writing was filed. In that case *Hedrick* purchased land, gave her bond, and a deed was made to her. She answered that she was incompetent from imbecility of mind to contract, and that the contract had been procured by fraud, and resisted the enforcement of the contract for that cause, and prayed rescission, as in this case. If anything could give the cast to the answer of one calling for affirmative relief, it would be the prayer for rescission. But in the *Cunningham-Hedrick* Case it was held that such relief could be given on an ordinary answer, and the answer did not call for a reply in writing, and the case could not be reversed for want of it. *Mettert v. Hagan*, 18 Grat. 231, was a bill to recover an interest in an estate, and an answer was filed resisting relief on the ground that the party was incapable from drink of making the deed; that it was procured by fraud; and asking that it be declared null and void. That is just this case. It was held that,

though strictly a cross bill would have been proper, yet the answer might, for that purpose, be treated as such, and rescission granted. So the cases settle that in such case relief may be refused, and cancellation made on answer, and a cross bill is not necessary. Now, we treat an answer as one under the statute calling for affirmative relief only where a cross bill must be filed according to the chancery practice to get the relief sought in the answer, not to cases where it can be given on the answer. Hence no reply was necessary. See, also, *Bart. Ch. Pr.* 304; *Kendrick v. Whitney*, 28 Grat. 655. There is another reason against reversal for want of such reply. After their answers were filed, the defendants went on to take depositions in support of them, and a hearing just as full and fair was had as if such reply had been filed. They treated it as if filed. Section 4, c. 134, Code, provides that "no decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done." Though the first clause does not apply to a special reply in writing, yet I think with Judge Johnson that the latter clause does, as he pointedly said in *Cunningham v. Hedrick*, *supra*. In that case the court held a second point strictly applicable to this case,—that where a defendant has taken depositions, and it appears that there has been a full, fair hearing upon the merits, and that substantial justice has been done, though there was informality in not requiring a plaintiff to file "a reply in writing," the decree will not be reversed for this reason. There is still another reason why the want of a reply in writing cannot matter. The only effect of the absence of such reply would be to take the facts in the answers to be true. Though true, yet the doctrine of laches would debar the relief the answers sought. The plaintiff entered a demurrer to these answers. If treated as cross bills, a demurrer would lie to them, and raise the question of laches. *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507. Are these defendants chargeable with laches? They sought to rescind and cancel a deed of trust, a fully executed deed, for fraud. Samples knew of the fraudulent deed of trust March 3, 1865. George W. Paxton knew of it, he says, in 1880. They brought no suit until they filed these answers. This bill was filed in August, 1883. George W. Paxton filed an answer simply denying the deed of trust, charging no forgery, and asking no cancellation. In his second answer (December, 1884) he still asks no rescission of the deed of trust, though he did of other instruments. In his third answer (May, 1891) he yet does not ask cancellation, though he

does of other papers. If he has any answer at all calling for rescission, it is only under prayer of general relief. Samples never asked rescission of the deed of trust, or even denied it, until his second answer, as late as April, 1891, though he filed an answer before. George W. Paxton thus knew of the fraud and forgery, giving him the benefit of a prayer for annulment more than 4 years, and Samples 26 years, before they took a step to rid themselves of it. The law is that he who elects to set aside an instrument for fraud must sue without unreasonable delay after discovery of it, unless there be good reason to excuse it. *Whittaker v. Improvement Co.*, 34 W. Va. 217, 12 S. E. 507, and cases cited. This is particularly applicable to Samples, and I hardly think Samples has any answer of the character spoken of.

Counsel for appellees contend that there are no orders filing these answers. Technically there are not. Especially should there be leave to file amended answers, and it is the amended answers which are relied upon for relief to the defendants. But the order showing plaintiffs' demurrer to them treats them as filed, and the decree refers to them as read on the hearing, and I treat them as filed. And, as pertinent to this subject of laches, for the purpose of showing not simply laches, but, as a circumstance of great force, and decisive, to repel all idea that George W. Paxton and Samples had any claim to the whole of the land, and never, until very lately, thought of setting up any, they allowed their brothers and sisters for years—many years—to occupy, improve, and cultivate separate parcels, without rent, without claim. Why? Because they knew they had no right under their deed from Vinyard, but that the land belonged to all the heirs. They knew there had been a voluntary partition into lots, and that these other heirs were holding under it,—a laying off into lots by their old father, who died as long ago as 1862, and which all recognized until these defendants sought to upset it of late years. George W. knew he had sold his interest to his brother Hays in 1874. Samples knew he had no interest save that under his wife. It was only of late years that he and Samples formed a combination to claim all. Their right is barred by reason of the separate claim for so many years, and possession and improvement by the other heirs, if George W. Paxton and Samples ever had any such right as they claim latterly.

The appellants complain that no notice of sale under the trust was given them. It required no notice to them, but notice in a newspaper, which was given.

It follows, as the deed of trust was valid, the sale and conveyance by the trustee is valid. Nothing is shown against it. The deed from the trustee to the heirs, in which William Paxton joined, recited that he, as

administrator, had purchased for the benefit of the heirs. He was one. The purchase was made, likely, to save the estate to the heirs, and with the debt, William Paxton, acting as administrator, prudently presumably, and honestly conveyed to all the heirs. As they had owned the debt for weal or woe, so he secured the land for weal or woe to them. We must presume he acted prudently. Not one iota is shown to the reverse. And to end any objection on this score, all the heirs, including George W. Paxton and Samples and wife, have by deeds and words ratified the act. And would any court of equity, after a quarter of a century of possession under it, now permit one heir to come in and say the administrator had no power to purchase and convey to the others? They should have protested sooner.

The assignment of error that the court heard the case on a special reply found in the record, but not appearing in any way ever to have been filed, is not well taken, because it is not mentioned as one of the papers read; though for reasons above given this is immaterial.

I scarcely know whether I should advert to the act of the court in excluding George W. Paxton from the partition, as no error is assigned for that cause. This exclusion was proper. By deed of October 14, 1874, George W. Paxton conveyed his right in the land to his brother Hays A. Paxton. He acknowledged the deed, and, as he admits, he delivered it to the grantee. He states that he delivered it on condition that, if a horse—a part of the consideration—should not be delivered in a certain time, the deed was to be surrendered; and that the horse was not delivered, and the deed was surrendered. The deed is found in George W. Paxton's possession, which would lend some countenance to this pretension; but we must exclude this evidence, as Hays A. Paxton's lips have mouldered in death, and he cannot speak his version. The deed is found in George W. Paxton's possession. Was it ever redelivered? Amanda E. Parks says she saw the deed written in Wirt county. It was there acknowledged. She says she saw it in the hands of Hays A. Paxton, the grantee, a year or two after it was made. A witness (Whitney) says he saw a letter in the possession of Hays A. Paxton from George W. Paxton, admitting he had sold him the land, and to so tell one Elmore. Whitney next saw this letter in the papers of the case, and later he saw it in the hands of George W. Paxton. Whitney told him he would have to put it back, when George W. Paxton said, "By —, it would defeat him, if he put it back without the balance of the letter." I should have before stated that the witness Parks states that George W. Paxton came to Hays A. Paxton to borrow the said deed until "he got through with Billy," and Hays Paxton loaned him the deed. A circumstance against George W.

Paxton's claim, and corroborating Parks, is that George W. Paxton yet held Hays A. Paxton's bond, which is part of the consideration. If there had been a surrender of the deed, why would George W. Paxton still have the obligation? A witness (King) states that he heard George W. Paxton state on a trial before a justice that he had sold all his interest in the land to Hays A. Paxton. A witness (Copin) states that just before this suit was brought he asked George W. Paxton if he had not an interest in land in Clay county, and he replied that he had none, but had sold it all to Hays A. Paxton. Nothing to the reverse is shown. The circuit court decided properly that George W. Paxton had passed his share to Hays A. Paxton. And, more surely yet, we cannot undertake to say that on this question of fact the finding is wrong, plainly.

As to the deeds between other heirs which are attacked, George W. Paxton and Samples only claim that they should be annulled because they owned all the land, and other heirs who made those deeds none; but, as we find that George W. Paxton and Samples had not such right, we need say no more as to those deeds.

The point that there was no revival against the heirs of America Simmons is not ground for reversal. The bill conceded her right to a share. So did the appellants, if not entitled to the whole. Her heirship was a concession, and how does it prejudice appellants? Her heirs were accorded a share. The appellants are not entitled either to the whole or shares.

As to the point that there was no revival as to heirs of G. W. Paxton. How does it prejudice appellants? But in fact there was such revival, the order calling the heirs heirs of A. J. instead of G. J. Paxton,—a mere misnomer as to one initial.

As to the point that heirs of John Paxton, Lyle Paxton, and Caroline Burdette were not parties. They had no interest. The bill charged that they had before suit conveyed their interest by deed to Hays Paxton. George W. Paxton's answers conceded it, and Samples did not deny it. Not one of these points are assigned for error. Decree affirmed.

STATE ex rel. THOMPSON et al. v. McALLISTER, Mayor, et al.

(Supreme Court of Appeals of West Virginia.
Nov. 15, 1893.)

CONSTITUTIONAL LAW—PROPERTY QUALIFICATION OF MUNICIPAL OFFICERS—REVIEWING ELECTION CONTESTS.

1. Section 13 of chapter 47 of the Code, which requires members of municipal councils to be freeholders therein, is constitutional and valid.

2. Certiorari, and not mandamus, is the proper remedy to review the proceedings of a

municipal council, under section 23 of chapter 47 of the Code.

Brannon, J., dissenting.
(Syllabus by the Court.)

Error to circuit court, Putnam county: F. A. Guthrie, Judge.

Action at the relation of John M. Thompson and another against W. H. McAllister, mayor, and others, for mandamus. There was judgment for relators, and defendants bring error. Reversed.

Brown, Jackson & Knight, for plaintiffs in error. C. R. Lewis and Bowyer & Green, for defendants in error.

DENT, J. The following is the statement of facts taken from the brief of the counsel for the defendants in error, to wit: "On the 5th day of January, in the year 1893, at an election in the town of Hurricane, Putnam county, W. Va., a town incorporated under chapter 47 of the Code, for municipal officers of said town, John M. Thompson and C. A. Smith, residents of said town, and entitled to vote for members of its common council, together with G. W. Dudding, J. P. Mynes, and M. L. Dunfee, were elected to office of councilmen of said town for the year commencing on the 1st day of February, 1893; the number of councilmen for said town being five, the town not being laid off into wards. On the 16th day of January, 1893, at a meeting of the outgoing council, the returns of said election were canvassed, and it was declared that the above five persons received the largest number of votes at said election for the office of councilmen of said town; and said council, at this meeting, further decided, among other things, that said Thompson and Smith were not duly-elected officers of said town, because they were not freeholders therein, and further declared that W. L. Losee and W. S. Turley, two members of the old council, but not elected to the new council, should hold over as councilmen until their successors were qualified,—the said Smith, at that time, and at the time of said election, being in possession of a lot of land in said town, which he owned by a title bond, and said Thompson's wife, at said dates, owning in fee land in said town. On the 17th day of January, 1893, the said Smith and J. M. Thompson each bought land in said town, which was conveyed to them, respectively, by deeds dated, respectively, on the 17th and 18th of January, 1893. On the 20th day of January, 1893, the said Thompson and Smith each duly took the oath of office as councilmen of said town, and duly filed the same with the recorder, or acting recorder. At the first meeting of the new council, said Turley and Losee being present and acting, on the 6th day of February, 1893, the said Thompson and Smith presented themselves, and demanded that they be admitted to the office of councilmen, and permitted to perform

their duties as such, but they were refused and denied admittance to their office. On the 11th day of February, 1893, the said Smith and Thompson obtained from the judge of the circuit court of Putnam county a mandamus nisi to Wm. H. McAllister, mayor; R. V. Dorsey, claiming to be and acting as recorder; G. W. Dudding, J. H. Mynes, and M. L. Dunfee, councilmen; and W. L. Losee and W. S. Turley, claiming to be and acting as councilmen of said town,—commanding the first five to admit said Thompson and Smith into the office of councilmen of said town, and commanding said Losee and Turley to surrender and turn over to said Thompson and Smith the office of councilmen of said town. The defendants Dudding and Mynes made return to said mandamus nisi that they were willing, and had always been, to admit said plaintiffs to the office of councilmen, and had made and seconded a motion to admit them, but that the majority, including said Losee and Turley, had voted against the motion. The defendants McAllister, Dorsey, Dunfee, Losee, and Turley moved to quash the writ of mandamus nisi, which motion the court overruled; and, the said defendants not desiring to make return to said writ, the court gave judgment for a peremptory writ of mandamus to issue, from which judgment the last five of defendants have obtained this writ of error and superseas.

Appellants assign these grounds of error in their petition for writ of error, viz.: First, it was error in the circuit court to hold the statute which requires councilmen to be freeholders unconstitutional; second, the circuit court should have sustained the motion to quash the alternative writ of mandamus because, among other defects upon the face thereof, the plaintiffs, claiming several rights, could not obtain a joint writ of mandamus; third, said motion to quash should also have been sustained because the alternative writ of mandamus failed to make a case for the plaintiffs, or either of them, to obtain the relief prayed for.

In my opinion, there are only two questions suggested by the facts in this case as proper, at the present time, for the consideration of this court: (1) Is the law containing the freehold requirement constitutional? (2) If so, have the relators mistaken their remedy as to all other questions raised by them?

1. In determining this constitutional question, we find the rule plainly laid down in the case of *State v. Dent*, 25 W. Va. 19, in these words, to wit: "Article 6, § 1, of our constitution provides: 'The legislative power shall be vested in a senate and a house of delegates.' This obviously confers on them all legislative power, except such as they are prohibited by the constitution, in other provisions, from exercising." And the person claiming that an act of the legislature is an infringement of the restrictions of the

constitution must point out the provision plainly forbidding, either by express words or by inevitable implication, the passage of such act; and, if none such exists, the act, however unjust or unreasonable it may seem, is valid, and must be sustained by this court. Judge Cooley, as quoted approvingly in the above case, lays down the rule that "any legislative act which does not encroach upon the powers apportioned to other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them." The defendants in error, recognizing the binding force of this rule, point out three sections of the constitution, all and each of which they claim are violated by the act in question:

First. Section 4, art. 4, which provides that "No person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal." That because this section forbids any persons except qualified electors to hold office, by just implication, the converse of the proposition is also included in the meaning of the section; that is to say, that all electors are duly qualified to hold office. Such reasoning is very fallacious. This provision was simply intended to limit the number from whom the various officers of this state might be chosen to those having a voice in the selection of such officers, and not in any sense intended to determine the qualifications necessary to properly discharge the duties of any office. For the electors to say in the constitution adopted by them that "no one but ourselves shall ever be elected or appointed to any office in this state" does not, by implication, say to the legislature, further, "You shall pass no law that would prevent any of us from holding office," for such an important matter as this would not be left to implication if the electors had considered such a provision desirable. While we have no decision in this state touching this question, the highest tribunals of other states have construed similar provisions in their state constitutions as above indicated. In the case of *Darrow v. People*, 8 Colo. 420, 8 Pac. 661, the supreme court of that state, in passing on the same question here raised, says: "Counsel argue that section 6, art. 7, of the constitution provides that 'no person except a qualified elector shall be elected to any civil or military office in the state,' by implication, inhibits the legislature from adding the property qualification under consideration. There is nothing in the constitution which expressly designates the qualifications of councilmen in a city or town, and this section contains the only language that can possibly be construed as applicable thereto. But it will be observed that the language used is negative in form; that it simply prohibits the election or appointment to office of one not a qualified elector. There is no conflict be-

tween it and the statute. By providing that a supervisor or an alderman shall be a taxpayer, the legislature does not declare that he need not be an elector. Nor is the provision at all unreasonable. On the contrary, it is a safeguard of the highest importance to property owners within the corporation. The right to vote and the right to hold office must not be confused. Citizenship, and the requisite sex, age, and residence, constitute the individual a legal voter, but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office; and certainly no doubtful implication should be favored, for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the constitution, by this provision, intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualifications should ever be demanded, and no other disqualifications should be imposed. If, as has been well said, they 'had intended to take away from the legislature the power to name disqualifications for office, other than the one named in the constitution, it would not have been left to the very doubtful implication which is claimed from the provision under consideration.' *State v. Covington*, 29 Ohio St. 102." In the latter decision the court laid down the law in a syllabus as follows, to wit: "The provision in the constitution (section 4, art. 15) that no person shall be elected or appointed to any office in this state unless he possesses the qualifications of an elector does not by implication forbid the legislature to require other reasonable qualifications for office."

Second. The next claim of the counsel is that the latter clause of section 5, art. 4, is violated, which is in these words: "And no other oath, declaration, or test shall be required as a qualification unless herein otherwise provided;" his argument being that the freehold requirement is a test, within the meaning of the constitution. The assertion is so unfounded as to hardly need refutation. This clause is simply an application of section 11, art. 3, to the case of officeholders, which is in these words: "Sec. 11. Political tests, requiring persons as a pre-requisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths of past alleged offences, are repugnant to the principles of free government and are cruel and oppressive. No religious or political test oath shall be required as a pre-requisite or qualification to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment. Nor shall any person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law." As will be seen at a glance, nothing is said about holding office, in this sec-

tion, but it is made to apply alone to the right "to vote, serve as a juror, sue, plead, appeal or pursue any profession or employment." To remedy the omission here, the constitution makers added the clause to section 5, art. 4, which refers alone to religious and political tests as a prerequisite or qualification for office, and has nothing whatever to do with any just qualification that the legislature may deem necessary to a proper discharge of the functions of the office. In the case of *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274, the court of appeals, construing the same provisions in the New York constitution, says: "Still another ground of invalidity is alleged by the appellant. He says that the statute conflicts with article 12, which provides for the taking of an oath of office by members of the legislature and all officers, executive and judicial, before they enter on the duties of their respective offices, which oath is therein set forth; and it is there stated that 'no other oath, declaration or test shall be required as a qualification for any office of public trust.' The statute by which an applicant for appointment to a position in a public office is made to show his fitness therefor is claimed to constitute an illegal test, within the meaning of this section. * * * We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people, through their legislature, to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office. So long as the means adopted to accomplish such end are appropriate therefor, they must be within the legislative power. The idea cannot be entertained for one moment that any intelligent people would ever consent to so bind themselves with constitutional restrictions on the power of their own representatives as to prevent the adoption of any means by which to secure, if possible, honest and intelligent service in public office. No law involving any test other than fitness and ability to discharge the duties of the office could be legally enacted under cover of a purpose to ascertain or prescribe such fitness. Statutes looking only to the purpose of ascertaining whether candidates for an appointive office are possessed of those qualifications which are necessary for a fit and intelligent discharge of the duties pertaining to such office are not dangerous in their nature, and in their execution they are not liable to abuse, in any manner involving the liberties of the people. * * * In this case, we simply hold that the imposing of a test, by means of which to secure the qualifications of a candidate for an appointive office, of a nature to enable him to properly and in-

telligently perform the duties of such office, violates no provision of the constitution." The same reasoning would hold good in an elective office, so far as the section under discussion is concerned.

Third. The last claim of the counsel is that the provision complained of is in violation of section 8, art. 4, of the constitution, in which the legislature is empowered to "prescribe by general laws the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." This section includes all municipal officers, and was only intended to require the legislature to enact general, and not special, laws in relation to the matters included in the section. But the counsel argue that "by granting the legislature the authority to establish offices, and provide the term of office, powers, duties, compensation, and manner of election and removal, the power to add a qualification, not being given, is excluded by implication." The learned counsel appear to forget the difference so often defined between the federal and state constitutions; the former being strictly a grant of powers, while the latter is a limitation or restriction on the powers of the state legislature, which otherwise would be supreme in all legislative matters, as it is now in all cases wherein not restricted by the constitution,—that instrument itself so declaring, as heretofore mentioned. And for the very reason that the power to prescribe qualifications is not mentioned in this section, the legislature has unrestricted control of that power. And it has been held by the court of appeals of another state that the same kind of provision gave the legislature entire control over all such officers; that the power to prescribe the manner in which they shall be elected and appointed included within it, necessarily, the power to prescribe civil-service examinations, or to prescribe that they should be chosen from a class of citizens who possess some qualification that specially fits them for office, or renders them efficient officers. In the case of *People v. Clute*, 50 N. Y. 459, the court of appeals, construing this same provision, says: "There is no right bestowed by the constitution upon the elector to choose by vote to that office. But there is a gift from the legislature to the elector so to do, or rather a power thereby intrusted to him by the statute, which may be taken back again. Now, the authority which confers a power, and may take it away, may, in bestowing it, limit and restrict its exercise, as it sees fit, so far as it is not specially prohibited therefrom, and may, within that limit, say for how long, in what manner, and upon what objects it shall be exerted. Certainly, if the legislature may say to the voter, 'You shall not vote for any one for this office, but it shall be appointive,' it may say, 'You shall not vote for any one for this office who is not free from this disqualification

which we now declare.' The legislature may not put upon any elector a personal restriction from voting for any officer who may be elective, or whom it may declare elective, save such restriction as is imposed by the constitution, for from that it is especially prohibited. But it may, in the exercise of its judgment, for the public good, limit the number from whom the elector may select, for thus to legislate is within the general and sovereign power of legislation, which it constitutionally possesses." And in the syllabus the court lays down the law as follows, to wit: "Where the power is reserved to the legislature to direct the method of filling an office, whether by election or appointment, it may, in its discretion, when conferring upon the elector the power to elect, limit the number from whom he may select." In this case the freehold requirement is not, technically speaking, a qualification, but it is a limitation by the legislature in conferring the right to vote, as to the number from whom the elector may select. It is the same as if the legislature had provided that the officers of the municipality must be chosen from among the freeholders thereof, the same as grand jurors are selected. This is not class legislation, because it is in the power of any one to become a freeholder, the same as it is in the power of any one to educate himself under civil-service rules. But it is clearly within the power of the legislature, even if, as the counsel claim, "there is no good reason for such law." Experience in municipal matters, and a wise consideration of the question, will convince any unbiased mind that such a law has under it the very best of reasons. The fact that a man owns real estate has little bearing on the question as to whether he is capable of filling an office, but the real-estate owners are the substantial people of any community,—its bone and its sinew,—and there are but few among them that do not have some property pride, and an interest in the welfare and prosperity of their permanent dwelling place. On the other hand, among those not owning real estate belong the floating population,—those who are too trifling and unthrifty to want property, and those who, having wasted their substance in riotous living, and spent their days in idleness are jealous of their neighbors' prosperity, and are ready to tear down, destroy, and scatter broadcast, the results of hard earnings, frugal management, and careful savings. To them, although electors, the prosperity and welfare of the municipality amounts to nothing, for, like the Bedouins of the plains, 'neath the shadows of night they can fold their tents, and silently steal away, while, if there are any among the unfortunate but deserving poor who would make capable officers, their more successful neighbors are ever ready and willing to lend a helping hand, and see that they own the necessary "ten feet of ground." It was no trouble for the relators to become freeholders, when they

found a necessity for so doing. A municipal corporation is the legislative grant of local self-government to the inhabitants within a certain designated territory, which is known as the "city," "town," or "village," and corporate powers granted are exercised by its inhabitants in its corporate name. The freeholders of such municipality own every foot thereof, and the benefits derived therefrom are enjoyed, and the burdens borne, almost entirely by them. The loss or gain of the municipality is their loss or gain. They favor just and reasonable taxation, because it increases the general welfare, and thereby is beneficial to their private interests. They oppose excessive and injudicious expenditures of public levies, because the waste must fall heaviest on them. They therefore have an interest that makes them efficient and reliable municipal officers. While the office of councilman is the most important office, within its limited jurisdiction, of any in the state,—combining, as it does, legislative, judicial, executive, and ministerial powers,—there is usually no pay, and but little honor, attached to such office, and the burden and annoyance are exceedingly heavy. A competent man, who has no sufficient interest in the community to become a freeholder, does not care to give his time, endure the labors, and suffer the annoyance of the office, simply to improve the property of others; and sometimes it is almost impossible to induce competent freeholders to undertake it, however great their interests may be. By making it exclusive, the office is rendered more important, and it devolves upon the freeholder, as a duty, to accept. Under our system of government, all officers are but the servants of the people, and it is but just that the people should have the best service possible; and in endeavoring to secure this, for the public weal, the legislature has wisely incorporated this provision in the general law relating to the incorporation of cities, towns, and villages, and it is now in the special charter of nearly every city and town of over 2,000 inhabitants. It is further plain, under our statutory law, the candidate must be a freeholder at the time he is voted for, because the voter has a right to presume that the candidate is eligible to the office at the time he asks his suffrage; otherwise, the election is void. The election law especially requires that, in nominating candidates for office, they shall be certified to be legally qualified to hold the office for which nominated. But it is not necessary to decide this question at the present time, except as a mere dictum.

The constitutional question being out of the way, the only other question that presents itself is whether mandamus is the proper remedy to review the action of a municipal council in determining, under the law, that a candidate is not legally qualified to hold the office. This entirely depends on the fact as to whether the council, in so determining,

was acting within the limits of its authority, or assuming a jurisdiction it did not possess. Mandamus is not a proper remedy to control the action of a municipal body, when acting within the scope of its legal powers, but only when it refuses to act at all, or is acting without legislative authority. *Supervisors v. Minturn*, 4 W. Va. 300. Section 23, c. 47, Code, provides: "All contested elections shall be heard and decided by the council." This constitutes the council a special tribunal to judge of the election and qualification of its own members. The counsel, in argument, places the question of contest on too narrow grounds. He would limit it to the case where two persons are claiming the same office by election. Where there are substantial doubts as to whether a candidate elected to office is eligible or not, any citizen interested, as taxpayer or elector, would have the right to raise the objection, and it would then become the duty of the council, as the only tribunal in which the authority is vested, to promptly hear and determine the matter. This gives a quick and speedy hearing, while the office might expire before a determination was reached, if left to the courts. In case of a miscarriage of justice before the council, chapter 110, § 2, provides for a review of the decision of the council by means of certiorari; and in case of reversal, and disobedience on the part of the council, which is not at all probable, a way would be found to compel respect to the orders of superior judicial tribunals. The judgment of the circuit court is reversed, the mandamus nisi is quashed, and these proceedings are dismissed, at the costs of the relators.

HOLT, J., (concurring.) Section 13 of chapter 47 reads: "The municipal authorities of such city, town or village shall be the mayor, recorder and the councilmen, who shall be freeholders therein and who together shall form a common council." I do not think the freehold qualification unconstitutional. These offices are created, not by the constitution, but by the legislature, in the exercise of its inherent, plenary, legislative power, qualified so as to require a general law for incorporating cities, towns, or villages containing a population of less than 2,000. Section 8, art. 4, of the constitution says that in such cases, among others, the legislature shall prescribe the manner in which they shall be elected, appointed, and removed, and leaves it to the legislature to say from what body of persons they shall be elected or appointed, but with this qualification: That, being municipal officers, the negative provision of section 8 of article 4 of the constitution applies,—they must, in any event, be citizens of the state, entitled to vote; for, if the constitution is to be taken as prescribing exhaustively the qualifications of such municipal officers created by law, as well as of those officers created by the constitution itself, then section 21 of chapter 47, saying that the mayor, re-

corder, and councilmen must be residents of such city, etc., is also unconstitutional, and a resident of the city of Pocatalico could be legally elected mayor of the city of Charleston, and a resident of the city of Charleston could be legally elected mayor of the city of Pocatalico. So there are many other equally obvious and indispensable qualifications for various offices which the legislature has created, and may yet create, under its inherent, plenary, legislative power over the subject. See *State v. Covington*, 29 Ohio St. 118; *Darrow v. People*, 8 Colo. 417, 420, 8 Pac. 661; *Mechem*, Pub. Off. § 96; *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274. I regard the power of the legislature inherent, as well as given by section 8 of article 4, as comprehending the power to create these municipal offices, and prescribe the qualifications of such as are appointed or elected to fill them, and that the statute, in so far as it requires them to be freeholders of the town, should not be declared void on account of an implication that might at first blush seem to arise from the negative provision contained in section 5 of the same article of the constitution. Plenary power in the legislature is the rule. There can be no restriction, except what the constitution of the United States or of the state prescribes. Therefore, it is for those who question the validity of the statute to point out where and how it is forbidden, and if this is not made clear and palpable, beyond reasonable doubt, such doubt must be solved in favor of the legislative power, and the act sustained; and this, if no other good reason were apparent, is sufficient. For 20 years, almost, (1877,) it has been practically interpreted as constitutional by the action of all departments of the government, and it would now create a great confusion and inconvenience to hold it void; and this in the case of special charters as well as in the general law. Great weight is always rightly attached to such long, contemporaneous, practical exposition. See *Bridges v. Shallockross*, 6 W. Va. 562, and the authorities cited by Judge Haymond.

BRANNON, J., (dissenting.) Not concurring in the judgment in this case, I file, without revision, to express my views, the following opinion prepared by me, but which did not meet with the approval of the court, as will appear in opinions prepared by Judges DENT and HOLT:

John M. Thompson and C. A. Smith were elected on January 5, 1893, at a municipal election for the town of Hurricane, Putnam county, as members of its council; but the council refused to allow them to enter into office, upon the ground that at the date of the election they were not freeholders, and allowed W. L. Losee and W. S. Turley, incumbents in said office, to continue to act therein until their successors should be elected and qualified. Upon a writ of mandamus, the circuit court gave judgment for the

claimants, Thompson and Smith. The writ ran to the mayor, recorder, and councilmen, including Losee and Turley, and they, except Mynes and Dunfee, councilmen, bring the case here by writ of error. A number of important questions arise on the record, involving principles of great practical importance:

First question: If the claimants were not freeholders, would it disqualify them from being councilmen? The town was incorporated under the general law found in chapter 47 of the Code, and as section 13 requires the mayor, recorder, and councilmen to be freeholders, it is claimed that claimants are disqualified. If this be so, then a resident of this town may be a voter, and qualified to be elected governor of the state, and yet be ineligible to the town council. The claimants are qualified voters. Are they qualified to hold these offices? Is the freehold qualification demanded by the statute unconstitutional? Section 1, art. 4, of the constitution reads, "The male citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside," with various exceptions in that section specified. Here is a broad declaration that all male citizens shall be entitled to vote, with specific exceptions. Other exceptions cannot be made by the legislature. Plainly, it was the purpose, by this section in the organic law, to point out, and make clear and certain, in what particular persons among the people of the state the sovereign power of the ballot resides. If we wish to know who is the voter, we look here, and here alone. It vests in the citizen this great right. It cannot be taken from him by legislation. If he falls within the general grant in the opening clause of the section, and not within any of its exceptions, he is a suffragan, over any power that would deny his right, or add another qualification. *Cooley*, Const. Lim. 753. He is a voter, though as poor as Lazarus. But has he another great privilege,—"right," I should say; for it is hard to say which is the higher right, in the freeman,—that of voting, or that of being voted for? The constitution has granted the citizen the ballot. Has it forgotten his right to hold public office? It has carefully defined the qualification of voters, in the well-drawn section quoted. Has it failed to define the qualification of officers? Having defined the qualifications of voters, it was not to be supposed that it would omit the very important matter of defining who might be officers. It has not omitted to do so. It makes the one right practically the correlative of the other. To the citizen clothed with the right of suffrage is given also the right of holding office. It should be so, and it is so. Section 4 of article 4 provides that "no person except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of

thirty, and the attorney-general the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the state for five years next preceding their election or appointment, or be citizens at the time this constitution goes into operation." This does not in affirmative express terms declare that a voter shall be competent to hold office, as does the first section say that all male citizens shall be voters. It could have been better drawn, for present purposes, by declaring that any one who is a voter should be competent to be elected or appointed to office, but the section means that. We must read sections 1 and 4 together, as if in *pari materia*, because they deal with two kindred subjects, and they are located close together. Section 1 has just defined the qualifications of voters. Section 4 takes up the subject of qualifications of officers, and, in saying that no person but citizens entitled to vote shall be eligible to office, it, by implication,—by strong and plain implication,—means to declare that a citizen entitled to vote shall likewise, because of his quality of voter, be entitled to be elected or appointed to office. In saying that none but voters shall be officers, it means to assert the converse,—that voters shall have right to be officers. It is a negative pregnant. A reading of the two sections will more strongly impress one that such is the meaning of the fourth section than can be conveyed in words of explanation or construction. The negative mode of expression was used in the section, likely, to exclude all persons not voters from office; for, if it had said that all voters should be eligible to office, it might have been contended that persons not voters might be made eligible to office, while under the section as it is, in the negative form, that is prohibited. But surely it did not mean to leave the gate swinging, so as to let any power disable a voter from holding office. When it says that one not a voter shall not hold an office, does it not impliedly say that a voter may hold office? That it meant, not simply to exclude those not voters from office, but at the same time to confer upon voters the right to hold office, is shown by the fact that the section goes on to prescribe certain qualifications for governor, judges, attorney general, and senators. Why touch the subject of qualification for office at all, if the section had for its aim only to exclude nonvoters? The convention, knowing that, by declaring that none but voters should become officers, it had vested in voters the right to become officers, and desiring to require, as to governor, judges, and senators, certain qualifications in addition to their being voters, made the specific additional requirements as to them. Comparing this section 4, art. 3, as found in the constitution of 1863, with that in the present one, we notice the insertion in the present constitution of the word "but," not till then found in the section. In the former consti-

tution, it read: "No persons, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office. Judges must have attained the age of thirty-five years, the governor the age of thirty years," etc. In the present constitution it reads: "No person, except citizens entitled to vote, shall be elected or appointed to any state, county or municipal office; but the governor and judges must have attained the age of thirty," etc. The insertion of the word "but" indicates that the convention knew that the first clause expressed a general rule or definition of qualification for office, admitting all voters to the right; and as governor, judges, senators, and attorney general would fall within it, unless excepted, and desiring to except them, it, for safety, inserted the word, to make it more clear than it had been. In other words, it is an exception, the same as if, after allowing all voters to be chosen to office, it had said, "except that the governor and judges must have attained the age," etc. Why the necessity of exception, if there is no general rule? Thus, to be a voter is to be also qualified to take office; to be a voter is the correlative of the right to be an officer, except as regards governor, judges, senators, and attorney general, to the extent, as to them, specified in section 4. Judge Brown so construed a similar section in the constitution of 1863, in *Phares v. State*, 3 W. Va. 509, saying: "The constitution prescribes who are entitled to vote, and it also provides that any person so entitled to vote shall be eligible to office."

I will propound two questions, which I will assume to think are decisive. Can the legislature enact that the governor, judges, or senators shall be freeholders? No; because the constitution only demands that they be voters, and of certain age, and no other qualifications can be exacted. The naming those shows that no others were intended. Can the legislature enact that the auditor and treasurer shall be freeholders? I answer no, as I do as to governor, because the constitution has only demanded that they be voters. The only difference is that as to governor, judges, and senators, further qualifications are exacted. Will it be contended by any one that the legislature may exclude a voter from the auditorship because he is not an owner of realty? If it cannot, it is only because of this constitutional provision. Section 8 empowers the legislature to "prescribe by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed." It does not give the legislature power to prescribe the qualifications of officers. If the convention had left open that important matter, it would be expected that it would, in the section just quoted, grant to the legislature the necessary function or power of prescribing such qualification; but it did not so,

and simply because it had itself done so in section 4. Can we suppose that the framers of the constitution intended to leave open that most important matter,—important as it concerns the rights of individual citizens, and more important as it concerns the vital interests of all the people of the state in the administration of its government,—namely, the qualification for office, leaving it subject to the fluctuation of sentiment, the caprices of constantly changing legislatures, the passions of the hour? The very idea of a written constitution of government tells us that the definition of eligibility to official station should be, and would be, one of the very first subjects dealt with in it. If section 4 does not perform this function, where do we find it? There is no statute defining qualification for office. The legislature has always understood that the constitution did this work; for the legislature of 1863, passing a general election law under the constitution of 1863, which contained a like section to section 4 now under discussion, did not define the qualifications for office. Neither did the legislature of 1872-73, passing a general election law under the present constitution. Neither did the legislatures of 1882 and 1891, in the general election laws passed in those years. Four general election laws have been passed in 28 years, none defining the qualifications for office. I have not found where the legislature has done so in any act. Thus, we have the contemporaneous construction of the legislative department of government through many years, and a great mass of legislation, to the effect that the constitution prescribed and fixed the qualifications of officers. This has great effect. *Cooley*, Const. Lim. 81.

Counsel for appellee argues that the fact that section 6 requires officers to take an oath, and closes with the injunction that "no other oath, or declaration or test shall be required as a qualification, unless herein otherwise provided," would forbid the freehold requirement. It would, if we could consider it a "test," within the meaning of this provision; but, from the first thought, I doubted whether it would apply to a property qualification or an educational qualification, though the words "unless herein otherwise provided" might favor, slightly, such contention. My inclination was to regard matters of opinion or bias or political action as here referred to. We know that this prohibition had its birth and suggestion in the existence of test oaths springing from the passions and excitement of the civil war, designed to exclude participants therein, on the Confederate side, from holding office. English history tells us of test acts, and they relate to matters of opinion, chiefly religious opinion, like that in 25 Car. II., requiring an oath from officers against transubstantiation, and requiring them to take the sacrament under the English church; and that earlier in the same reign, called the

"Corporation Act," requiring officers to renounce the covenant; and also the uniformity act, requiring clergymen to assent to everything in the Book of Common Prayer. So far as advised, from authority here accessible, I think this provision against tests relates to opinion, and not such as a property qualification. See *Story*, Const. §§ 1847, 1849, and *Hume's* and *Macaulay's Histories of England*. I have met with the cases of *Attorney General v. Detroit Common Council*, 58 Mich. 213, 24 N. W. 887, where it is held, par. 6, that a provision in the Michigan constitution just like the one in ours does not apply to those special qualifications required for particular offices. The opinions in that case, and also the opinion on pages 91, 92, in the case of *People v. Hurlbut*, 24 Mich., will sustain the view I have just expressed as to the meaning of the word "test" as here used. I have also met with *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274, holding same view. Therefore, as section 4 confers upon the voter the capacity to take office, with the exceptions therein stated, the legislature does not possess the power to add to those exceptions, any more than it possesses power to disfranchise a citizen from voting by prescribing qualifications or exceptions beyond those stated in section 1.

The legislature cannot establish arbitrary exclusions from office, or any general regulations requiring qualifications not required by the constitution, except for crime. *Cooley*, Const. Lim. (4th Ed.) 78; *Barker v. People*, 3 Cow. 686; *Black v. Trower*, 79 Va. 123; *Thomas v. Owens*, 4 Md. 189; *Page v. Hardin*, 8 B. Mon. 648. Chancellor Sanford, in *Barker v. People*, supra, used this language: "Eligibility to public trusts is claimed as a constitutional right which cannot be abridged or impaired. The constitution establishes and defines the right of suffrage, and gives to the electors and to various authorities the power to confer public trusts. It declares that ministers of religion shall be ineligible to any office. It prescribes, in respect to certain officers, particular circumstances without which a person is not eligible to those stations, [as does ours,] and it provides that persons holding certain offices shall hold no other public trust. [So does ours.] Excepting particular exclusions thus established, the electors and the appointing powers are, by the constitution, wholly free to confer public station upon any person, according to their pleasure. The constitution giving the right of election and the right of appointment, these rights consisting essentially in the freedom of choice, and the constitution also declaring that certain persons are not eligible to office, it follows from those powers and provisions that all other persons are eligible. Eligibility to office is not declared as a right or principle by any express terms of the constitution, but it results as a just deduction from the express powers and pro-

visions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and to appoint any person who is not made ineligible by the constitution. Eligibility to office, therefore, belongs not exclusively or especially to electors enjoying the right of suffrage. It belongs to all persons whomsoever, not excluded by the constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusion from office, or any general regulations requiring qualifications which the constitution has not required. If, for example, it should be enacted by law that all physicians, or all persons of a particular religious sect, should be ineligible to public trusts, or that all persons not possessing a certain amount of property should be excluded, or that a member of the assembly must be a freeholder, any such regulation would be an infringement of the constitution; and it would be so because, should it prevail, it would be, in effect, an alteration of the constitution." Now, observe that Chancellor Sanford goes beyond where I need go; for he says that, without anything in the constitution expressly defining qualifications for officers, the mere fact that certain persons were by the New York constitution excluded, as is the case with us, is sufficient, alone, to vest in others, not excluded, the right to take office, or in the voters the range of choice from all not excluded. There was no such section as our section 4 for the chancellor to rely upon. If his proposition was right, how more can I assert that the position here taken is right, where we have a section 4, excluding only nonvoters, and leaving it to be understood that all that were voters should be allowed to receive office? This common principle of construction is illustrated in *Donaldson v. Voltz*, 19 W. Va. 156, holding that as the constitution, after granting exemption from execution, had specified certain exceptions, the legislature could not add rent. The expression of certain exceptions included others.

We have been under the impression that the property qualification for office had been, many years ago, abolished, by change in constitutional law. It surely has not been restored, and cannot be, but by a change in the constitution. It will not do to say that, while it may not be demanded as to state and county office, it may be as to municipal offices; for section 4 includes them, in terms. Were this not so, I would hold a different opinion. So I hold that the want of freehold qualification does not exclude from holding the position of councilman. It cannot be true that a man may be elected governor, and yet cannot be elected a town councilman, merely because, though a voter, he is not a freeholder. This would impress one as an absurdity and injustice. Ought the local taxing power be vested only in the property owner? Members of the legislature,

vested with greater taxing powers, need not be freeholders. The only cases cited in support of the contention that the freehold qualification is not unconstitutional are *State v. Covington*, 29 Ohio St. 102, and *Darrow v. People*, 8 Colo. 417, 8 Pac. 661. In the former it is held that the provision in the Ohio constitution that "no person shall be elected or appointed to any office unless he possesses the qualifications of an elector" does not forbid, by implication, the legislature to require other reasonable qualifications for office. The reasoning on the point is short and unsatisfactory. The judge says the power of the legislature should not be denied by mere implication, unless clear. He thought it was not clear. I think it very clear. But I add that it does not appear that the clause in the Ohio constitution containing the negative words had, as ours has, the feature of prescribing qualifications as to governor, judges, and senators, nor the section giving the legislature power only to prescribe terms, compensation, and manner of choice of officers, but failing to give it power to fix qualifications. The Colorado constitution is the same, in effect, as that of Ohio. The remarks just made apply to the Colorado case; and I note the fact, specially, that in neither the Ohio nor the Colorado constitutions did the clause include municipal offices, as ours does. The Colorado court says that the clause in the Colorado constitution had no relation to municipal officers. The decisions are of less authority because of that fact. If one additional material qualification may be prescribed, why not another? Why not many others? The constitution is fundamental law, and strictly construed in defense of the citizen's rights. It is the Magna Charta of his freedom and rights, political and civil. Admit once that it does not fix his qualification for office. Where would his disfranchisement end? That would depend upon uncertain political, religious, or other winds. Would we limit the act within the bounds of the reasonable? That would be indefinite, unsafe, precarious,—dependent upon the times and motives and aims dominating them. Against these things, it was intended to imbed the right in the solid rock of the constitution. If we say it might have been imbedded in plainer language, yet we must look at the policy,—the evil against which it was intended to provide. I do not say that no provision or qualification whatever that is reasonable—essential to fit the party for the duty—may not be prescribed. I lay down a general rule. But I say this freehold test is not reasonable or necessary to make a man a competent or suitable officer. The Virginia court, passing on the constitutional clause giving all voters the right to hold office, held void an act requiring members of electoral boards to be freeholders. It admitted that there might be cases where, by implication, an additional qualification might be imposed, when it was essential to the dis-

charge of the duties of the place, but the qualification of freehold could not be justified on this theory. *Black v. Trower*, 79 Va. 123.

Another question: Were Thompson and Smith freeholders when elected? Smith held land under a purchase evidenced by a title bond providing for a conveyance on payment of purchase money, and was in possession, but had not paid for the land. He thus had an equitable estate in fee simple. A freehold may be in an equitable estate as well as legal estate, as authorities below cited show. There is nothing, then, to prevent his being a freeholder, but nonpayment of purchase money. Shall a man owning land, in possession, who happens to owe yet a little purchase money, be deemed not a freeholder? The only reason is that he is not entitled to call for a conveyance of the legal estate. But he has a vested interest or property in the land, recognized by law. In the eye of equity, he is the owner of the land, holding in trust for his vendor only for purchase money, while the vendor holds the legal estate in trust for him, and is entitled only to the money. A court of law would recognize his right by giving him an action of trespass. If the law were that, to be a freeholder, he must have legal title, it would be different, but Virginia cases of binding authority repel that idea. It is ancient law that the cestui que use is a freeholder, so as to be a good juror. *Co. Litt.* 272b; 4 *Bac. Abr.* 556, tit. "Juries." But as to such cases I think the statute of uses would execute the use to the possession, and give good legal title. *Helmondollar's Case*, 4 *Grat.* 536, held that one having the equitable interest in land, entitled to call for the legal title, is a freeholder; and it is stated that, among many Virginia cases, no one denies that a cestui que trust of a freehold estate is a good grand juror, who is required to be a freeholder. In *Cunningham's Case*, 6 *Grat.* 695, a purchaser, by oral contract, in possession, who had paid for the land, was held to be a freeholder. In *Carter's Case*, 2 *Va. Cas.* 319, it was held that a grantor, who had passed away the legal title by deed of trust, and had merely the equity of redemption, was a freeholder. In *Moore's Case*, 9 *Leigh*, 639, the owner conveyed the land to a trustee to secure a debt, and then such owner conveyed to another person his equity of redemption, and put him in possession, and this person was held to be a freeholder. So the legal title in the person is clearly not necessary to constitute him a freeholder. And upon the strength of *Burcher's Case*, 2 *Rob. (Va.)* 826, I conclude that the fact that Smith owed yet some purchase money does not prevent his being a freeholder. It decided that a person was a freeholder who was in possession under a purchase; the deed to him not being delivered to him, but in the hands of another, as an escrow, to be delivered on payment of purchase money, which remained partially unpaid. The opinion said, as I now

say: "It seems sufficient if the juror is in possession of a freehold estate, and enjoying the profits and substantial ownership thereof;" that he was in lawful possession, and a court of equity would regard the land as the purchaser's property, and, if he failed to pay, would not turn him out, but give him a day to pay, and then sell the land as his, and pay him any surplus of its proceeds after payment of the debt. If that was so at the date of that decision, when the court of law did not recognize the equitable title, or its owner as having any title, but would turn the purchaser out, by ejectment, at the suit of the vendor, how much more should we hold it to be law now, when section 20, c. 90, of the Code compels the court of law to view the purchaser's right as a substantial right, by declaring that a vendor shall not, at law, recover against the vendee land sold by the vendor to such vendee, when there is a writing stating the purchase and its terms? The heading in *Reynold's Case*, 4 *Leigh*, 663, says that it seems that one who has contracted, by article under seal, to sell his land, but has not conveyed it, and still holds the legal title, is a freeholder,—that is, the vendor; and therefore it may be said that if the vendor is a freeholder the vendee cannot be a freeholder in the self-same land. But that statement is not binding, because the court says it did not decide it, as that question was not adjourned to it; and, secondly, it is true, as said by Judge Gholson in *Burcher's Case*, supra, that the vendor only agreed to sell on certain conditions precedent to be complied with by the vendee, and the record did not show that they had been performed, or a dollar paid, or that any title had been made, or even that possession had passed to the vendee. I hold that the want of legal title or failure to pay purchase money does not settle that the party is not a freeholder. Is he in possession of land, claiming freehold estate, by right, legal or equitable, recognized by law, whether the purchase money had been paid or not? If yes, then he is a freeholder. Therefore, Smith was a freeholder.

Another question: Was Thompson a freeholder when elected? His wife owned an estate in fee in land. We do not know by record when she acquired it, so as to say whether it was separate estate, nor whether there was issue by the marriage. But in no conceivable view upon the record, as it is, was Thompson a freeholder when elected. If we could see that the wife acquired the land, and the marriage took place before the married woman's separate estate act, (April 1, 1869,) we could say that he was a freeholder, because, by marriage simply, he was entitled to possession and rents and profits during the joint lives of himself and wife. *Pickens' Ex'rs v. Kniseley*, 36 *W. Va.* 794, 800, 15 *S. E.* 997. It would be a freehold, as it would continue during their joint lives, at least. 2 *Kent*, Comm. 130; *Dejarnatte v. Allen*, 5 *Grat.* 499, 513; *Schouler, Husb. &*

Wife, §§ 167, 181; Schouler, Dom. Rel. §§ 89, 201. Thompson would also be a freeholder, by reason of being invested with an estate by the curtesy initiate, though it does not appear that there was issue of the marriage, as such an estate is freehold, since it exists for the life of husband. It is true that at common law there must be issue, to create an estate by curtesy initiate. 2 BL Comm. 126; 2 Minor, Inst. 103. And under our statute, (Code, c. 65, § 15,) as it stood up to the act of March 20, 1882, notwithstanding it broadly declared that "if a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same," yet Winkler v. Winkler, 18 W. Va. 455, construed it as not dispensing with any of the four common-law requisites of curtesy. But chapter 86, Acts 1882, amended said Code, § 15, by utterly dispensing with issue as an element in curtesy; and I think it would operate to vest in the husband an estate by curtesy initiate, as here is an estate of inheritance, not separate estate, vested in the wife during coverture. But we cannot say that the land vested in the wife, and the marriage took place, before April 1, 1869. If, on the other hand, we suppose that the wife acquired this land after April 1, 1869, it being thus separate estate, under section 2, c. 66, Code 1891, (chapter 65, § 3, Code 1887,) the wife yet living, the husband could not be tenant by the curtesy initiate. It has been seriously questioned whether a husband could, by force of common law, take an estate by curtesy in the separate real estate of his wife; but the better opinion is—and the law here, as settled in Winkler v. Winkler, 18 W. Va. 455, is—that he can. That question—that is, whether the common law would, alone, give him such estate—is, however, unimportant, practically, because the statute would certainly give it. Code, c. 65, § 15; opinion in case just cited, (page 468.) But there is this distinction between an estate by curtesy in lands of the wife, not separate estate, and lands that are her separate estate, namely, that in lands not her separate estate there is curtesy initiate, whereas, in lands that are separate estate, there cannot be curtesy initiate, but only curtesy consummate. In other words, until the death of the wife, no estate whatever in her lands vests in the husband. He has, while she lives, only a chance or possibility of becoming clothed with an estate upon the event of the death of the wife before his death. This is because the separate estate statute declares that the wife shall hold her separate estate, and its issues, rents, and profits, to her sole and separate use, as if she were single, free from the control or disposal of her husband. This statute is, in letter, spirit, and purpose, plainly inconsistent with the existence of any substantial estate of the husband in her land while she lives. See Breeding v. Davis, 77 Va. 639; Alexander v. Alexander, 85 Va. 354,

7 S. E. 335; Wells, Mar. Wom. 106; Hill v. Chambers, 30 Mich. 422; Porch v. Fries, 13 N. J. Eq. 204; Thurber v. Townsend, 22 N. Y. 517; Beach v. Miller, 51 Ill. 206; Cole v. Van Riper, 44 Ill. 58; Stewart v. Ross, 50 Miss. 776; 4 Amer. & Eng. Enc. Law, 967; Billings v. Baker, 28 Barb. 843. Therefore, Thompson was not a freeholder, when elected.

Another question: But both Smith and Thompson, after election, and before their term of office began, acquired land, and became freeholders. This raises the question whether, though they were not freeholders when elected, it is enough that they were when their terms began. Much difference of opinion has existed in the courts upon this question. Where the constitution or statute declares that only certain persons shall be elected or be eligible to office, it may be plausibly contended that it refers to the date of the election, and that one not so qualified cannot be elected to, and cannot hold, the office, though he become so qualified before his term begins. But, even in such case, highly respectable authorities hold that it is sufficient if he be so qualified at the commencement of the term. Some authorities for the former view are Searcy v. Crow, 15 Cal. 117; State v. McMillen, 23 Neb. 385, 36 N. W. 587; Taylor v. Sullivan, 45 Minn. 309, 47 N. W. 802; State v. Clarke, 3 Nev. 566; State v. Williams, 99 Mo. 291, 12 S. W. 905. Some authorities for the latter view are Smith v. Moore, 90 Ind. 294; Brown v. Goben, 122 Ind. 113, 23 N. E. 519; State v. Murray, 28 Wis. 96; State v. Trumpf, 50 Wis. 103, 5 N. W. 876, and 6 N. W. 512. The latter view derives additional force by the fact that the votes cast for the ineligible candidate are not necessarily void. If they were, there would be more reason to say that he could not even be voted for; but they are so far votes, so far effectual, that if the ineligibility be not known to the voters, or be not such as they are bound to know, the minority candidate, is not elected, and cannot claim the office. Dryden v. Swinburne, 20 W. Va. 89. But we are not called upon to say which of those views is correct, because in this case the statute cited to disable these claimants from holding their offices does not say that only freeholders shall be chosen or elected or be eligible, but says, "The municipal authorities of such city, town or village shall be a mayor, recorder and councilmen, who shall be freeholders therein." This simply says that to be such officers they must be freeholders. It only means that the powers and functions of these offices shall be wielded only by freeholders. Why defeat the popular will, this being the language, by mere construction, simply because, when elected, the persons elected were not freeholders, when at the time they actually act in office they are? The letter of the act does not require it, neither does its spirit, since

its object is only to keep nonfreeholders from acting in office. It was meant, not as a prohibition against their election, but against their holding office. Authority will sustain this position: In *Privett v. Bickford*, 20 Kan. 52, the constitution provided that no person who had borne arms against the United States should be "qualified to vote or hold office" unless his disability should be removed, and it was held that though disqualified when elected, if the person's disabilities be removed before taking office, it was sufficient. In *State v. Murray*, 28 Wis. 96, it was held that an alien at date of election, but naturalized at beginning of term, could hold. In *De Turk v. Com.*, 129 Pa. St. 159, 18 Atl. 757, the constitution provided that no one holding office under the United States should "hold or exercise any office in this state." A postmaster, when chosen county commissioner, resigned as postmaster, even after quo warranto begun to oust him as commissioner, and it was held he was competent to hold. In *Com. v. Pyle*, 18 Pa. St. 519, it was held that, "where one would be ineligible to office on account of disqualification, he must get rid of the disqualification before he is appointed or elected; but, where the prohibition extends only to the enjoyment or exercise of an office, it is sufficient that the person be qualified before he is sworn." The United States constitution says, "No one shall be a representative" who is not of a certain age, or has engaged in rebellion; but John Young Brown, under age at date of election, and others under disability when elected, but becoming of age, and whose disabilities had been removed, have been admitted to the house of representatives and senate. *McCrary, Elect.* § 258. Therefore, I conclude that it is sufficient that the plaintiffs were freeholders at the commencement of their terms.

Another question: Can both Smith and Thompson unite in one writ of mandamus? The rule is that, where the interests of several relators are separate and independent, they cannot join in one writ of mandamus, any more than in another form of action. *High, Extr. Rem.* § 439; 14 Amer. & Eng. Enc. Law, 219. But this is a peculiar case, as to this point; and, if any case would justify a joinder of two interests, this would. The offices may be deemed separate, it is true; but they are claims to seats in a body composed of numerous members, elected simply to that body, not to any particular places or seats therein, not by separate wards, but for the whole town, by all its voters, at one election. Their places are held by Losee and Turley. Which one of these parties holds Thompson's place? Neither one more than the other. Suppose Thompson to sue alone, simply for the admission to the board of councilmen. If he were admitted, whom would he oust,—Losee or Turley? Would the council say which

one? If it did, it would simply do so arbitrarily, or by lot, for it would have no rule to go by. Perhaps Thompson might ask Losee's place alone, and have order for his motion. But what if Smith, also, asked the place of Losee? And perhaps, if he sued for Losee's place, Losee might say that he did not withhold his place, any more than did Turley. Would not, if we assert that both should sue separately, either be entitled simply to ask admission generally, without asking the place of either Losee or Turley? If so, is it not better to tolerate a joint application for both Losee's and Turley's seats? Precedents are found fully justifying this joint writ. Two persons joined in one writ to be sworn in as church wardens. *Reg. v. Guise*, 2 Ld. Raym. 1008; *Reg. v. Twitty*, 2 Salk. 433; *King v. Middlesex*, 30 E. C. L. 286; *Reg. v. Heathcote*, 10 Mod. 48. In *Manns v. Givens*, 7 Leigh, 689, seven persons held as slaves, claiming manumission under one and the same deed, joined in one mandamus to compel its recordation, and no objection was thought of, for misjoinder. True, they all claimed under one deed, but each one's freedom was a separate right annexed to his person only. These parties claim under one election, which is one element for consideration. Nineteen persons appointed as a board of visitors to a college sued out, without objection, a joint writ against that number, constituting the old board, to try title. *Lewis v. Whittle*, 77 Va. 415. In a case reported in 43 La. Ann. 92, 8 South. 803, (*State v. Shakspeare*), several councilmen of New Orleans, turned out of the board, took one mandamus to obtain restoration, and it was held that they could so sue. The opinion in *Haskins v. Board*, 51 Miss. 410, using language probably of *Merrill* (Mand. § 232,) states the principle that "relators must have a right common to all of them; must have a joint benefit in the performance of the act or duty required of respondent, and be joint sufferers because of the nondoin. Otherwise, they cannot unite in this suit." Does not the plaintiffs' case come within that statement of the principle? Though I have had some question on this point, I conclude that there is no error in the use of the writ jointly by Smith and Thompson.

Another question: It is contended that mandamus does not lie, but that certiorari is the proper remedy. The council canvassed the election returns, and declared by its order that Smith and Thompson received the highest number of votes. There was no complaint or error in its action touching the election to call for certiorari, but, after declaring them elected, the council refused to admit them. This called for mandamus, not certiorari. That mandamus has been long used in the Virginias as a proper process to try title to office, and compel admission of him who has title to it, is well settled. In the great, I may say historic, case of *Bridges*

v. Shallcross, 6 W. Va. 562, where every inch of ground of the slightest value was hotly contested, wherein Bridges sought to enforce his title and admission to the office of superintendent of the penitentiary, the efficacy of the writ was not even questioned, and Judge Haymond said that if it had been the objection could not have been maintained. I shall not discuss the matter, being satisfied that that case, and others I cite, will sustain the remedy by mandamus. *Cross v. Railway Co.*, 34 W. Va. 742, 12 S. E. 765; *Id.*, 35 W. Va. 174, 12 S. E. 1071; *Booker v. Young*, 12 Gratt. 303; *Dew v. Judges*, 3 Hen. & M. 1; *Hutch. Treat. W. Va.* § 1278; *Lewis v. Whittle*, 77 Va. 415. I would affirm the judgment.

POLING v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 6, 1893.)

NEGLIGENCE—PLEADINGS—MAP AS EVIDENCE—APPEAL—RULINGS ON EVIDENCE—LIABILITY OF RAILROAD COMPANY FOR ACTS OF UNITED STATES POSTAL CLERK—INJURY TO LICENSEE—ASSUMPTION OF RISK—ALTERATION OF COUNTY ROAD—NEW TRIAL.

1. A declaration for negligence is good if it contains the substantial elements of a cause of action, the duty violated, the breach thereof, properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given.

2. An ex parte map or diagram made by a witness, and shown by him to be correct, may be given in evidence for the consideration of the jury, not as independent evidence, but to be considered by them in connection with other evidence, so as to enable them to understand and apply it.

3. To make an objection made during the trial to the admission of evidence available in the appellate court, the point must be made and properly saved by bill of exception. It is not enough to note the objection in the certificate of evidence.

4. As a general rule, a railroad company is not responsible for the negligent acts of United States postal clerks or agents upon its trains.

5. A railroad company has a platform and mail crane near a postoffice at which the mail train does not stop, but the postal clerk from the mail car, with a "catcher," takes in from the crane the mail pouch suspended thereon, without the train slackening speed. A person who stations himself on the company's land, near the mail crane, for the purpose of witnessing the catch, or for some other purpose of like kind, as a mere voluntary licensee, is subject to the concomitant risks and danger of injury thus assumed, and the company does not owe him the duty of keeping the mail crane in suitable and safe condition. The railroad company is only liable for such wanton injury as may be done to such licensee by the gross negligence of the company, its agents and servants.

6. A defendant who, after the plaintiff has given in his evidence in chief, and rests, then moves the court to instruct the jury to render a verdict for defendant, but, the motion being overruled, goes on with his case, will be held to have waived his exception taken to such ruling of the court.

7. The road surveyor may change any county road in his precinct with the consent of the owner of the land, (Code, § 21, c. 43;) and,

when any road is altered, the former road shall be discontinued to the extent of such alteration, and no further, and the new one established, (section 32, c. 43.)

8. When the verdict of a jury, viewed according to the ordinary rules of considering the evidence on motion for a new trial, is plainly against the law of the case upon the facts proved, the court, on motion of the party aggrieved, will set the same aside and award a new trial; but not more than two new trials can be granted to the same party in the same cause.

9. A case in which the foregoing rules are applied, and various instructions and rulings are considered and discussed.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

Action by J. M. Poling, administrator of the estate of C. Swain, deceased, against the Ohio River Railroad Company, to recover for the death of decedent. Plaintiff had judgment, and defendant brings error. Reversed.

D. H. Leonard and V. B. Archer, for plaintiff in error. Chas. E. Hogg, N. C. Prickett, and Jas. H. Couch, Jr., for defendant in error.

HOLT, J. This was an action of trespass on the case, brought in the circuit court of Jackson county on 22d March, 1892, by Poling, as administrator of C. Swain, against the Ohio River Railroad Company, for causing the death of his intestate, C. Swain, which resulted in a judgment for plaintiff for \$3,000, from which defendant has obtained this writ of error. The assignments of error will be considered somewhat in the order made.

1. The court erred in overruling defendant's demurrer to the declaration. The declaration contains three counts, and the demurrer is to the declaration and to each count. In *Hawker v. Railroad Co.*, 15 W. Va. 628, it is held that a declaration against a railroad company for negligently and wrongfully killing the plaintiff's cattle on its track need not state the acts of omission or commission which constitute the negligence and wrong. It is neither usual nor necessary in this state to specify the acts or omissions of defendant which constitute the negligence. This is matter of proof, and need not be specified in the declaration. It was not specified in the declaration in the case of *Blaine v. Railroad Co.*, 9 W. Va. 253, nor in *Baylor v. Railroad Co.*, *Id.* 270; and the declarations in these cases were held good on demurrer. It is good if it contains the substantial elements of a cause of action; and the demurrer must be overruled, unless there be omitted something so essential to the action that judgment according to law and the very right of the cause cannot be given. But the declaration must set forth the duty which has been neglected, and aver the neglect. *Railroad Co. v. Stark*, 88 Mich. 714. The essential ground or principal subject matter of complaint, with such matter of inducement as may be necessary to lead up to or render

It intelligible, introduced and averred with time and place in the technical modes of expression suited to the action, was all that was ever necessary under the strictest forms of common-law pleading. The first count avers that plaintiff's intestate lost his life by reason of the negligence of defendant in failing to keep its mail crane in safe condition, decedent being at the time a traveler on the highway, and without fault on his part; giving the circumstances with great particularity. Necessary implications of fact and matters of law need not be averred. It avers that it was defendant's duty to keep at all times a proper and safe mail crane at Douglas station, and that by the neglect of such duty defendant caused his intestate's death; that is, defendant's duty to decedent as a traveler on the highway. The second count avers the duty of defendant to keep its said mail crane and appliances and railroad track safe and free from danger to the traveling public, and to all persons rightfully at or near said crane and railroad; that defendant neglected such duty; that in consequence thereof decedent lost his life while on and near the public road, and without fault on his part. The third count is substantially the same. The averments that the father, Newman Swain, sustained damage by reason thereof, may be regarded as impertinent, and therefore may be disregarded as surplusage, as he is not the plaintiff. And the declaration concludes in the usual form: "And thereupon the said plaintiff says that by reason of the premises," etc., "and by force of the statute in such cases made and provided, an action hath accrued to him, as such administrator as aforesaid, to have and demand of and from the said defendant, for and by reason of the grievous wrongs and injuries in said three counts mentioned, damages to the amount of ten thousand dollars, for the uses and purposes in said several counts mentioned, and therefore he brings this suit."

By the statute of this state giving the right of action in such cases, the action is brought by and in the name of the personal representative of such deceased person, and the amount recovered in any such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate, (Code, §§ 5, 6, c. 103;) damages given not to exceed \$10,000, and barred in two years, (see Statute of Descents and Distributions, c. 78.) It will be seen by section 10 that to the state shall accrue all the personal estate of any decedent of which there may be no other distributee. It may be that the state would not take; in which event it would certainly not be improper to aver that there are distributees, but not necessary, because it must be assumed that kindred exist, and it need not be averred. Cooley, Torts, (2d Ed.) top p. 317. The demurrer was properly overruled.

In this case the court has certified all the evidence under section 9, c. 131, Code, from which the material facts appear to be as follows: In 1886 the defendant company built its road along the Ohio river, through the county of Jackson, where the death of Charles Swain, the subject matter of this suit, took place. There was an old county road of long standing leading from Douglas landing, in Grant district, on the Ohio river, back to Murrayville, on the turnpike. By order of 13th April, 1886, the county court of Jackson county "granted its consent to the said company to construct, maintain, and operate its railroad across any highway or public road in said districts of Ravenswood, Grant, or Union, in this county, when necessary to do so, but upon the following conditions: That if said railroad company shall, by the building of its said road or otherwise, obstruct any public road in this county, it shall put the road obstructed in as good condition at every crossing of said railroad as it was before the obstruction, and in all other respects according to law." In the fall of 1886 the construction company building the railroad along the Ohio river, at the point called "Lone Cedar," or "Douglas Landing," changed to the old county road, moving it down about 100 feet, made a crossing over the track 16 feet wide, and graded the road from there to Douglas landing, at the river; but the road surveyor refused to receive that part of the road from the railroad to the river. In the winter of 1886-1887 the river washed away the new road next to the river. The road surveyor then had a new road made from the crossing into the old road, on the river side of the railroad, which has been used and worked as the public road, under the direction of the road surveyor, ever since. The land between the railroad and the river at Douglas landing is lying open, unfenced; and the road made by the construction company is also used as a foot path, and for horsemen, but is not worked or recognized as the highway, and, if it had ever been a part of the county road, it had in the spring of 1887 been abandoned, and thenceforward was a mere private path, used by tacit permission of Hall, the landowner. The road made by the construction company, turning to the left, and the new road, turning to the right, separate at the railroad crossing, and come together at the landing on the beach; the distance being only 75 yards. The crossing over the track is 15 feet wide. On the river side of the track, and 8 feet below the 16-foot crossing, the railway company erected a platform and mail "crane," but no other building, called "Douglas Station," where, by means of a "mail catcher" on the car, mail pouches could be taken on without stopping or slackening the speed of the train. The mail pouches and the mail catchers attached to the postal cars for taking up mails without stopping the trains are furnished by the United States

government mail-equipment division of the post-office department; but the mail cranes are constructed, erected, and are to be kept in good order by the railroad companies, at their expense. The store where the Lone Cedar post office was kept was on the hill side from the railroad, about 180 or 190 feet distant. The deceased, Charles Swain, was an intelligent, sober, industrious, strong, healthy young man; 20 years old, lacking three months; living with his father, Newman Swain, about one and a half miles back in the country from the station in question. Father and son were at the station together on the morning of the accident. The mail train came in about noon, and, not wishing to return until they should get their mail, young Swain, with the consent of his father, went hunting with a young man named George Pickering, who sometimes acted as deputy postmaster at that place. They were hunting near by, on the land of Mr. Hall. Near noon they quit hunting; came down to the railroad, about 75 or 100 feet down the river, below the station; walked up the track to the platform; stayed there five or ten minutes; heard the coming south-bound mail train whistle when a half or three-fourths of a mile away; saw the train come in sight about 600 yards off; young Swain saying, "That is engine No. 16." The two young men then walked across the platform back of the crane, next the river, and stepped on a rise or bank 15 feet from the upright of the mail crane. The mail sack was hanging on the crane when they came up, and they knew that the mail clerk on the approaching train would attempt to catch the sack. The lower arm had been struck by the catcher, and knocked off, about two weeks before. When the mail car came up, the postal clerk caught the mail pouch hanging on the crane, the train running 20 or 25 miles per hour, but, on making the catch, struck the lower arm of the mail crane with the hook of the catcher, knocking off the upper part of the lower arm, and hurling it forward, and around against the left breast of young Swain with such force that he took a few steps, fell, and died in a few seconds. The piece of the lower arm broken off, and thrown around and back against young Swain, was large at one end, tapering to a feather edge at the other, which was the explanation given by a witness of the direction in which the blow by the catcher threw it. The decedent had no business with the train; was there simply as a looker-on at the passing mail train. He was not traveling on, or in any way using, the county road. But one of the questions of fact, about which a considerable part of the testimony was given, was whether the point, 15 feet behind the upright part of the crane, to which he walked as the train approached, and where he was standing by the side of Mr. Pickering when he (Swain) was struck and killed, was in the county road or not. It was within the railroad company's

right of way. There is a diagram in evidence which shows with great precision where the decedent stood when killed, with reference to these two roads. He was not within the 30 feet of the road running from where the road crosses the rails to the right to the landing at the river, but was within the 30 feet of the road turning to the left, and running to the river at the same point, being 11 feet from the center of the 30-foot right of way, but was not within the 30-foot right of way of the road turning to the right. There is also a diagram showing the location of the mail crane, and also a great deal of evidence as to whether it was a safe and proper appliance. In the present attitude of the case, taking it most strongly for plaintiff, and confining it to plaintiff's evidence, after the verdict of the jury, we must regard it as not an appliance in complete and proper order, to the full measure of what was required on behalf of any one to whom the company owed the duty to see that such appliances under their own control were in full and complete and proper order; otherwise, it would not have been possible to strike the lower arm of the crane with the hook of the catcher. The thing itself speaks, and shows that if the distance between the arms had been greater, or the catcher had been shorter, it would have been impossible for the catcher, no matter at what angle raised, to have struck the lower arm; but it cannot in any proper sense be called a nuisance. It is also shown that if the catcher on the mail car is raised to a horizontal position, or anything near that, it passes through without danger. This is also shown by the very many times it was successfully used without accident, although the lower arm had been struck about two weeks before. The mail agent who made the catch was a young man without experience, who commenced on October 8, 1888, 18 days before the accident happened; and in the second week of his running on the train the accident occurred. The evidence also shows that the mail crane was on the concave side of a curve, and that there was a loose joint, and there had been a slight washout under the track at that point; both having a tendency to swing the train towards the crane.

But one instruction was asked by and given for plaintiff, and to this defendant excepted. For defendant the court gave instructions Nos. 1, 2, 3, 6, 7, and 8, but refused to give defendant's instructions Nos. 4 and 5, and defendant excepted. Plaintiff's instruction is in the words and figures following: "The jury are hereby instructed that if they believe, from the evidence in this case, that the decedent, C. Swain, at the time that he was struck by the piece of the arm of defendant's mail crane, was on the highway leading from a point called 'Douglas Landing' to another point on the Murrayville road, then at the time said Swain was so struck he cannot be considered or

neld to have been a trespasser on defendant's premises." Defendant's instructions given: "No. 1. The jury are instructed that it is the duty of the plaintiff to make out his case by a preponderance of the evidence. No. 2. The jury are further instructed that negligence is the doing of something which, under the circumstances, a reasonable person would not do, or the omission to do something in discharge of a legal duty which, under the circumstances, a reasonable person would do, and which act of commission or omission, as a natural consequence directly following, produces damages to another. No. 3. The jury are further instructed that if they believe, from the evidence, that the deceased, C. Swain, was using the railroad track or its right of way as a foot path for his own convenience, and that he was not so using said track or right of way at a lawful crossing, and that the said C. Swain received his injury, while he was so using said track or right of way at a place other than a lawful crossing, by the breaking of a mail crane belonging to the Ohio River Railroad, that the plaintiff cannot recover in this case, unless they believe, from the evidence, that the defendant was guilty of wanton or gross negligence." "No. 6. The jury are further instructed that the defendant is not responsible for the negligence of the postal clerks on its postal cars on its road. No. 7. The jury are further instructed that if they believe, from the evidence, that the breaking of the lower arm of the defendant's crane was caused by the failure of the postal clerk to properly adjust the mail catcher on the postal cars for the purpose of catching the mail sack, then the defendant is not liable, and they should find for the defendant. No. 8. The jury are further instructed that if they believe, from the evidence, that the deceased, C. Swain, was a person in the full possession of his senses of seeing and hearing, and also in the full possession of his mental faculties; and if they further believe, from the evidence, that at the time of the accident the said Swain knew that there was danger in standing about the mail crane; and if they further believe, from the evidence, that said mail crane, with the mail sack adjusted thereon, was in plain view, and seen by said Swain; and if they further believe, from the evidence, that the defendant knew that a train of cars was approaching, or would soon approach, the place where said crane was standing; and if they believe, from the evidence, said Swain knew the mail sack would be caught, or an attempt would be made to catch it, by the mail clerk on the train; and if they further believe, from the evidence, that said C. Swain visited the vicinity of said mail crane from curiosity, or for personal convenience, without any reasonable duty calling him there,—that in such case, even although they may believe, from the evidence, that at the time of the accident the deceased was standing in a pub-

lic road, yet he was guilty of contributory negligence by so standing near a known place of danger, and the jury should find for the defendant." Defendant's instructions refused: "No. 4. The jury are further instructed that if they believe, from the evidence, that the death of C. Swain was caused by the breaking of the lower arm of the mail crane of the defendant; and that if they further believe, from the evidence, that the breaking of the crane was the result of the lower arm being too near to the upper arm,—that in such case the failure to construct such crane with the lower arm further from the upper arm, if it was a duty devolving upon the defendant to so construct, such failure to construct it is only an omission of duty, and, if it is such omission of duty, the plaintiff cannot recover, under the evidence in this case. No. 5. The jury are further instructed that if they believe, from the evidence, that the deceased, C. Swain, was at the time of his death on and about the defendant's platform and mail crane, not as a passenger, or upon any business connected with the railroad company, but merely there for his own convenience or curiosity, or for personal enjoyment, the defendant owed to him no active duty to look out for his protection; and hence, if he was killed by the breaking of a mail crane caused by a passing train, the plaintiff cannot recover on the theory that the defendant has been guilty of negligence by a failure to discharge towards him a legal duty."

The order of the county court of Jackson, as we have seen, permitted the railway company to construct, maintain, and operate the railroad across this public road on condition that, if they obstructed it, it should put the public road in as good condition at the crossing as it was before. But the road made by the company from the crossing down to the landing at the river was not accepted; but Mr. Peters, the road surveyor of the district, notified the parties making it that he objected to it at that place, and would not receive it; nor was it ever received or assented to by him or the county authorities; and after it washed away next to the river, in a few months thereafter, the road from the crossing turning to the right, and going down to the landing, was made by Mr. Hall, the landowner, with the sanction of the road surveyor, and has been worked and used and kept in order by the county as the public road ever since, which includes the time of the accident. By section 21, c. 43, Code, the surveyor may change any county road in his precinct with the consent of the owner of the land, and, "when any road is altered, the former road shall be discontinued to the extent of such alteration and no further, and the new one established." Code, § 32, c. 43. So that, if the road turning to the left from the crossing, and running to the river, had ever been a part of the Murrayville and Douglas

Landing road, it had been changed by the road surveyor, and thereby discontinued, by the alteration; and the road turning to the right had been thereby established, and was the public road at the time of the accident. Yet the left-hand road was still used by horsemen and footmen, and where the young man stood when struck was on it, giving it a width of 30 feet, and was only 11 feet from the edge of the true public road,—the one turning to the right. Under this state of the evidence, the court cannot say that plaintiff's instruction should have been refused as being abstract, and wholly without evidence on the point; for the two roads coincide at the crossing, and coincide in part opposite where the decedent was standing.

Second error assigned by plaintiff: In admitting the parol evidence of Dr. Davis and others to prove that deceased was in the public road at the time of the accident. It is true that mere user of a road will not make it a public road, under Code, § 31, c. 43. The user must be accompanied either by an order of the county court recognizing it in some way as a road, or the road must be worked by the road surveyor as such. Still, there was an attempt in this case to show a recognition in both these ways; and I do not think it was error to permit witnesses to testify that it was made by the construction company as a substituted part of a public road, and was used by the public as such for some time.

Third error assigned by plaintiff: In permitting the witnesses D. R. King and others to testify from the plat, Exhibit A, with the record. This was a map or diagram of the place of the accident, showing the relative positions of the railway mail crane, roads, and crossing, and the place where the accident happened, where the young man stood. Though *ex parte*, it was shown to be correct by a witness who made it, and must have been useful for the understanding of the testimony, and almost indispensable to many of the witnesses in making their testimony readily intelligible to the court and jury. It was used by the witness who made it, in order to explain and apply his own testimony, and make it capable of being understood. It was not offered or used as independent evidence, but for this purpose, and no other. Such use is common in practice, and clearly legitimate. *Curtiss v. Ayrault*, 3 Hun, 487; *Brown v. Tile Co.*, 132 Ill. 649, 24 N. E. 522. "It was received for the consideration of the jury, so far as it was shown to be correct, in connection with other evidence, and to enable them to understand and apply it, and not as independent evidence." See, also, *Hoge v. Railroad Co.*, 35 W. Va. 562-564, 14 S. E. 152. It is one of the appropriate methods of bringing before the eye of the jury a representation of the things and scenes in which the fact took place, and as an aid in under-

standing and applying the evidence. See 1 Greenl. Ev. (15th Ed.) § 82, note.

Fourth error assigned by plaintiff: In admitting illegal evidence, and excluding competent evidence, against the objections of defendant, "as noted in the transcript of the evidence." Under section 9, c. 131, all the evidence, and not the facts, is certified. The transcript of the evidence is voluminous, and it shows many exceptions "noted" to evidence during the progress of the trial; but no bill of exceptions was taken to such rulings, and the exceptions are therefore taken as waived. It would involve great labor, indeed, to go over a verbatim report of all the evidence as given in, and pick out and consider all exceptions "noted" to questions asked and answers given, permitted, or overruled. The law does not contemplate so easy and compendious a mode of bringing up for review all such rulings of the lower court, nor one so general and indefinite in specification, and involving so much labor on the part of the appellate court. See *Gregory's Adm'r v. Railway Co.*, (W. Va.) 16 S. E. 819. It must in some way be so set out as to be capable of being easily found and identified.

I have already given the main facts of the case with some fullness of detail, and, because the plaintiff comes to us with a verdict in his favor, from his evidence alone, except where the defendant's evidence is not contradicted. On one point,—a vital one, as the counsel regard it,—where did decedent stand with reference to a public road when killed? there is perhaps some evidence tending in a very slight degree to prove the plaintiff's claim in that respect. So, at least, I have regarded it. The principles and rules of law to be applied are involved in the question, did the railway company owe to decedent any duty of which the violation by the company was the direct and immediate cause of his death, and what points of law, with reference to the rulings complained of, spring up out of the application to the facts of such principles and rules? The principles may be said to be few and simple, (the common principles of right and wrong, public policy, and general convenience of that day;) but the rules based upon them, and formed by generalizing, more or less, the points decided in the very many cases, are quite numerous and complex. These rulings relate to the instructions asked by defendant, and refused; its motion for a verdict on plaintiff's evidence, and for a new trial, both overruled. These, as far as may be, will be considered together.

The postal clerk who made the catch from the running train was in the service of the United States government; was not in the employ of defendant. He was not the servant or agent of the company; not hired or paid by them, nor subject to their control. A postal clerk is not an employe of the railroad company, (*Mellor v. Railroad Co.*, [Mo. Sup.] 14 S. W. 759;) and a railroad company

is not responsible for the negligent acts of postal clerks or agents upon its trains, (*Muster v. Railway Co.*, 61 Wis. 325, 21 N. W. 223,) except under circumstances which need not now be discussed, (see *Snow v. Railroad Co.*, 136 Mass. 552;) and the reason is, the postal clerk is neither the servant nor the agent of the railway company; had nothing to do with his selection or employment, have over him no supervision or control, and have no power to discharge him; so in no sense could his act be said to be the act of the company. The decedent was a voluntary licensee, one without invitation, standing on the side of the defendant's right of way as a trespasser or licensee, for some purpose of his own,—most likely to see the catch made by the passing mail train, or to wait for his companion to get the sack thrown off; evidently not as a servant of the company, for he was in no wise in their service; not as an expectant passenger, for the train did not stop; not to get the sack, for he had nothing to do with the post-office or mail business; not as using the county road for any purpose, for he was not in it, and had not been using it there that day, and the place to get his mail for which he was waiting, and his direction of travel, was on the other side,—the post-office, 180 feet away; not as a mere trespasser, unless in a technical sense, for it is fair to infer that he was there with the tacit consent of the company, though it does not appear that it was with their knowledge. In *Woolwine's Adm'r v. Railway Co.*, 36 W. Va. 329, 15 S. E. 81, it was held that such a licensee subjects himself to the risks and perils incident to the place he is in as such licensee, and that no duty is imposed upon the owner or occupant to keep the premises in safe and suitable condition for such person; and the owner is only liable for such willful or wanton injury as may be done to the licensee by the gross negligence of the railroad company, its agents or employees. Was there gross negligence on the part of the company in this case? For such contention there is no foundation that I can see, unless the mail crane was of such a character as to be a common nuisance to those using, or waiting to use, the highway at the crossing. We have already seen that such was not his business there. He was not in the road at the time, had not used it, and the only evidence—that of his companion—shows that they stepped back there 15 feet from the mail crane, to what was evidently supposed to be a safe place, to see the mail train go by, and, we may reasonably infer, to see the catch made of the mail pouch. But, from this evidence, can we fairly say that the mail crane, which it was the duty of the company to put up properly and keep in repair, was a common nuisance? Gross negligence having been branded as an unmeaning, vituperative epithet, the modern tendency is to discard its use, and treat everything under the head of ordinary care, and

its correlative, simple negligence. But it would be remarkable to find a few simple and useful gradations in almost all things, and yet none in negligence. It may not be generally useful in practice in the present day; but that is because of the multiplicity of the degrees of negligence, and the unevenness of the grades and subdivisions, and not because there is no such thing as gross negligence. *Railway Co. v. Arms*, 91 U. S. 489; *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932. To say that it is but the violation of the duty of ordinary care required in the case is but putting two things of different degrees in one class, by using "ordinary care" as a generic term; and the term "ordinary care" has still to be graded and divided by the jury by the conduct of the prudent man under the circumstances, putting themselves in his place, and measuring what is required of him by such circumstances, before it can be applied. Thus supplemented by a sliding scale, and thus made adaptable to measuring in such practical, but indefinite, way, the care required, it is found, no doubt, to be more useful and convenient in the vast majority of modern cases. Nevertheless, this broad and simple classification is, with us, still regarded as useful and convenient in two or more classes of cases. The terms "utmost care" and "slightest negligence," "slight care" and "gross negligence," are still applied, especially in two classes of cases: The former, to common carriers of passengers, as in *Farish v. Reigle*, 11 Grat. 697, (decided in 1854, 40 years ago;) *Railroad Co. v. Sanger*, 15 Grat. 230,—both still leading authorities with us. In this class of cases the common carrier owes to the passenger the duty of exercising more than ordinary—the utmost—care. The latter, to voluntary licensees and trespassers. *Woolwine's Adm'r v. Railway Co.*, 36 W. Va. 329, 15 S. E. 81; *Spicer v. Railway Co.*, 34 W. Va. 514, 12 S. E. 553. In this class of cases the owner and occupant does not owe the duty of exercising ordinary care; but slight care, so as not to cause wanton injury, and thereby be guilty of gross negligence, discharges the only duty he owes. Where one is liable for the slightest negligence,—for example, to a passenger,—he must take the greatest care. He will be liable for such injury from negligence as the most thorough and conscientious diligence could not have foreseen and prevented. *Carrico v. Railway Co.*, 35 W. Va. 389–390, 14 S. E. 12. When one inflicts upon a voluntary licensee a wanton, reckless, heedless injury, he is guilty of gross negligence, and is liable. See *Woolwine's Adm'r v. Railway Co.*, above. A mere sightseer, on no other business, goes into any one of the large modern factories in operation throughout the civilized world. It requires great care and watchfulness on his part, unfamiliar as he is with such places and things, to avoid danger and escape injury, although the place is reasonably safe and fit, and

everything is carried on with due ordinary care; but unless there is wanton injury, the result of gross negligence, the owner is not liable. Why? The owner has set no trap for him; he did not induce, but only permitted, him to come; he is not there on business; the place and appliances belong to the manufacturing company; it was fixed for them and their employees; it suits them; by their knowledge and skill they avoid danger, though to those unskilled and unfamiliar it may be dangerous,—dangerous to any one in fact; but it was not made for, and is not carried on for, any purpose with which the licensee has anything to do; if the injury is not wanton, the negligence is not gross, and the company is not liable, for it owed him no other duty, and that one has not been violated. As appears by the event, a step or two further to the right would have put this unfortunate young man in the highway, and, as it happened, out of harm's way. But I do not see how he can be charged with contributory negligence, except in a very technical or artificial sense. No one would have been likely to anticipate or foresee the danger. He merely assumed the risk, whatever it might be. The risk, perhaps, was not less of his being struck by lightning at that place during a thunder storm; so that I do not see how it can be said that he was guilty of contributory negligence in any proper, or at least natural, sense. If he had been a traveler at that place, just a step or two on the company's right of way, and off the public road, and perhaps a technical trespasser, but a traveler, waiting to cross the track at the crossing, I am not prepared to say that the company would not have been liable, because they would then have owed him the duty of ordinary care. See *Beach, Contrib. Neg.* § 254; *Sanders v. Reister*, 1 Dak. 151, 46 N. W. 680; *Murray v. McShane*, 52 Md. 217. Or if he had been in the highway, where he had a right to be, without business, at a safe distance from the passing train, and the mail crane was so imperfect and dangerous as to be a common nuisance, being so close to the public road, then they would be guilty of gross negligence, and liable; but in our view this case is neither of these. Besides, it may be said that there was in this case an intermediate efficient cause of the injury between it and the having there the imperfect, and in some degree dangerous, mail crane.

Did this mail crane unlawfully obstruct or render dangerous this highway and crossing to the extent of making it a nuisance? The only description made of it, and criticism made upon it, on the part of plaintiff's witnesses, is made by Mr. Vosburg, evidently a correct and very intelligent man, a civil engineer by profession, who was on the ground, and examined and made his measurements 13 months after the accident happened, who says, in constructing cranes: "I have no experience at all." "What do you know about them?" "Not anything at

all." He had observed others, but this was the only one he ever measured or directed his attention to particularly. That you could not change the distance between the arms, and keep them parallel, without changing the length of the mail pouch. The post-office department made the specifications for both sacks and arms, and furnished the pouches and the catcher. That if the sack is changed, and made longer, the outer end of the lower arm must be lowered, and the fastened end ought to be. In answer to the question, "Is it possible for the mail clerk to make these catches in the condition in which you found it?" answered, "Possibly; yes, sir; because the evidence is that he made them for a long time while in that condition." And the evidence on the side of defendant on this point is that, with ordinary skill,—and it took but little,—the catcher can be raised parallel with the floor of the car, with the rod that runs between the doors from side to side; that, when brought to about that position, there is no danger of striking either the lower or upper arm of the mail crane, but, if the mail clerk should delay elevating this catcher into proper position until he was too near the crane, then he would be liable to strike the lower arm in putting it into position. For diagram of mail crane, see *Postal Laws and Regulations 1887*. By change in length of mail pouches, we may infer the lower arm was dropped at the outer end about 13 inches out of a line parallel with the upper arm; and this made the striking of the lower arm with the catcher possible. I do not think this crane could be pronounced a nuisance; but, if it were such, the decedent was not in the highway, but on the defendant's right of way,—a place he selected with his eyes open, with all his faculties unimpaired and in full play, for the purpose of seeing the catch made, or for some purpose of like kind.

Defendant's Assignments of Error Nos. 5, 6, 7, 8, and 9. Exception No. 7, to the giving of plaintiff's one instruction, has already been considered. It cannot be said that there was absolutely no evidence tending in any appreciable degree to show that the decedent was not a trespasser or voluntary licensee on defendant's premises; for he was standing in a place that had once been dug and used as a road, though afterwards altered by the road surveyor, and thus discontinued. For a still stronger reason, defendant's motion to direct the jury to return a verdict for defendant was properly overruled. Where the party is guaranteed the right of trial by jury, especially in cases of negligence, which are, for the most part, peculiarly cases of fact, and therefore such cases are peculiarly within the province of the jury, such direction is only proper in a few cases so plain that there is no room for two opinions. It stands on ground wholly distinct from a motion for a new trial;

though the latter, in one of its reasons, often comprehends the former,—as where the case is wholly without evidence as to some essential fact. It saves time, trouble, and expense, is sometimes all that can be said in its favor. But here the defendant waived this exception by going on with his case. If he intends to save it, he must submit his case to court or jury without further evidence. He (the defendant) has appealed to the court to end the case, as matter of law, then and there, for defect of proof. He can go to the jury at that stage, his motion being overruled, or he can waive his exception, and go on with the case, take his chance before the jury, and, if losing, move for a new trial, which is more comprehensive; but is not permitted to take all these chances, and, in addition, skip his own evidence, which may have supplied the defect in plaintiff's case, put himself back where plaintiff rested, and he made his motion as if he had taken the hazard of submitting his case at that point. The six instructions given for defendant he cannot complain of, and they need not be considered, except as to any bearing they may have upon the question of the refusal of instructions Nos. 4 and 5. As a general rule, it may be affirmed that omissions, unless when involving the nonperformance or malperformance of a positive duty, are not the subject of suit. Whart. Neg. § 82. But otherwise, when the omission is the defect in the discharge of a legal duty; for it is of the essence of negligence to omit to do something that ought to be done. *Id.* § 83. Instruction No. 4 was properly refused. If the negligence of the defendant in failing to construct a proper crane was the proximate cause of the injury to the plaintiff, and it owed the decedent the duty to see that it was a safe appliance, it is of no consequence whether it be omission or commission. See *Harriman v. Railway Co.*, 45 Ohio St. 11, 12 N. E. 451, and other cases cited; *Beach Contrib. Neg.* § 25, note 2. It depends on the question whether defendant owed decedent any duty or not, under the circumstances; and although the thing complained of may help to determine that question by reason of its nature, as that it was an omission, yet that does not furnish the true criterion of liability, and the plaintiff might still be entitled "to recover under the evidence in this case." No hypothetical state of facts being stated, this instruction treats the question of negligence as a question of law, to be determined by the court "under the evidence in the case," or as a question of law and fact, to be thus determined by the court, and for that reason also is bad. Plaintiff's instruction No. 5 was also properly refused. While apparently putting the fact of decedent being on or about defendant's platform and mail crane as the hypothetical fact, *inter alia*, out of which the court is to tell the jury the given legal point arises,

such fact is really assumed; and the fact that he was not there as a passenger, etc., but for his own curiosity, etc., is the real hypothetical fact of the instruction. "About defendant's platform and mail crane?" Where is that? The counsel on both sides have made a difference of 10 or 12 feet in the location of the county road, near and about the platform and mail crane, the crucial point in the case; and both locations are equally comprehended in the fact assumed by the court, and may be said to be the one controverted fact. In such a case, "around and about" is also too indefinite. If the instruction was intended to raise the point that it made no difference whether the place where the young man stood was on the company's right of way, and not in the county road, or in the county road, and not on the right of way, then it is obscure and confusing, and should have been framed differently. *Mayor, etc., v. Poultney*, 25 Md. 34; *Railway Co. v. Snyder*, 24 Ohio St. 678. See, also, *Morse v. Gilman*, 18 Wis. 385; *Hughes v. Monty*, 24 Iowa, 501,—all cited to sections 466, 467, Wells, Law & F. And an indirect assumption of this fact, as in this case, is condemned on the same principle; for it also throws the weight of the case upon a part of the evidence or facts, instead of putting it upon all. See Wells, Law & F. § 477; *Roots v. Tyner*, 10 Ind. 87, cited. These things being believed from the evidence, the jury is told the defendant owed decedent no active duty to look out for his protection. Then it adds, "And hence, if he was killed by the breaking of a mail crane caused by a passing train, the plaintiff cannot recover on the theory that the defendant has been guilty of negligence by a failure to discharge towards him a legal duty." I think the instruction, as a whole, calculated to confuse and mislead the jury, and, if not argumentative, it suggests the implication that plaintiff may be entitled to recover on some other ground than that of being guilty of negligence. It also involves the question of active duty, which has already been considered. The defendant might be liable for an injury to one traveling in a highway, directly caused by a nuisance close by, without reference to the character of the duty, whether active or passive. He may put up some structure so near as to render the lawful use of the public road dangerous. He, it may be said in the first place, owed the passive duty not to put it up, and when he put it up he violated that duty by an act of commission. Second. Being up, he owed the active duty to look out for and guard against the party's injury from such nuisance. Besides, instructions No. 3 and No. 8 covered the same state of facts in all material points, and were given, being based on the law as laid down in *Spicer v. Railway Co.*, 34 W. Va. 514, 12 S. E. 553. I regard this case as ruled by the law as laid down in the case of

Woolwine's Adm'r v. Railway Co., 36 W. Va. 329, 15 S. E. 81, and the case, just cited, of *Spicer v. Railway Co.*, and do not think it can be distinguished as to the controlling elements of law and fact, or withdrawn from their decisive influence.

I need scarcely add, from what has already been said, that the facts, taken at their strongest, according to the rules in such cases, do not justify the verdict. The evidence of plaintiff, taking it all as true, with all fair and reasonable inferences, together with the uncontradicted evidence of defendant, proves nothing from which the jury could reasonably infer that defendant had violated any duty which it owed to plaintiff's intestate, or was guilty of any negligence for which plaintiff is entitled to recover, but is plainly insufficient to warrant such finding. The verdict is against the law of the case upon the facts proved, and must therefore be set aside. Judgment and verdict set aside, and new trial awarded. Reversed and remanded.

On Rehearing.

This unfortunate young man, when so unexpectedly struck by the sliver from the lower arm of the mail crane, was standing 15 feet from, and back of, the upright supporting the arms, and not in any road, but on the land or right of way of defendant. The left-hand road running from the railroad crossing to the landing on the Ohio river was made by the construction company, was not only not received or adopted as a part of the county road by the road surveyor, but, on the contrary, was expressly refused and repudiated, and soon after was washed away at the river. The landowner, by the sanction and direction of the road surveyor, made what is called the "right-hand" road, which was adopted and worked as the only road leading from the crossing to the river in existence at the time of the accident; and in this he was not standing, but on the land of the defendant. He was not there on the invitation of defendant, or on business of any kind with it; not to become a passenger, for the train did not stop; and he was not in defendant's employ. He was there simply as a looker-on, to see the mail train go by, and the mail agent make the flying catch of the mail pouch. Therefore he was a mere trespasser, or, at best, a voluntary licensee. The company made no change to endanger him after he came. It owed him no duty that was violated. For although, in the present attitude of the case, I take for granted that the mail crane was not of the best construction, but must have been in some respect defective, yet it was not a public nuisance; for it had been frequently used with safety, and successfully, both before and immediately after this accident, without harm or danger to any one, unless it was dangerous to the one using it. It was a case in which the unexpected happened, and its lia-

bility to happen could not be foreseen, and is only proved by the actual happening (see *Richards v. Rough*, 53 Mich. 212, 18 N. W. 785; *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812; *Cooley, Torts*, 92, note 1.), and therefore a case of damage without injury; at least, so far as defendant is concerned. Moreover, the one who made the catch, knocking the sliver off the lower arm of the mail crane, was the mail agent of the United States government, not in the employ or subject to the orders or under the control of defendant, and, if there was any negligence at all, it was his intervening and breaking the usual connection; for, in law, it is not the remote, but the proximate, cause which is looked to and regarded as the real cause. See *Washington v. Railroad Co.*, 17 W. Va. 190. That these are the facts as they indisputably appear in this record, there is, in my opinion, no sort of doubt, and, from the application of the appropriate principles and well-settled rules of law, it is equally clear that the defendant did not appear to be liable, and a new trial should have been granted; for it has long been as much the duty of the court, in certain cases, to set verdicts aside, as it is the duty, in general, of juries to find them. Verdicts like this include legal propositions, as well as propositions of fact, and the power must reside somewhere to grant new trials; for it is absolutely essential to justice that there should, on many occasions, be opportunities of reconsidering the cause by a new trial. See *Bright v. Eynon*, (1757) 1 Burrows, 391, 394. Here the verdict is against the law of the case upon the facts proved, and is therefore set aside, and a new trial awarded.

PELZER MANUF'G CO. v. CELY et al.

(Supreme Court of South Carolina. Jan. 22, 1894.)

APPELLATE COURT—WHEN JURISDICTION ATTACHES—FILING RETURN—RIGHT TO LEVY EXECUTION—EFFECT OF APPEAL.

1. The jurisdiction of the supreme court on appeal from the circuit court does not attach till the return is filed, as required by rules 1 and 2; and a judgment, an execution, and a levy in the circuit court after appeal, but before the return is filed, are not void for want of jurisdiction, since the circuit court does not lose its jurisdiction till that of the supreme court attaches.

2. A judgment obtained on a money demand is one "directing the payment of money," within Code, § 346, providing that "a notice of appeal from a judgment directing the payment of money shall not stay the execution of the judgment, unless" a stay of execution is granted.

Action by the Pelzer Manufacturing Company against Cely & Bro. Judgment for plaintiff. Defendants move to set aside the judgment, an execution issued thereon, and a levy made thereunder. Denied.

Perry & Hayward, for plaintiff. H. J. Haynsworth and A. M. Lee, for defendants.

McIVER, C. J. This is a motion addressed to this court under a notice duly served, of which the following is a copy: "Take notice that upon the affidavit hereto attached, and all the pleadings and proceedings in the above-entitled cause, we shall move the above-mentioned court at Columbia, S. C., on Wednesday, the 17th day of January instant, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the judgment entered in the above-entitled cause, the execution issued thereon, and the levy made thereunder, upon the ground that said judgment, execution, and levy are void, the circuit court having been deprived, by this appeal, of all jurisdiction in the cause." It appears from the showing made at the hearing of this motion that the judgment appealed from was duly entered in the proper office on the 15th day of December, 1893, and on the same day execution was issued to enforce said judgment, which was lodged in the office of the sheriff on the said 15th of December, 1893. On the same day, notice of intention to appeal was served on Mr. Haynsworth (one of the attorneys of plaintiff,) but, as appears from the uncontradicted affidavit of Mr. Haynsworth, two or three hours after he had filed the judgment in the clerk's office, and after he had left the execution in the office, with instructions to sign, seal, and deliver the same to the sheriff. It furthermore appears that on or about the 30th day of December, 1893, the plaintiff executed the bond to the defendants, with two good sureties, provided for by section 346 of the Code, to enable the plaintiff to enforce a sale of property, which being satisfactory to the sheriff, that officer thereafter, to wit, on the 3d day of January, 1894, levied upon the stock of goods of the defendants, and took the same into his custody and possession. It also appears that in due time, to wit, on the 13th day of January, 1894, the appellants served their proposed "case" and exceptions, and on the 16th of January, 1894, duly filed the return required by rules 1 and 2 of this court. It will be observed that this is not a motion for a stay of proceedings in the court below, pending an appeal under the provisions of section 349 of the Code; nor does it appear that any such application has been made to either of the justices of this court, under rule 21 of the supreme court; nor does it appear that any application has been made to the presiding judge before whom the judgment was obtained for a stay of execution; but, on the contrary, as it is explicitly stated in the notice of the motion, (for which reason we have deemed it proper to set out such notice in *haec verba*.) it is an application for an order "vacating and setting aside the judgment entered in the above-entitled cause, the execution issued thereon, and the levy made thereunder, upon the ground that said judgment, execution, and levy are void, the circuit court having been

deprived, by this appeal, of all jurisdiction in the cause." So that the only question presented by this motion is whether the circuit court had lost its jurisdiction of the cause at the time when the judgment was entered, the execution issued, or the levy made. As we understand it, the circuit court, having once acquired jurisdiction of a cause and the parties thereto, retains such jurisdiction until it is lost; and it is not lost until the jurisdiction of this court attaches. Now, as it has always been held that the jurisdiction of this court does not attach until the return required by rules 1 and 2 has been filed in this court, for the obvious reason that, until the return is filed, this court has no record upon which it could take jurisdiction of any cause, except such as are specially provided for either by the constitution, the statutes, or rules of court, and as it is very clear that the present case does not fall within any of those classes, it follows necessarily that this court never acquired jurisdiction of this cause until after the return was filed; and, this being after the judgment was entered, and after the execution was issued and the levy made, the motion to vacate and set aside the judgment, execution, and levy, as void for lack of jurisdiction in the circuit court, cannot be granted.

While this view is decisive of the question presented for our determination, yet it may not be amiss to decide also the other question which seems to have been mainly argued at the bar, as to the proper construction of section 346 of the Code. That section, or so much thereof as we deem it necessary to quote, provides: "A notice of appeal from a judgment directing the payment of money shall not stay the execution of the judgment, unless the presiding judge before whom the judgment was obtained shall grant a stay of execution;" and, after going on to provide that after notice of appeal the plaintiff shall not enforce a sale of property without giving the prescribed bond, the section proceeds in the following language: "Nor shall the plaintiff in such case be allowed to proceed with a sale of defendant's property, if the defendant do enter into an undertaking," etc., as prescribed. On the part of the appellants it is contended that this section does not apply to judgments obtained on money demands, but applies only to a judgment directing the payment of money; and great, and, as we think, undue, stress is laid upon the word "directing." We do not think that such a view can be sustained. If a judgment for the recovery of so much money on an ordinary money demand cannot be regarded as a judgment directing the payment of money, then it is somewhat difficult to understand what it does amount to. It unquestionably does require the payment of the amount of money adjudged to be due by the one party to the other, and the word "directing" amounts to neither more nor less than the word "requiring." When a tribunal

invested with the power to enforce its mandates directs, by its judgment, the payment of money, it is equivalent to saying that it requires the payment of such money, and in this connection the two words may be used interchangeably. It is also to be observed that the language used is, not an appeal from an "order," a word which would be much more appropriate if appellants' view be correct, but an appeal from a "judgment" directing the payment of money. The word "judgment" has a well-defined meaning: "A judgment is the final determination of the rights of the parties in the action," (Code, § 286;) and, when a judgment on an ordinary money demand is rendered, it determines that the payment of so much money shall be made by the defendant to the plaintiff,—it amounts to a direction to that effect. But, in addition to this, the subsequent language used in the same section serves to show that the construction which we have adopted is correct. It uses the words "stay of execution," "shall not enforce a sale of property;" the provision contemplating the giving of the bonds provided for both fixes the amount of such bonds at double the amount of the judgment, and the provision that the bond to be given shall be conditioned to pay the judgment. All this shows that the legislature intended to embrace, in the provisions of that section, judgments recovered upon ordinary money demands. Again, if the view contended for by appellants should be adopted, the extraordinary anomaly would be presented that the legislature, while providing that a mere notice of appeal shall not operate as a stay of execution unless the required bond shall be given, in the several cases mentioned in sections 350, 351, and 352, leaves, without any such protection, the large, if not the largest, class of judgments, in which, in most cases, such protection is most needed. Now, while this result would not be sufficient to support the construction which we have adopted, if the language used plainly required a different construction, yet, where the language admits of two constructions, that which is most consistent with justice, and with what may be assumed to be the true intention of the legislature, should be adopted. But again, even if we could adopt the view contended for by appellant, that would not avail the appellants in this case, for that section only forbids a sale of defendant's property where he has not obtained a stay of execution from the presiding judge by whom the judgment was rendered; and in this case it does not appear that any attempt has yet been made to enforce a sale of defendants' property. While it may be possible (though we do not think so) that the legislature intended to forbid a sale of property after a notice of appeal has been given, it is quite clear that there is no provision in section 346 forbidding the plaintiff acquiring a lien by a levy. And there would be good reason for such a distinction; for while the

legislature might possibly have thought it best to allow a sale of the defendant's property after a notice of appeal had been given, unless the plaintiff would, by giving the bond required, protect the defendant from the hazards of loss by a sale, yet there would be no reason for depriving the plaintiff of the benefit of the prior lien which he was entitled to by reason of his superior diligence; and such lien he could only acquire, on personal property, by a levy. In any view which we have been able to take of this case, we do not think that the appellants are entitled to the order asked for. It is therefore adjudged that the motion be refused.

McGOWAN and POPE, JJ., concur.

WILSON v. CITY COUNCIL OF FLORENCE.

(Supreme Court of South Carolina. Dec. 18, 1893.)

MUNICIPAL CORPORATIONS—ISSUE OF BONDS—VOTE BY PROPERTY—INJUNCTION.

A city will not be restrained from issuing bonds; where there has been a majority vote therefor, one vote being allowed for every \$100 of taxed property, including that of corporations and estates; its charter (Act Dec. 24, 1890) declaring the right to issue bonds to be in a majority vote of the city, a person to have one vote for every \$100 worth of property on which he pays taxes.

Petition by John Wilson against the city council of Florence to restrain an issue of bonds. Injunction denied.

The petition and return were as follows:

Petition: "The petition of John Wilson respectfully shows to this honorable court (1) that the city council of the city of Florence are about to issue twenty-five thousand dollars of the bonds of the corporation, and will do so unless restrained therefrom; (2) that heretofore the said city council undertook to issue said bonds, claiming the right to do so by virtue of an election held for that purpose, and were restrained therefrom by this court, which restraining order is still of force; (3) that on the 2d day of August, 1893, after said restraining order was issued, the said city council held another election to determine the issue of said bonds, and are about to issue said bonds by virtue of the result of said election; (4) that said city council allowed the board of managers of the said election to receive the votes of corporations by their president or agents authorized for that purpose, and the votes of estates held in trust by the trustees of such estates, and thereby obtained a majority vote of the taxable property of said city. Wherefore your petitioner prays that an injunction be issued by this court, restraining the city council of Florence from issuing the bonds of the corporation in the said sum of twenty-five thousand dollars, and such other and further relief be granted as to this court should seem

just and proper, and your petitioner will ever pray, etc.”

Return: “The relator herein, the city council of Florence, through its attorney, W. W. Harlee, making return to a rule issued by this court, dated November 29th, 1893, requiring said city council to show cause before this court at 11 o'clock on Monday, the 4th day of December, A. D. 1893, why an injunction should not issue restraining said council from issuing the bonds of the corporation in the sum of twenty-five thousand dollars, shows for cause: (1) That by resolution of said city council adopted at a meeting held on the 20th day of July, A. D. 1893, the mayor of said city was authorized to order an election to determine the issue of said bonds, a copy thereof being hereto attached as part of this return, marked ‘Exhibit A,’ and, pursuant to such resolution, an election was ordered to be held on the second day of August, A. D. 1893, for such purpose, due notice of which was given by publication in the Florence Times and the Messenger, such notice stating the object of the election, the time of opening and closing, the place, and such persons as were allowed to vote, complying strictly with the act incorporating said city. (2) That said election was held on said day in the city of Florence, by J. B. Douglas, J. E. Schouboe, and Robert Bowler, three managers, duly appointed and sworn in by the city clerk before entering upon the performance of their duty, as appears by the city clerk’s certificate, a copy of which is hereto attached as part of this return, and marked ‘Exhibit B.’ (3) That before said board of managers entered upon said election they were furnished by the city clerk with a list of the property holders of said city whose names were upon said books, who have returned and paid taxes on one hundred dollars or upward for the year 1892, together with the amount owned by each; also, the total taxable property of the said city, as appears by the certificate of said clerk, a copy of which is hereto attached, and marked ‘Exhibit C,’ as part of this return. (4) That an election was duly held in pursuance to the published notice for that purpose on the said day, commencing and closing at the times specified, and held at the place designated, and a vote of 5,804 was polled in favor of issuing said bonds, no vote being polled against it, representing \$580,400.00 worth of property, one vote representing, in each case, one hundred dollars, as appeared from the city tax books at that time, the total taxable property of said city aggregating the sum of \$1,098,072,—less than double the amount voted in favor of issuing said bonds,—as appears by the return of said board of managers duly certified, a copy of which is hereto attached as part of this return, and marked ‘Exhibit D.’ (5) That upon the result the city council are about to issue the said bonds, and will do so unless restrained by this court, or some other of competent

jurisdiction. (6) That the relator admits the allegations contained in paragraph one, (1,) (3,) three, and (4,) four, and all of (2) two except so much as alleges that the former order of this court is binding on the city council as to the action taken subsequent to date of said order of the petition; but avers, in reply thereto, that no agent or president of any corporation in said city voted except as duly authorized by the board of directors of said corporations, and requested to vote thereon, with full instructions how to vote, as the relator is informed and believes, and alleges such information to be true. (7) That it is respectfully submitted that said corporations and trustees are taxpayers, and are therefore, under said act approved 24 December, A. D. 1890, incorporating the city of Florence, on page 860, Statutes at Large, entitled to express either assent or dissent as to a burden being placed on their property. Wherefore your relators pray that said application be refused, and petition dismissed, with such other relief as to the court shall seem meet and proper. W. W. Harlee, Relator’s Attorney.”

Exhibit A: “City of Florence, Council Chamber, 20th July, 1893. At a special meeting of the city council held this day, the following resolution was adopted: * * * ‘Resolved, that the mayor be authorized to order a new election for the issue of city bonds under the provisions of the ruling of the supreme court,’—which was accepted. * * * E. W. Lloyd, City Clerk. [City Seal.]”

Exhibit B: “Florence, S. C., Clerk’s Office, 1st August, 1893. I appoint J. B. Douglas, J. E. Schouboe, and Robert Bowler managers of an election to be held on August the 2d, 1893, to determine the issuing by city council \$25,000 of the bonds of the corporation. [Signed] W. W. Hursey, Mayor. “I hereby certify that the above is a true copy of an order now on file in my office. 30th Nov., 1893. E. W. Lloyd, City Clerk. [City Seal.]”

Exhibit C: “Florence, S. C., November 29, 1893. Council Chamber. I, E. W. Lloyd, clerk of the city council of Florence, do hereby certify that on the morning of August the 2d, A. D. 1893, I furnished to J. B. Douglas, J. E. Schouboe, and Robert Bowler, managers of an election to be held on that day in said city to determine the issue of the bonds of the corporation in the sum of \$25,000.00, a list taken from the tax books of said city of the entire property on the tax books, and the amount of each taxpayer; and that, as appeared by the tax books for that time, the taxable property of said city amounted to \$1,098,072. E. W. Lloyd, City Clerk. [City Seal.]”

Exhibit D: “State of South Carolina, County of Florence. We, J. B. Douglas, J. E. Schouboe, and Robert Bowler, do hereby certify that on Tuesday, the first day of August, A. D. 1893, after being duly appointed as managers of an election to be held on

Wednesday, the second day of August, we were duly sworn in by Capt. E. W. Lloyd, clerk of city council, for such office, and on said second day of August, 1893, we opened the polls for said election (which election was held for the purpose of determining the issue of \$25,000 of the city's bonds by city council) at 6 o'clock A. M., and continued the same until 8 o'clock P. M., allowing each voter to cast one vote for each and every one hundred dollars' worth of property returned and paid taxes on for the year A. D. 1892, the ballots being printed to read as follows: 'Issue Bonds, Yes.' 'Issue Bonds, No.' That 5,804 votes were polled in favor of issuing said bonds, representing \$580,400.00 property, and no votes polled against the issue of said bonds. That we were furnished by city clerk with the tax books for the year 1892, and find the taxable property of the city of Florence to be \$1,098,072, including every kind of property of the said city. Necessary to make a majority vote, \$549,037, (5,491;) and we therefore return to city council that a majority vote was cast in favor of issuing said bonds. August, A. D. 1893. [Signed] J. B. Douglas, J. E. Schouboe, Robt. Bowler, Managers."

J. P. McNeill, for petitioner. W. W. Harlee, for respondent.

McIVER, C. J. This is an application, made by the petitioner, who is a citizen and taxpayer of the city of Florence, addressed to this court in the exercise of its original jurisdiction, praying that the city council of Florence may be enjoined and restrained from issuing bonds to the amount of \$25,000 for the purpose of raising money for internal improvements in said city. The respondent made a return to the rule to show cause, setting forth fully the facts, which, as the return is not traversed, must be taken as true. These facts may be thus briefly summarized, (though both the petition and return should be incorporated in the report of this case), to wit: That, in pursuance of the powers conferred upon said city council by the charter of the city, an election was duly ordered and regularly held on the 2d day of August, 1893, to determine whether the bonds here in question should be issued; that at such election only those who were entitled by the charter to vote were permitted to do so; and that the result of the election, at which a majority of the qualified voters cast their votes, was in favor of the issue of said bonds, no votes having been cast against such issue. It is quite clear, therefore, that there is no ground for the injunction prayed for. It seems to have been supposed that because this court, in a previous action between these same parties for the same purpose, granted the injunction then asked for, (Wilson v. City Council, 17 S. E. 835,) the same result should follow in this case; but, by reference to the opinion of Mr. Justice McGOWAN, who, as the organ

of the court, rendered the judgment in the former case, it will be seen that the judgment then rendered was based upon totally different facts from those presented in the present case, and which have arisen since the former decision. There the injunction was granted because the election then held was not conducted in the manner prescribed by the charter of the city, and hence the city council was not legally invested with the power to issue the bonds. But, since that decision was rendered, another election has been duly ordered, and conducted in conformity to the provisions of the charter, as construed by this court in the former decision, which resulted, as has been stated, in favor of the issue of said bonds, and hence the said city council is now fully invested with the power to issue said bonds. The judgment of this court is that the application for the injunction be dismissed.

McGOWAN and POPE, JJ., concur.

TINSLEY et al. v. UNION COUNTY.

(Supreme Court of South Carolina. Dec. 18, 1893.)

COUNTY BOARDS—DISALLOWANCE OF CLAIMS—APPEAL.

1. On appeal from the board of county commissioners' disallowance of a claim, the circuit court may review the facts returned, (Code, § 368,) but its finding thereon is not reviewable.

2. Gen. St. § 623, providing that nothing in said section shall prevent a board from disallowing, as incorrect, any account, in whole or part, nor from requiring further evidence of its truth, does not require the board to hear other testimony, nor to apprise a claimant that other testimony on his claim is needed.

3. A board of commissioners is not required to hear claims as a court, fixing a day for hearing, with witnesses.

Appeal from common pleas circuit court of Union county; L. B. Fraser, Judge.

Appeal by Ira E. Tinsley and Robert S. Foster from a decision of the board of commissioners of Union county disallowing a claim against said county. Appeal dismissed, and claimants appeal. Affirmed.

D. A. Townsend, (Thos. S. Moorman, of counsel,) for appellants. William Munro, for respondent.

McGOWAN, J. There is some confusion in this case, and it will be necessary to make a short statement of facts: The action or proceeding is upon a claim for \$100 against the county of Union for work and labor alleged to have been done by the plaintiffs on a certain highway of the county under a contract with the county commissioners. It appears, among other things, that on September 14, 1889, the plaintiffs presented to the board of county commissioners the claim of \$100 "for work and labor on a highway near Supple Jack," which was considered by the board on the same day, and disal-

lowed because, as stated, the contract made by them had not been complied with. On September 20th the plaintiffs sued upon the account in the court of common pleas, but the action was soon discontinued, and need not be again referred to. On October 7, 1889, the plaintiffs presented to the board of county commissioners, again, a claim, substantially for the same account, of \$100, which had attached to it the following affidavit: "Ira E. Tinsley and Robert S. Foster, being duly sworn, say, each for himself, that they were employed by the county commissioners of Union county, to wit, James F. Norman, William Gallman, and Jasper Acock, in the year 1889, to perform certain work on the public highway leading from Union O. H. to Columbia; that the price agreed to be paid was one hundred dollars; that the work was performed according to contract, and was received after the inspection and examination by the said commissioners. [Signed only by one of the parties] R. S. Foster. Sworn to October 7, 1889. D. A. Townsend, N. P. We hereby apply for payment of the above account, on the affidavit hereto attached, and upon such other testimony as the board may desire to hear. We ask that the said claim be paid without delay, and, in case it be refused, that the cause of such refusal be stated in writing. [Signed] D. A. Townsend, Atty."

To this claim the county commissioners made the following objection: "State of South Carolina, Union county. Jasper M. Acock, James F. Norman, and William M. Gallman, being duly sworn, say, each for himself, that they have read the foregoing affidavit signed by R. S. Foster, dated October 7, 1889, and deny the statements therein contained to be correct, and deny that the county is indebted to said Tinsley and Foster, as alleged, in any amount. [Signed] W. M. Gallman. J. F. Norman. J. M. Acock. Sworn to Nov. 5, 1889." The following notice was served on Mr. Townsend, the attorney of the parties, on November 9, 1889: "Please take notice that the claim of Ira E. Tinsley and R. S. Foster for one hundred dollars has been disapproved." Whereupon, the plaintiffs appealed from the judgment to the circuit court: "(1) Because said board erred in deciding that the said county commissioners did not employ the plaintiffs to perform the work set forth in their claim herein; the evidence introduced by the plaintiffs in support thereof being amply sufficient, and no notice whatever having been served upon the plaintiffs of the introduction or consideration of any rebutting testimony or evidence of any kind, and there being no such rebutting testimony or evidence properly before said board for their consideration. (2) Because the said board erred in deciding that the said county commissioners did not promise to pay the plaintiffs one hundred dollars for said work; the evidence introduced by the plaintiffs being amply sufficient

to sustain said promise, and no notice whatever having been served upon the plaintiffs of the introduction or consideration of any rebutting testimony or evidence of any kind, and there being no such rebutting testimony or evidence properly before said board for their consideration. (3) Because said board erred in deciding that the said county commissioners did not receive said work, after its completion, unconditionally; the evidence thereof introduced by the plaintiffs being amply sufficient to prove it, and no notice whatever having been served upon the plaintiffs of the introduction or consideration of any rebutting testimony or evidence of any kind whatever, and there being no such rebutting testimony or evidence properly before the board for consideration. (4) Because the plaintiffs having informed said board, in the application, that other and further testimony would be introduced if the said board should not deem the testimony or evidence introduced with the application sufficient, the said board erred in not apprising the plaintiffs of the necessity for the introduction by the plaintiffs of other testimony, in order to convince the said board that said claim should be allowed. (5) Because the said board erred in not hearing said case according to the usual custom of all other courts, and not fixing a day certain for the hearing of said case, on which the plaintiffs might appear before said board with their witnesses, and exercise their right of replying to any rebutting testimony or evidence introduced against said plaintiffs, or considered by said board against the plaintiffs. (6) Because said board erred in not deciding that the claim of the plaintiffs was a just and proper claim against said county, and that it should be paid," etc.

After this, some efforts seem to have been made by the county commissioners to have the case reheard, with all the parties present. But, as the matter was then on appeal to the circuit court, the plaintiffs objected; and we need not incur the case by setting out those ex parte proceedings, but consider only the proceedings by the commissioners on November 5th, and the appeal which was taken therefrom, as hereinbefore stated. The exceptions to the decision of the commissioners came up first before his honor, Judge Norton, who required the commissioners to make a return, which they did; including, however, a statement of the proceedings which took place after the appeal, but which, as before stated, do not touch the questions involved in the simple appeal. Under the order of Judge Norton the commissioners made a return of their proceedings and judgment rendered November 5, 1889, disallowing the claim for \$100 filed by appellants, and stating all that occurred on that occasion, viz. November 5th. The case came up, on the exceptions herein stated, before Judge Fraser, who affirmed the judgment of the county commissioners and dismissed the

appeal; and, as we understand it, the only questions before the circuit court (Judge Fraser) were the errors of law and of fact alleged in the grounds of appeal from the decision of the county commissioners. "On appeal from a decision of the county commissioners to the circuit court, the only questions before that court are the errors of law and of fact alleged in the grounds of appeal." *Green v. Commissioners*, 27 S. C. 9, 2 S. E. 618. It is therefore needless for this court to consider any of the various matters which occurred before or after November 5, 1889; the sole question before this court being whether the circuit judge committed any error of law in overruling any one of the exceptions taken by the plaintiffs to the judgment rendered by the county commissioners on November 5, 1889. This was what is known as a "county claim," of which the board of county commissioners has exclusive jurisdiction, subject to appeal to the circuit court. See *Jennings v. Abbeville Co.*, 24 S. C. 543. Now, were there any errors of law or of fact committed by the circuit judge, as disclosed by the exceptions to the judgment of the commissioners?

Exceptions 1, 2, and 3, in different forms, complain that the proof was amply sufficient to establish the claim of the plaintiffs, and that it was error in Judge Fraser not to so hold. There are other matters stated in the exceptions, but, as far as the sufficiency of the testimony was concerned, it was a question of fact, and upon appeal was reviewable by the circuit judge. It will be observed that on the occasion in question (November 5th) the plaintiffs presented an account of \$100 for work alleged to have been done by them on a certain highway under a contract with the county commissioners. The character of the work done was not stated, except simply the charge: "To work and labor on public highway near Supple Jack, \$100." The only evidence offered by the plaintiffs was the affidavit of R. S. Foster, one of the plaintiffs. Mr. Townsend, attorney for plaintiffs, stated as follows: "We hereby apply for payment of the account on the affidavit annexed, and such other testimony as the board may desire to hear," etc. To this claim the commissioners made the following answer: All three of the commissioners—Gallman, Norman, and Acock—made an affidavit, each swearing for himself, that the affidavit of Mr. R. S. Foster, dated October 7, 1889, was not correct, and denying that the county was indebted to said Tinsley and Foster as alleged, or in any amount. And thereupon notice was served upon Mr. Townsend, the attorney of the plaintiffs, on November 9, 1889, "that the claim of Tinsley and Foster for \$100 has been disallowed." In hearing the appeal, Judge Fraser, under section 368 of the Code, had the right to consider the facts as returned, which he did, but this court has no right to review and reverse his decision upon the facts.

Exception 4 alleges that Judge Fraser committed error of law, in this: "That the plaintiffs having informed the board, in their application, that other and further testimony would be introduced if the board should not deem the testimony or evidence introduced with the application sufficient, the said board erred in not apprising the plaintiffs of the necessity for the plaintiffs to introduce other testimony in order to convince the board that said claim should be allowed," etc. The ground of appeal states the matter of notice thus: "That other and further testimony would be introduced if the board should not deem the testimony sufficient. The said board erred in not apprising the plaintiffs of the necessity for the introduction by the plaintiffs of other testimony," etc. But the notice actually given was somewhat different, in these words, *viz.*: "On the affidavit annexed, and upon such other testimony as the board may desire to hear," etc. It seems that the members of the board made the contract, whatever it was, with the plaintiffs, and, having full knowledge as to what it was, they did "not desire" to hear other testimony. Was that error of law? We do not think so, but it was a matter of discretion with the commissioners. This identical question was decided in the case of *Green v. Commissioners*, *supra*, in which Chief Justice McIVER, in delivering the judgment of the court, said: "But, assuming that it did appear that the board did not require such further evidence, we are unable to see that they committed error of law in not doing so. The statute does not require that the board should demand such further evidence. It is only permissive. The language of the proviso to section 623 of the General Statutes, relied on by the plaintiffs, is as follows: 'Nothing in this section shall be construed to prevent any board from disallowing any account in whole or in part, where so rendered and verified, if it appears that the charges are incorrect, or that the services or disbursements have not in fact been made or rendered, nor from requiring any other or further evidence of the truth or propriety thereof. No allowance or payment beyond legal claim shall ever be allowed. And the board of county commissioners in any county may refuse to audit or allow any claim or demand whatsoever, unless made out and verified in the manner herein specified.' So that it is plain that the provision for requiring further evidence is permissive, and not mandatory; and, if the board neglect to require such further evidence, no error of law can be imputed to them on that account," etc. We see no error here.

Exception 5 complains that the said board "erred in not hearing said case according to the usual custom of all other courts, and not fixing a day certain for the hearing of said case, on which the plaintiffs might appear before said board with their witnesses, and exercising their rights of replying to rebut-

ting testimony," etc. The board of county commissioners is comparatively a new tribunal, under our law, and the forms of procedure in it have never been clearly settled. "Some of the forms incident to a court have undoubtedly been conferred upon the county commissioners; but it would seem that they are regarded more as a 'board of audit.' They are not styled a 'court,' but a 'board.' Its members are called 'commissioners,' not 'judges.' It does not proceed according to the forms generally considered essential to a court, with parties before it as plaintiff and defendant, but in a summary way, without formal pleadings, evidence, or record. We do not think that the board of county commissioners is a court, in such sense that its record may be pleaded in bar as evidence of a former recovery in respect to a claim against a county allowed by the commissioners," etc. See *County of Richland v. Miller*, 16 S. C. 247. We see no error here.

The sixth exception is too general to be entitled to consideration.

We agree with his honor, Judge Fraser,—but for reasons other than those stated,—that there was no error of law, reviewable by this court, charged in the exceptions to the judgment of the county commissioners rendered on November 5, 1889. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

STATE v. LUCKER.

(Supreme Court of South Carolina. Dec. 19, 1893.)

CRIMINAL LAW—PRESENCE OF ACCUSED—TRIAL—CONTINUANCE—DISCRETION OF TRIAL COURT—REVIEW ON APPEAL.

1. A person charged with a misdemeanor may be tried therefor in his absence.

2. The granting of a continuance is a matter within the discretion of the trial court.

3. A request, by counsel retained to prosecute an appeal, for time to except to the charge of the trial court, should be denied, where it appears that he has had five months in which to prepare his exceptions, and no reason is shown why he has failed to do so.

Appeal from general sessions circuit court of Berkeley county; James F. Izlar, Judge.

C. W. Lucker was convicted of a misdemeanor, and appeals. Affirmed.

C. S. Bissell, for appellant. W. St. Julien Jervy, for the State.

POPE, J. The defendant, (appellant,) C. W. Lucker, was tried for a misdemeanor at the June term, 1893, of the court of general sessions for Berkeley county, before Judge Izlar and a jury, and was found guilty, and sentenced to $2\frac{1}{2}$ years' imprisonment in the

state penitentiary, or to pay a fine of \$500. He gave notice of appeal, upon the following grounds:

Because the defendant was tried in his absence, and could have presented a meritorious defense, had he been present, and that it was not through any fault of the defendant that he was not present, as will appear from the following affidavit: "The state of South Carolina, county of Berkeley. Personally appeared before me E. J. Dennis, who, being duly sworn, says that on Monday morning, June 5, 1893, while he was going to Mt. Pleasant Courthouse, from the ferry wharf, on the arrival of the 10 A. M. boat from Charleston, C. W. Lucker called him into his house, and told him that he desired the case of the State v. C. W. Lucker continued until the next term of court, because he, the said C. W. Lucker, was suffering from rheumatism in the foot, and his wife with neuralgia in the head; and the deponent further says that he promised to endeavor to put off the said case, and believed at the time that he could do so, and the said C. W. Lucker, at the said interview, assured the deponent that he had a witness or witnesses to prove where he got the plants planted in his field. Sworn to before me this — day of June, 1893. E. J. Dennis. Thos. S. Gaillard, [L. S.] Notary Public."

The offense for which the appellant was convicted was made a misdemeanor by an act of the general assembly passed in 1885. See 19 Stat. 140. Being a misdemeanor, it was legal to try the offender in his absence. The appellant, by his one ground of appeal, in effect, complains that the circuit judge erred in not granting a continuance of his case. This is a matter within the sound discretion of the circuit judge, and we have repeatedly declined to interfere with the exercise by him of this discretion. *State v. Howard*, 35 S. C. 197–200, 14 S. E. 481; *Cantey v. Whitaker*, 17 S. C. 527; *State v. Dodson*, 16 S. C. 459; *McDaniel v. Stokes*, 19 S. C. 61; *Westfield v. Westfield*, Id. 88; *Symmes v. Symmes*, Id. Besides, in the case, we do not find the fact that this affidavit was ever brought to the attention of the circuit judge at the trial.

We are also requested by the attorney for appellant to grant him time to except to the charge of the circuit judge. It seems he was retained by the appellant to conduct his appeal at some time in June, 1893. He has therefore enjoyed five months within which to make out his exceptions, and no reason is given why he has not been able to avail himself of all this time. We can see no merit in the application. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

HUNT et al. v. NOLEN.

(Supreme Court of South Carolina. Dec. 27, 1893.)

MORTGAGES—FORECLOSURE—PARTIES.

C. was a necessary party defendant to an action to foreclose a mortgage for the price of 200 acres of land, where he had actual possession of 30 acres under a title paramount to that of the mortgagor, but from the same common source, and his possession amounted to an eviction sufficient to entitle the mortgagor to claim damages for breach of warranty, and the mortgagor had tendered payment to the value of the rest of the land, and it was a question whether C. owned the 30 acres in fee, or owned a life estate in them, with ultimate reversion to the mortgagor.

Appeal from common pleas circuit court of Spartanburg county; James F. Izlar, Judge.

Action by Amanda C. Hunt and Marie Hunt against W. R. Nolen to foreclose a mortgage. From a decree for plaintiffs, cross appeals are taken. Modified and remanded.

Izlar, P. J., heard the cause on the master's third report and the exceptions thereto, and thereafter signed the following decree:

"This case was heard by me at the October term, 1892, court of common pleas for Spartanburg county, on the supplemental report of the master of said county, and the exceptions of the defendant thereto. To obtain a clear understanding of the questions presented by the exceptions, it is necessary to state, succinctly as possible, the facts leading up to the issues growing out of the supplemental report of the master. It appears that in July, 1889, the plaintiffs executed and delivered to the defendant their deed, whereby they undertook to convey to the defendant, in fee simple, a tract or parcel of land situated in said county, on the waters of Fair Forest creek, containing 200 acres, in consideration of four thousand five hundred dollars. The defendant paid two thousand five hundred dollars of the purchase price, cash, and executed his bond and mortgage to the plaintiffs, bearing date the 15th of July, 1889, to secure the credit portion of the purchase price. The credit part of the purchase, two thousand dollars, was to be paid to the said plaintiffs on or by the 1st day of January, 1890, with interest from the date of said bond at the rate of ten per cent. per annum. Under his purchase the defendant was not put in possession of the two hundred acres conveyed to him by the plaintiff. The location of the land under the deed of conveyance made by the plaintiffs to the defendant developed the fact that a portion of the land which the defendant supposed he had purchased at the time was in possession of one J. F. Cleveland. That the portion in possession of J. F. Cleveland contained about thirty acres; so that, instead of two hundred acres, the defendant was only put into possession of about one hundred and seventy acres. The portion in possession of the said J. F. Cleveland is a valuable piece or parcel of land, and, if lost to the defendant, will impair

the value of the portion in his possession. That the 13th day of January, 1890, the defendant paid to the plaintiffs, on his bond and mortgage, the sum of fourteen hundred dollars, but refused to pay the balance thereof until he was put into possession of the remaining portion of the tract purchased by him. On the 21st day of January, 1891, the plaintiffs commenced their action of foreclosure against the defendant for the balance of the purchase money due and remaining unpaid on the bond and mortgage of the defendant. The defendant appeared, and answered the complaint. For a defense and counterclaim, he alleged the foregoing facts, and claimed that by reason thereof there had been a breach of the covenant of warranty and other covenants on the part of the plaintiffs in said deed, and that he had been injured and damaged thereby in the sum of one thousand dollars. All the issues were referred to the master. A number of witnesses were examined relative to the issues raised by the pleadings. On the 30th day of November, 1891, the master filed his report, finding, among other things, that there was a deficiency in the quantity of acres intended to be conveyed by the plaintiffs to the defendant, of thirty and one-quarter acres, worth twenty-one dollars and ninety-five cents per acre; that the thirty and one-quarter acres, at twenty-one dollars and ninety-five cents per acre, would amount to six hundred and sixty-three dollars and ninety-eight cents; and that giving the defendant credit for this sum on his bond and mortgage in January, 1890, would leave a balance due by the defendant to the plaintiffs of thirty-nine dollars and fifty-eight cents. And the master recommended that the plaintiffs have judgment of foreclosure for this amount, and costs of the action. To this report both the plaintiffs and defendant excepted. These exceptions were heard by his honor, Judge Fraser, who filed an order in the cause, holding that the parties under whom Cleveland claimed only had a life interest in the portion of the land involved in this controversy. He then goes on to say: 'There is no evidence before me to show the value of these estates for life, and to what extent the defendant has been damaged, in this view of the rights of the parties, all the estimates having been made on the theory that the outstanding paramount title was an estate in fee simple, and not an estate merely for the life or lives of certain individuals. There is evidence that some of them were at one time alive, and it must be assumed that they are still alive, as they were when the sale was made by order of court, unless there is evidence to the contrary.' He therefore re-committed the case to the master 'to inquire and report as to which of the said life tenants are still living, as to the ages of such as are living, and any other facts that may be necessary to enable the court to come to a proper conclusion, and that he report his con-

clusions thereon.' On the 10th day of July, 1892, a motion was made in the cause before his honor, Judge Wallace, to require the plaintiffs to make J. F. Cleveland a party defendant in this action. This motion was refused. The master, in obedience to the order of Judge Fraser, filed his report, bearing date the 10th day of November, 1892, in which he finds the ages of the life tenants who are still living, and then concluded: 'Calculating the value of the life estate of these parties by means of reliable life insurance tables, I find that it amounts to sixty-seven 8-100 dollars, which is as near accuracy as can be reached by calculation in a matter of this kind.' On the 12th day of November, 1892, after hearing this report, I made an order recommitting the cause again to the master, requiring him to report more fully upon the matter referred to him by his honor, Judge Fraser. On the same day, the same master, in obedience to this order, filed his report. In this report the master says: 'Defendant's counsel take the position before me that no money should be paid by defendant to plaintiffs until defendant is put in possession of the whole land deeded to him, and that he ought not to pay interest. Plaintiffs insist that there is nothing in the position, and, if there was, it could not be raised now. My conclusion is that the position of defendant is not tenable, and that, even if it was, it could not be raised at this stage of the case. With this view of the case, I have made the calculation, and find that the sum of seven hundred and fifty-seven dollars is due at this date, and should be paid by defendant to plaintiffs.' To this report the defendant duly excepted.

"The case is, without doubt, novel, in at least some of its features. This being the case, I have endeavored to give to the questions presented all the consideration possible, under the circumstances. I am prepared, however, to say that the conclusion to which I have arrived, if not correct, is at least satisfactory to myself. I think it meets fully the equities of the case. But three questions are presented by the exceptions: (1) Should the defendant be required to pay to the plaintiffs the balance due on his bond and mortgage until he is put in possession of the whole of the lands purchased by him? (2) Should he be required to pay interest on said balance during the time he is kept out of possession? And (3) can these questions be raised at this stage of the proceedings?

"It may be as well to dispose of the third question first. In passing upon this question, the fact must not be overlooked that no decree has been ever made in the cause. Only a few preliminary questions have been determined. These I shall not interfere with, even had I the inclination and the power. I shall, in all that I may say, consider the questions heretofore passed upon in this cause as settled. There is nothing heretofore decided in this cause, so far as I am

able to discover, which prevents the court from now considering the questions raised by the exceptions of the defendant. Therefore, without discussing the question further, I shall content myself with simply saying that in my opinion the master erred in holding that the questions involved in the exception of the defendant could not be raised at this stage of the case.

"Now, as to the first question. The rule, it seems to me, is well settled that where there is a deficiency in the quantity of land sold, in a case like the present, the purchaser is entitled to a deduction from the purchase price,—the average or relative value of the deficiency. But the difficulty arises in this case from the fact that it is claimed that the party in possession of the deficiency only has a life estate therein, and that upon the falling in of the life estate the defendant will be entitled to the possession of the land claimed to be deficient, and that under these circumstances he is not entitled to a deduction of the average or relative value of the lands deficient, but only to a deduction of the value of the life estate of the tenant or tenants for life. To enforce a rule of this kind, it seems to me, would be contrary to equity and good conscience; especially so under the circumstances of the present case. J. F. Cleveland, who is in possession of the deficiency, is not a party to these proceedings. No one is advised of the title under which he claims. It is only assumed that he has a life estate in these lands from the fact that the trust deed from H. H. Thomson to William C. Bennett only conveyed a life estate to the persons under and through whom J. F. Cleveland is supposed to have derived his title to these lands. It may be that J. F. Cleveland now has a perfect, paramount title to these lands. Who can tell? But, be this as it may, there is one fact about which there can be no dispute: He is, and has been ever since the purchase of the defendant, in the possession and use of a certain portion of the land which the plaintiffs undertook to convey to the defendant. Where is the guaranty that he will deliver up the possession to the defendant upon the falling in of the life estate? The defendant may never get the possession of these lands, and, if he does, it may be years after the life estate is terminated, and after a long and expensive litigation. Under these circumstances, is the defendant to be told that justice and equity demand that he pay now for these lands, in the possession of another, and trust to 'fickle fortune' to save him harmless in the end, or that equity regards the value of an ancient life or lives deducted from a balance due upon the purchase price of these lands full and complete compensation for the loss of the possession and use of these lands for an indefinite period, and perhaps forever? I cannot think so; it seems to me that it would be inequitable to compel the defendant, upon a bare contin-

gency, to pay for this portion of the land conveyed to him, until the plaintiffs have put him in the quiet and peaceable possession thereof.

"The next to be considered is that of interest. I do not think the defendant should be required to pay interest on so much of the purchase price of said land as is represented by the deficiency, for the time he has been or may be kept out of the possession of said lands. This conclusion seems to me to be so fair and just, under the circumstances of the case, I shall not protract this opinion by discussing it.

"Deducting the value of the number of acres found deficient, as fixed by the master,—that is to say, six hundred and sixty-three 98-100 dollars for the amount of bond,—and the balance remaining would be \$1,336.12. This sum, with interest at the rate of ten per centum per annum to the 13th of January, 1890, would amount to \$1,408.15; so that the payment of \$1,400 practically paid for all the land in the possession of the defendant. If the deficiency is put at the average price per acre of the 200 acres conveyed, the payment of \$1,400 would have exceeded the value of the portion now possessed by the defendant. In the view I take of this case, the plaintiffs are entitled to their judgment of foreclosure for the sum of six hundred and sixty-seven dollars and fifteen cents; said sum to commence to bear interest from the day the defendant shall be put into the possession of said thirty and one-quarter acres deficiency. It is therefore ordered, adjudged, and decreed that the plaintiffs have judgment against the defendant for foreclosure and sale of the mortgage premises, and that the said judgment be duly entered in the office of the clerk of the court. It is further ordered and adjudged that the judgment of foreclosure and sale entered in conformity with this decree shall not be enforced until the defendant shall have been put into the quiet possession of the thirty and one-quarter acres deficiency by the plaintiffs, or their heirs or assignees, and that, until the possession of said land is so given, the plaintiffs, their heirs and assignees, legal representatives and attorneys, are restrained and enjoined from enforcing said judgment of foreclosure and sale. It is further ordered and adjudged that if the plaintiffs, their heirs or assignees, shall fail, neglect, or refuse to put the defendant (or, in case he be dead, his heirs at law) in possession of said land within twelve months after the falling in of the life estate of the tenants for life in said lands, (unless, by an order of this court, said time is extended,) the said judgment of foreclosure and sale shall be marked 'Satisfied' by the clerk of this court, for the time being, upon the payment of the usual fee for such service by the defendant, or others interested in having such satisfaction entered. It is further ordered and adjudged that in case the defendant, his heirs at law,

legal representatives, or assignees, shall fail to pay the sum heretofore found to be the value of thirty and one-quarter acres, with interest from the date he shall be put in possession of the same, within sixty days after he shall have been put into quiet possession of said lands, the said mortgaged premises shall be sold by the master of said county, (and, in case there shall be no master of said county, by the clerk of this court,) on some regular sales day, after due advertisement, for cash; that the officer making the sale shall, out of the proceeds arising from said sale, pay first the cost and expenses of said sale, and any lien or liens for taxes and assessments upon the said mortgaged premises, then the amounts due the plaintiffs, with interest as aforesaid, and, if there be a surplus after paying the said sums, that he hold said surplus subject to the further order of the court; that the officer making the sale shall execute and deliver to the purchaser or purchasers a deed or deeds to the premises sold; and that the purchaser or purchasers be let into possession upon the production of said deed. It is further adjudged that in case of sale the defendant, and all persons claiming by, through, and under him, be forever barred and foreclosed of all right, title, interest, and equity of redemption in and to said mortgage premises, or any part thereof. It is finally ordered that the costs of this action be paid by the parties,—that is to say, each party to pay his or their own costs,—and that the parties have leave to apply for further orders at the foot of this decree."

Bomar & Simpson, for plaintiffs. Ralph K. Carson and Duncan & Sanders, for defendant.

McGOWAN, J. We certainly agree with the circuit judge that in some respects this is a novel case, and to prevent confusion, and to make the points clear, we will condense a portion of the very full statement of the circuit decree. It appears that in July, 1889, the plaintiffs executed a deed to the defendant, whereby they undertook to convey to him a tract of land on waters of Fair Forest creek, Spartanburg county, 200 acres, in consideration of \$4,500. The defendant paid in cash \$2,500, and executed his bond for the credit portion, \$2,000, which was to be paid on or before January, 1890, with interest from date at 10 per cent., and to secure this balance the defendant executed a mortgage of the said premises. The location of the land under the deed developed the fact that a part of the land the defendant supposed he had purchased was in the possession of one J. F. Cleveland; that this portion contained about 30 acres; so that, instead of 200 acres, the defendant was only put into the possession of about 170 acres. On January 13, 1890, the defendant paid to the plaintiffs \$1,400, but refused to pay the bal-

ance thereof until he was put into the possession of the remaining portion,—the aforesaid 30 acres. This is the subject of this contention. On January 2, 1891, the plaintiffs commenced this action of foreclosure for the remainder of the purchase money due. The defendant, for a defense and counterclaim, alleged the foregoing facts, and claimed that by reason thereof there had been a breach of the covenant of warranty, and that he had been damaged to the extent of \$1,000. All the issues were referred to the master, who took the testimony, (which is all in the brief,) and, among other things, found that there was a deficiency in the quantity of land of 30¼ acres, worth \$21.95 per acre, making \$663.98, and that giving the defendant credit for that sum in January, 1890, would leave a balance due by the defendant to the plaintiffs of \$39.58, and he recommended that the plaintiffs have judgment for that sum and costs, etc. To this report both parties excepted. These exceptions were heard by his honor, Judge Fraser, who, among other things held that there was a deficiency of land; that Dr. Cleveland holds under a title from the same common source, which is paramount to that held by the defendant under his deed in this case. He is in actual possession of a part of the disputed land under that paramount title. For the purposes of this case, Dr. Cleveland's title to the possession is perfect, and his possession of a part by actual occupation under his title is a sufficient eviction to entitle the defendant to claim damages for the breach of warranty. See 7 Amer. & Eng. Enc. Law, p. 40; Garvin v. Cohen, 13 Rich. Law, 153; Van Lew v. Parr, 2 Rich. Eq. 321. His honor, Judge Fraser, also held that the deed under which Dr. Cleveland claims gives a title only for the life of the persons named in the deed of H. H. Thomson to Dr. William C. Bennett, (naming them,) after which life estate the land reverts to defendant; and, as the master's report had been made on the assumption that Dr. Cleveland had a fee-simple title to the land in question, his honor, Judge Fraser, therefore recommitted the case to the master, to inquire and report as to which of the said life tenants are still living, and as to the ages of such as are living, and any other facts that may be necessary to enable the court to come to a proper conclusion, and that he report his conclusions thereon. The master reported the names of the aforesaid life tenants: Hettie Miller, 70 years of age; Susan Turner, 78 years; Sallie Burnett, 74 years; Julia Du Priest, 71 years; and John Du Priest, 67 years of age. Calculating the value of the life estate of these parties by means of reliable life insurance tables, I find that it amounts to \$67.08, which is as near accuracy as can be reached by calculation in a matter of this kind. In July, 1892, the defendant moved before Judge Wallace, at chambers, to require the plain-

tiffs to make J. F. Cleveland a party defendant in the case. This motion was refused. The master, in his third report, making his statements more full, says: "Defendant's counsel take the position before me that no money should be paid by defendant to plaintiffs until defendant is put in possession of the whole land deeded, and that until then he ought not to pay interest. Plaintiffs insist that there is nothing in the position, and, if there was, it could not be raised now. My conclusion is that the position is not tenable, and, if it was, it could not be raised at this stage of the case. With this view of the case, I have made the calculation, and find that the sum of seven hundred and fifty-seven dollars (\$757) is due at this date, and should be paid by defendant to plaintiffs." To this report the defendant excepted, and the cause came on for a hearing before his honor, Judge Izlar, who, passing by the preliminary questions which had been decided with the remark that he "would not interfere with them, but consider all the questions heretofore passed upon in the case as settled," stated that only three questions were presented by the exceptions: (1) Should the defendant be required to pay to the plaintiffs the balance due on his bond and mortgage until he is put into possession of the whole of the lands purchased by him? (2) Should he be required to pay interest on said balance during the time he is kept out of possession? (3) Can these questions be raised at this stage of the proceedings? And upon these points he held that the master was in error in deciding that the questions involved in the exceptions of defendant could not be raised at this stage of the case. He held that the defendant should not be required to pay the balance due on his bond, nor the interest thereon, until put into possession of the whole tract of land (200 acres) purchased by him; and he decreed that the plaintiffs are entitled to their judgment of foreclosure for the sum of \$687.15, said sum to bear interest from the day the defendant shall be put into the possession of said 30¼ acres deficiency, but said judgment not to be enforced until quiet possession of the said deficiency of 30¼ acres is given to the defendant or his representative by the plaintiffs or their representatives. (A full copy of the decree should appear in the report.) From this decree, as well as that of Judge Fraser, both the plaintiffs and defendant appeal, upon various exceptions, which are all printed in the record; and the defendant also appealed from the order of Judge Wallace refusing the motion for leave to make J. F. Cleveland, who is in possession of the land deficiency, a party defendant.

From the view which the court takes, it will not be necessary, now, to consider any of the grounds of appeal, except the latter,—that from the order of Judge Wallace refusing the motion to make Cleveland a party defendant as to his title to the land de-

iciency in his possession. It is true the general rule seems to be "that adverse claimants are not to be made parties to a foreclosure suit, for the purpose of litigating their title, as between defendants. The only proper parties are the mortgagee and mortgagor, and those who have acquired any interest from them subsequently to the mortgage. An adverse claimant is a stranger to the mortgage and the estate," etc. See 2 Jones, *Mortg.* 1440, and *Quattlebaum v. Black*, 24 S. C. 55, cited for the plaintiffs. But this is most certainly, in several particulars, a novel case, to which, as it seems to us, the aforesaid rule is not properly applicable. The case had been commenced, and was progressing, upon the assumption that the title of Cleveland in the deficiency was a fee simple, when his honor, Judge Fraser, held that his title was limited to the heirs of certain persons named, and upon their death would revert to the defendant, and thereupon he re-committed the case to the master for a new report under that view of the case. When that ruling was first made by Judge Fraser, the case was thereby so essentially changed as to make it, in fact, a new case, to which new principles were applicable. J. F. Cleveland, who was and is in possession of the deficiency parcel, was not a party to the proceeding. No one is certainly advised of the title under which Cleveland claims. It is only assumed that he has no more than a life estate in these lands from the fact that the trust deed from H. H. Thomson to William C. Bennett only conveyed a life estate to the persons under whom J. F. Cleveland is supposed to have derived his title to the land. As stated by the circuit judge, it may be that Cleveland now has a perfect paramount title to the lands. Who can tell? Be this as it may, there is one fact about which there can be no dispute: He is now, and has been ever since the purchase of the defendant, in the possession and use of a certain portion of the land, which the plaintiffs have undertaken to convey to the defendant. Where is the guaranty that he will deliver up the possession to the defendant upon the falling in of the life estate? And, even if it should be decided that he has no greater interest than a life estate, the defendant, possibly, may not get possession of the lands, or, if so, it may be years after the life estate has terminated, and after a long and expensive litigation. The circuit judge, among other things, found, as a matter of fact, that the defendant had substantially paid for all the land in his possession, and that the contest was now, in effect, reduced to the 30 acres of deficiency in the possession of Cleveland, who is not a party to the proceeding. We do not think that the equities of the parties can be reached without having Cleveland before the court as a party. Under these peculiar circumstances, it seems to

us that Dr. Cleveland should have the opportunity to be heard upon the subject of his title, and, as a consequence thereof, to be bound by the decree which may be rendered upon the subject. It seems to us that all the parties have an interest that Cleveland should be made a party, under the fundamental doctrine of equity, as to parties, "That all persons in whose favor, or against whom, there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject-matter and the relief granted, that their rights or duties might be affected by the decree, although no substantial recovery can be obtained, either for or against them, shall be made parties to the suit," etc. 1 Pom. Eq. Jur. § 114. The judgment of this court is that the judgment of the circuit court be modified as herein indicated, and the cause be remanded to the circuit court, in order that J. F. Cleveland shall be made a party defendant in regard to the alleged deficiency of 30 acres, and his title thereto, and for a reconsideration of the questions involved.

McIVER, C. J., and POPE, J., concur.

EBAUGH v. MULLINAX.

(Supreme Court of South Carolina. Dec. 11, 1893.)

TAX SALES—REDEMPTION—FORFEITED LANDS.

1. Advertisement of sale of delinquent lands for taxes, made in a daily paper on January 28th and February 4th, is made "weekly for two weeks," under Act 1874, § 100, and authorizes a sale February 6th. *Alexander v. Messervey*, 14 S. E. 854, 35 S. C. 409, followed.

2. While Act 1874 limited the right of redemption to 91 days after sale, Act Dec. 23, 1879, providing that all lands then or thereafter on the forfeited land record, which had been offered for sale under Act 1874, and not sold for want of bidders, should be sold by the sinking fund commission by public auction, and its amendment, (Act Dec. 21, 1880,) providing that at any time before actual sale the owners might redeem lands forfeited, applied to lands delinquent for 1880 taxes, and forfeited to the state in 1882.

3. The court charged that plaintiff contended that he redeemed the land before the sinking fund commissioners sold it; that the right to redeem extended 91 days after delinquent sale; that there was no effort to redeem for probably two years. But it was contended that the offer was made before sale; that the jury should determine that fact; that they had heard the secretary's letter to plaintiff, returning his money, and stating that it came too late; that the sale had been made; that the law gave 91 days after delinquent sale, and thereafter the commission had a right to sell; that if, before the commission sold, plaintiff offered to redeem, there was no statute authorizing redemption, but that the jury must take the testimony even on that point; that the time for redemption had passed, plaintiff's entire right to reclaim the land was gone, and the commission could sell the land. *Held*, that such charge denied plaintiff's right to redeem up to the time of the commissioners' sale, and so nullified its submission whether his offer preceded the sale. McIVER, C. J., dissenting.

Appeal from common pleas circuit court of Berkeley county; J. H. Hudson, Judge.

Trespass by D. C. Ebaugh against A. J. Mullinax. Judgment for defendant. Plaintiff appeals. Reversed.

For report on former appeal, see 13 S. E. 613.

R. J. Kirk, for appellant. Mordecai & Gadsden, for respondent.

MCGOWAN, J. This was an action for a tract of land (308 acres) in Berkeley county. The land was the property of the plaintiff, but the defendant claimed that the title had been transferred to him, by virtue of a sale and deed for \$10.84 taxes and penalty to him by the commissioners of the sinking fund, acting for the state. The case was once before in this court. Upon the first trial the tax title of the defendant was sustained on circuit, but upon appeal to this court the judgment was reversed, and a new trial ordered, on the ground that, "before the land of a defaulting taxpayer can be validly sold for the nonpayment of the taxes assessed thereon, there must be an unsuccessful effort made to enforce payment by distress and sale of the personal property of the defaulting taxpayer, the best evidence of which is an execution issued, and a return of nulla bona thereon." See 34 S. C. 364, 13 S. E. 613. Accordingly the case went back to the circuit for a new trial, which was had before Judge Hudson and a jury. For the purpose of the trial the defendant admitted that if the plaintiff's witnesses were present and sworn they would prove that up to the time of the delinquent sale of the property in question, to wit, February 6, 1882, the plaintiff had a fee-simple title thereto, dating back to a grant, etc., and thereupon the plaintiff rested his case. For the purpose of this trial the plaintiff admits the passage of the resolution by the board of sinking fund commissioners, under which the title about to be put in evidence was made and delivered. The title deed from the sinking fund commission to A. J. Mullinax, dated May 6, 1884, was put in evidence. The defendant also proved that the various steps required to be taken by the acts of the general assembly of the state for the carrying out of delinquent land sales had in this instance been practically complied with, the only exceptions thereto claimed by the plaintiff and denied by the defendant being (1) that the notice of the delinquent lands had not been advertised for the length of time required by the statute governing said sales; and (2) that before the sale by the sinking fund commission to the defendant the plaintiff had made a legal "redemption" of the land by paying the amount of the tax, with costs and penalties, into the hands of the agent of the sinking fund commission, and taking his receipt therefor. As to the first question,—the

sufficiency of the advertisement,—Mr. Eason, county auditor, testified that he received from the treasurer a list of delinquent lands for the year 1880, and the tract in question was among them. The advertisement was published in the News & Courier, a daily paper in Charleston, January 28 and February 4, 1882. Attended the sale on February 6, 1882. The tract was knocked down to the state for want of bidders. As to the second question,—the "redemption" claimed,—Mr. Ebaugh, the plaintiff, testified that he was absent from the state until the spring of 1882, and when he returned he found that his land had been forfeited, and he made an application to redeem it, and paid what money was demanded to Mr. U. R. Brooks, claiming to be the agent of the sinking fund commission. Mr. Brooks received the money, and gave witness a receipt for it, subject, as he thinks, to the approval of the sinking fund commission; but some two or three weeks after paying the money he received a letter from Mr. J. N. Lipscomb, secretary of state, inclosing check for the money which had been paid, and saying it was returned, "because the lands were already sold by the sinking fund to Mr. A. J. Mullinax," etc. This letter bore the same date as the deed of the land to Mullinax, viz. May 6, 1884.

Both the plaintiff and defendant made a number of requests to charge, but it is not considered necessary to state them here, as the charges and the refusals to charge will be considered in connection with the exceptions. Under the charge of the judge the jury found a verdict for the "defendant," and the plaintiff appeals to this court upon the following exceptions: "(1) Because his honor refused to charge, as requested by the plaintiff: 'The one hundredth section of the act of 1874, which required the sale of delinquent lands for taxes to be published "weekly for two weeks," requires the auditor to advertise for full fourteen days. An advertisement for any shorter length of time is not a compliance with the statute, and a sale under such circumstances passes no title to the purchaser.' (2) Because his honor refused to charge, as requested by plaintiff: 'If the jury find that the tax, costs, and penalties had been paid by the plaintiff to the agent of the sinking fund commission at any time before the sale to Mullinax, then the acceptance by said agent was a legal redemption by the owner, and the subsequent sale to Mullinax was without authority and void.' (3) Because his honor erred in charging the jury: 'If before the sinking fund commission conveyed the land to Mullinax, Ebaugh made the offer to redeem, there would be nothing in the statute law authorizing the redemption.' (4) Because his honor erred in charging the jury: 'But the time for redemption had passed. His entire right under the law to redeem the land was gone, and the sinking fund commission had the

right to make a sale of the land. Not only had the 91 days gone, but about two years had elapsed. Remember these points.' (5) Because his honor erred in charging the jury: 'Under the decision of our own supreme court in the case of Alexander v. Messervey, I will instruct you that the tax collector is required to advertise for two weeks. Therefore if there was an insertion in a weekly paper once (a) week, and the weekly issue of the same paper for the next week, or any day in the following week, he can sell, whether the full period of fourteen days has expired or not, because he has advertised weekly for two weeks,' etc.

First. Exceptions 1 and 5 make the point as to the alleged insufficiency of the advertisement of the sale,—that the publication for two days only, once on January 28 and once February 4, 1882, was not "weekly for two weeks." It is true that this was not a judicial sale, ordered by the court, but a sale by a collector; and, as Judge Cooley said: "A sale by a collector cannot be assimilated to a sale by a sheriff under judicial process, issued by a competent court. His power is a naked power, not coupled with an interest, and in all such cases the law requires that every prerequisite to the exercise of the power must precede its exercise." But the question here resolves itself into one of construction of the language used, and, looked at in that way, we concur with the circuit judge in being unable to distinguish this case from that of Alexander v. Messervey, 35 S. C. 409, 14 S. E. 854.

Exceptions 2, 3, and 4 raise the only other question seriously made in the case, complaining of error on the part of the circuit judge in charging: "If before the sinking fund commission made the conveyance to Mullinax the offer to 'redeem' was made by Ebaugh, there would be nothing in the statute law authorizing the redemption, but the time for redemption had passed. His entire right, under the law, to redeem the land was gone; and the sinking fund commission had the right to make a sale of the land. Not only had the 91 days gone, but about two years had elapsed." Was this error? It is undoubtedly true that statutes "allowing 'redemption' from tax sales are to be liberally construed in favor of the owner. Whatever tends to modify the right of the government to sell lands for taxes is favorable to the citizens, and ought to be liberally construed, on the principle that remedial statutes are to be beneficially expounded." *Desty, Tax'n*, p. 532. As we understand it, the only object of the state in making such stringent requirements in regard to the forfeiture and sale of delinquent lands is to secure at all events the taxes and costs; and therefore it is the wise policy of the state to favor "redemptions," as in that way the payment of tax dues is secured without the expense of sales or the sacrifice of the property of the citizen incidental thereto. It is certainly

now the law of the state that the owner of lands forfeited for taxes has the right to redeem the land at any time before the sale shall be actually made. See section 291 of the act of February 9, 1882, "to provide for the assessment and taxation of property," (17 St. 1039); and also section 307 of the General Statutes. But in answer to this view it is urged that the act of 1882 is not retrospective, and its last section (305) declares that the provisions of the act should not affect the assessment made in the year 1881, nor the collection of taxes under any act passed at that session (1882) of the legislature, but such collection should proceed in the manner prescribed by the acts authorizing the same, and the laws in relation thereto, that were of force from (we suppose it should be "before") November 1, 1881. Assuming, then, that we must apply the law here as it stood before the passage of the act of 1882, how will the matter stand? The default of the taxpayer was for the year 1880, the land offered for sale and forfeited for want of bidders February 6, 1882, and conveyed to Mullinax May 6, 1884. It is contended that, the act of 1882 being the first and only one which provides that the property owner shall have the right to redeem it at any time before the actual sale, and the provisions of that act not applying here, the landowner is relegated to the act of 1874, which limits the right of "redemption" to 91 days after the sale, and that under it the property owner, after the expiration of 91 days, had absolutely lost his right to redeem at all, his right having vested in the state by forfeiture. We cannot accept this view. It certainly overlooks the fact that the act of 1882 was not the first to change the law by allowing "redemption" at any time before the actual sale. On December 23, 1879, an act was passed "to extend the time for the redemption of forfeited lands," (17 St. 40); the second section of which provided as follows: "That all lands now or hereafter upon the forfeited land record which have been offered for sale under section 117 of the act of 1874, * * * and which have not been sold for want of bidders, nor redeemed under the provisions of this act, shall be treated as assets of the state in charge of the sinking fund commission, and by them sold at public sale. * * * Provided, that this section shall take effect on and after the 31st day of October, 1880." And at the very next session of the legislature, on December 21, 1880, the above act was altered in some particulars, and amended by adding the following: "That section 2 of 'An act to extend the time for the 'redemption' of forfeited lands,' be and the same is hereby amended, by adding the following: Provided that any time before any such sale shall be actually made, the owners of any such piece or parcel of such lands, or those claiming under or through such owners, or others, shall have the right to redeem any piece or parcel of the lands so

forfeited, by paying in gold, silver, United States treasury notes, national bank notes, the full amount of all accumulated taxes costs and penalties due and unpaid thereon up to the date of such payments." See 17 St. 327. We do not see why this amended act should not control the case. The original act took effect October 31, 1880, and the amendment from its passage, December 21, 1880. At that time the land still remained private property,—had not been forfeited to the state, which did not occur until February 3, 1882. The terms of the provision, however, are large enough to include the case when it did arise,—“all lands now or hereafter upon the forfeited land record.” As to the cases described, it provides that the landowner, “at any time before any such sale shall be actually made,” might redeem his land by paying all taxes and penalties; and, as we think, thereby repealing so much of the act of 1874 as limited the right of redemption to 91 days after forfeiture.

There was conflicting testimony as to whether the payment to the agent, Brooks, was before the actual sale and conveyance to Mullinax; and it was claimed that the circuit judge, as he ought to have done, left that question of fact to the jury. That is so, but what could that avail the plaintiff, when the jury were at the same time instructed that the plaintiff's right of “redemption” was absolutely gone, and that, without regard to that question, or how they might decide it, the sinking fund commission had the right to disregard the effort to redeem the land and to sell it? In the view taken by the circuit judge, it seems to us that the charge on the facts was unnecessary, if not misleading. The judgment of this court is that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

POPE, J., concurs.

On Rehearing.

McIVER, C. J., (dissenting.) In this case two questions are presented: (1) As to the sufficiency of the notice of the delinquent land sale; (2) as to the charge of the circuit judge upon the question of redemption. As to the first of these questions I agree with Mr. Justice McGOVAN in the view which he has taken, and do not deem it necessary to add anything to what he has said. But as to the second question I am unable to agree with him; not because I have any fault to find with his view of the law applicable to this case, but because, as it seems to me, he has placed an erroneous construction upon the charge of the circuit judge. Assuming the law to be that the plaintiff, as a defaulting taxpayer, was entitled to redeem his land at any time before it was sold by the sinking fund commissioners, and that such right of redemption was not finally lost by the expiration of 91 days after the delinquent

land sale, when the property was declared forfeited to the state for want of bidders, the practical inquiry is whether the charge of the circuit judge, properly construed, was in conflict with this view of the law. The error in the opinion, as I submit with deference, arises from the fact that detached sentences of the charge are set out in the exceptions and incorporated in the opinion, from which the conclusion is drawn that the charge was in conflict with the law as stated. But nothing is better settled than that the whole charge must be taken together, and construed as a whole, and not by detached sentences that may be found in it; otherwise it would be very difficult, if not impossible, for any charge to stand the test. Owing to the imperfections of human nature it would be unreasonable to expect that even the best and most careful judge could escape criticism if his charge is to be judged of by taking up detached sentences, without regard to the context in which they appear. The material inquiry is whether the jury have received erroneous instruction as to the law applicable to a given case, and to determine this inquiry it is necessary that the whole charge should be considered together, for that is the way it was received by the jury, and that, therefore, is the way in which the jury must be regarded as having considered it. Looking at the charge in this light, I do not see how the jury could have been misled as to the law applicable to this case. The following is the whole of the charge relating to the question of redemption as it is set out in the “case,” to which alone we must look, and not to the exceptions, where it is not fully set out: “The next point principally contended for is that Mr. Ebaugh practically and in the eye of the law redeemed this land before it was sold to Mullinax. The right to redeem extended to the full period of ninety-one days after the delinquent land sale. In this case there was no attempt made to redeem until probably two years had elapsed, but it was contended that the offer to redeem took place before the sale to Mullinax. You are to determine that fact,—whether it did or not. You have heard the letter of the secretary of state, who was chairman of the sinking fund commission, in response to Mr. Ebaugh, sending back the money he had given to Mr. Brooks, and declaring that it came too late, and that the sale had been made to Mr. Mullinax. Mr. Ebaugh unfortunately was absent from the state. I do not know that there is any provision in the statute to save one from the penalties of the law because he is absent from the state. The law gives ninety-one days after the sale, and after that time the sinking fund commission would have the right to sell this property. If, before the sinking fund commission made the contract of sale, he made the offer to redeem, there would be nothing in the statute law authorizing the redemption. But in this case you must take

the testimony even on this point. There is the letter of the secretary of state, the testimony of Mr. Ebaugh as to his payment to Mr. Brooks, and all that. You will consider it all. But the time for redemption had passed. His entire right under the law to reclaim the land was gone, and the sinking fund commission had the right to make a sale of the land. Not only had the ninety-one days gone, but about two years had elapsed. Remember these points." It seems to me that the obvious meaning of that portion of the charge relating to the question of redemption, all of which is copied above, when considered as a whole, as it must be, is that until after the lapse of 91 days from the delinquent land sale the defaulting taxpayer has the absolute right to redeem, and before that time does elapse the sinking fund commission have no authority to offer the land for sale, but, after that time has elapsed, without an offer to redeem having been made, the land may then be offered for sale by the commission; and, if actually sold before any offer to redeem is made, then the purchaser will acquire a good title. Unless such be the proper construction of the charge, it is impossible to conceive why the question of fact whether the offer to redeem was made before the sale to Mullinax should have been submitted to the jury. If the jury were to understand from the charge that the undisputed fact that Ebaugh had made no offer to redeem within the 91 days effectually barred his right of redemption, there was literally no question of fact in the case; and it would have been the idlest folly, amounting to a mere mockery, to submit the question of fact as to whether the offer to redeem was made before the sale to Mullinax to the decision of the jury. I am unwilling to adopt a construction of the charge which necessarily involves such an idea, especially when, in my judgment, the charge, considered as a whole, forbids such a construction. The detached sentences in the charge, which seem to be relied upon by appellant, are: First. "If, before the sinking fund commission made the contract of sale, he made the offer to redeem, there would be nothing in the statute law authorizing the redemption;" but it seems to me clear that from the language immediately preceding and that immediately following that sentence the circuit judge was speaking of the right to redeem within the 91 days, and not of the right to redeem after the lapse of 91 days; for the language preceding is: "The law gave ninety-one days after the sale, [meaning, of course, the delinquent land sale,] and after that time the sinking fund commission would have the right to sell this property;" and, as if to make the meaning more plain, the sentence relied upon by appellant is immediately followed by these words: "But *in this case* [*italics mine*] you must take the testimony even on this point,"—that is, the point whether Ebaugh made the offer to redeem before the sale to Mullinax,—

clearly meaning that, though Ebaugh had lost the right to redeem by the lapse of the 91 days, before any sale could be made by the commission, yet if he did offer to redeem before the sale was actually made, that would be sufficient. Second. The other sentences relied upon are as follows: "But the time for redemption had passed. His entire right under the law to reclaim the land was gone, and the sinking fund commission had the right to make a sale of the land. Not only had the ninety-one days gone, but about two years had elapsed. Remember these points." The latter part of this quotation shows clearly that the judge was speaking of the 91 days which must elapse before "the sinking fund commission had the right to make a sale of the land;" and his concluding injunction. "Remember these points"—not "this point"—shows that he meant that the jury should consider not only the point that the 91-days right to redeem was gone, but also the further point, which he had previously directed them to consider "in this case,"—whether the offer to redeem by Ebaugh was made before the sale to Mullinax. I have no doubt that the judge intended the jury to understand, and have as little doubt that the jury did understand, that the whole case turned upon the question whether Ebaugh made the offer to redeem before the sale to Mullinax; and their verdict must be regarded as a response in the negative to that question.

There is one circumstance in this case not without significance, and that is the failure to produce the receipt which the plaintiff says he took from Brooks, which he thinks was given subject to the approval of the sinking fund commission. That receipt would have tended to show not only the precise date of the payment of the money, but also the terms upon which the money was received; whether conditioned upon the approval of the sinking fund commission, or, what was more probable, upon the condition that the land had not already been sold, as was stated to be the fact in the letter of the secretary of state returning the money. It must be remembered that the act of 1879, (17 St. 40,) requiring sales of forfeited land by the sinking fund commission to be made "at public sale," after advertisement, was amended by the act of 1880 (17 St. 327) by striking out the words "at public sale" and the words "after such advertisement;" so that, as the law then stood, there was nothing to prevent a private sale of such lands without advertisement. It may be, therefore, that Brooks received the money upon the condition that the land had not already been sold at private sale, of which he was not informed. While I do not mean to insinuate even that this receipt was intentionally suppressed by the plaintiff, yet it seems to me it would have been an important piece of evidence, and if the plaintiff from any cause, even the most innocent, failed to produce it, he must take the consequences. It was the duty of

the plaintiff to prove his case, and in order to do so it was necessary for him to show that he had actually paid the money before the sale of Mullinax, which I think we are bound to assume the jury found was not the case; and that is the end of the matter. I think, therefore, that the judgment of the circuit court should be affirmed.

WIANT et al. v. HAYS, Commissioner, et al.
(Supreme Court of Appeals of West Virginia.
Dec. 9, 1893.)

STATE SCHOOL LANDS—FORFEITURE—SALE—PROPERTY IN EXCESS—EXECUTION LIEN.

1. The title to land forfeited for nonentry on the assessor's land books, by section 7, p. 90, Acts 1869, (Code 1868, c. 31, § 34,) vested in the state upon the forfeiture, by the mere force of the statute, and without judicial or other proceeding declaring the forfeiture, and therefore a judgment against the former owner, rendered after such forfeiture, is no lien on such land.

2. The right of the former owner to the excess of the proceeds of the sale of such forfeited land, after payment of taxes, interest, and costs, accorded to him by section 5, art. 13, of the constitution, is property in the former owner,—personal property,—which he may sell, and which is liable to the lien of a fieri facias against him; and such property as that, if a transfer be made of it in fraud of creditors, they may maintain a suit in equity to avoid the transfer.

3. Personal property, to be the subject of sale, must have an existence, but a potential existence is sufficient.

4. Under section 2, c. 141, Code, a writ of fieri facias is a lien upon personal property, not of such nature as to be leviable, owned by the debtor before its return day, if docketed as required in said section, against a purchaser for value, without notice other than the constructive notice arising from such docketing; but, if not so docketed, the lien will not affect such purchaser, if he be a bona fide purchaser for value, and without notice of the writ. It makes no difference, so far as the protection of the purchaser is concerned, whether he purchased before or after the return day of the writ.

5. A proceeding, under chapter 105 of the Code of 1887, by a commissioner of school lands, for the sale of forfeited lands, is a judicial proceeding,—a suit, not simply an administrative proceeding. The court may in it allow one claiming right to the surplus proceeds of its sale to file his petition asking such surplus to be paid to him.

(Syllabus by the Court.)

Appeal from circuit court, Gilmer county;
V. S. Armstrong, Judge.

Action by William T. Wiant and others against S. A. Hays, commissioner of school lands for Gilmer county, and others. There was decree for defendants, and plaintiffs appeal. Reversed.

Linn & Withers and N. M. Bennett, for appellants. R. F. Fleming, for appellees.

BRANNON, J. A tract of land, the property of Peregrine Hays, was forfeited for nonentry on the assessor's land books of Gilmer county for more than five years, from and including the year 1870; and under a decree in a proceeding instituted by the

commissioner of school lands made February 5, 1891, the land was sold as forfeited, and purchased by Kidd, and its proceeds, after paying taxes and costs, left a surplus. The sale was on October 1, 1891, and it was confirmed by decree of October 8, 1891. By a writing dated June 1, 1891, Peregrine Hays assigned to Kidd any excess that might remain from its sale. Peregrine Hays and Kidd, before confirmation of sale, united in filing a petition in the circuit court of Gilmer, wherein said proceeding was going on, setting up said assignment, and asking that said surplus be paid to Kidd, pursuant to the assignment. William T. Wiant and R. G. Linn, administrator of Robert Linn, and others, filed in said proceeding a petition against Hays and others, setting up that Linn, administrator, had obtained a decree for money against Hays in February, 1886, and that Wiant had recovered a judgment for money against Hays, July 2, 1887, which were docketed in the judgment lien docket, and that various writs of fieri facias had been issued on said decree and judgment, which were returned unsatisfied; and that certain ones of them had been entered in the execution lien docket,—Linn's first, docketed on February 13, 1891, and Wiant's earliest, docketed June 4, 1891; and they claimed in their petition that, under said judgments and executions, they were entitled to said surplus. The petition of said Wiant and Linn and others was, on demurrer, dismissed, and the said surplus fund was decreed to Kidd, and said Wiant, Linn, administrator, and other petitioners appeal.

To whom should such surplus fund go,—to Kidd, under his assignment from Hays, or to Wiant and Linn, administrator, under their said claims as creditors of Hays? By the omission of the land from the tax books, its forfeiture became complete some time in 1875. By such forfeiture the whole title went from Hays, and vested in the state, by force of the statute, (Acts 1869, p. 90, § 7; Code 1868, c. 31, § 34,) without any legal proceeding or sale. The act operates as a legislative grant, and vests title in the state. *Levasser v. Washburn*, 11 Grat. 572. As was said in *McClure v. Maitland*, 24 W. Va. 561, and *McClure v. Mauperture*, 29 W. Va. 633, 2 S. E. 761, after the forfeiture became complete, the former owner had no more right or title in the land than if he had never owned it. Therefore, as before Wiant's and Linn's judgments Hays had ceased to own the land, their judgments did not become liens on this land, as they were not rendered until in the years 1886 and 1887. What interest, then, had Hays as to the land after such forfeiture? This is a material question, because, under the arguments in the case, we must answer whether Hays had such interest as could be assigned to Kidd, or such as could be subject to the writs of fieri facias upon Wiant's and Linn's judgment and decree.

The constitution, (article 13, § 5,) as also the statute, provides that the former owner of forfeited lands shall be entitled to receive the excess of the sum for which the land may be sold over taxes and costs, if his claim be filed within two years after the sale. This surely does not vest any estate that is real estate in the former owner, for the statute vests the whole estate in the state; and in *McClure v. Maitland*, 24 W. Va. 561, it is held that this provision does not confer upon the former owner any interest in the land. But he has something that is property, dependent upon a sale and the existence of an excess for its fruition. In *McClure v. Maitland* it is held that the grant to him of the excess is a gratuity,—an act of grace in the state. This language was used to support the position taken in that case that, under the then existing act relative to proceedings for the sale of forfeited lands, the owner had no right to demand to be a party, and was not a proper party, but it was surely not intended to mean that the right, under the constitution and act, to the excess, should it ever come to exist, was not a property right. It is a vested right, contingent, so far as its vesting in possession and enjoyment is concerned, upon the happening of the event of a sale and excess,—a right inchoate until sale, and then consummated, if it leave a surplus. It has potentiality, as contrasted with a mere naked possibility. There is the land out of which money may issue, and that land is required by law to be sold, and will be sold, and to that money the law gives the former owner a right. It is not a mere expectancy, like that of a child as to the estate of the living father, or the sale of the catch of fish on a future voyage. The fact that perchance the land may never be sold, and may never produce a surplus, does not render the former owner's right a mere possibility, legally speaking, but it is a probability. The facts that the land exists, and will be sold under fixed law commanding it, and that the right of the owner to the surplus is connected with it, and that the surplus issues out of it, give that right a potential present existence. That which is in every sense nonexistent—a non-entity—cannot be sold, is not property; but it need not have, in every sense, a perfect, tangible existence, to be regarded in law as capable of ownership. So it have a potential existence, it is enough. A man may not sell the fruit from trees, or wool or lambs from sheep, which he has not; but he may do so if he then owns the trees or sheep. Their ownership gives potential existence to the fruit and wool and lambs, though as yet the trees have not blossomed, or the wool grown, or the ewes become pregnant. "A mere contingent possibility, not coupled with an interest, is not the subject of sale, as all the wool one shall ever have, or the sheep which a lessee has covenanted to leave at the end of an existing term. If rights are vested, or possibilities are distinctly connected with in-

terest or property, they may be sold." 1 Pars. Cont. 523. What is a devise of land to an executor to be sold,—part of proceeds to one, part to another? The law ought to go as far as possible to deem that property necessary to pay creditors. We find it in old and late books, as laid down in *Benj. Sales*, p. 80, § 78, that "things not yet existing, which may be sold, are said to have a potential existence; that is, things which are the natural product or expected increase of something already belonging to the vendor." Here the land did not belong to Hays, but that land existed, and he had a conceded right to certain money to issue from it. It would be unreasonable to say that a man whose land, worth many thousands of dollars, forfeited for a few dollars of taxes, has no such interest in the excess as that, when it comes into real existence as money, it cannot be subjected to pay his debts. It might be said with some force that while the land is, as regards the legal title, vested in the state, yet the state holds in trust for the former owner as to the residue, and that his interest is land; but perhaps that view is untenable. I shall without further elaboration refer to the following authorities for the discussion of this somewhat abstruse subject: *Huling v. Cabell*, 9 W. Va. 522, and many citations there; *Bank v. Kimberlands*, 16 W. Va. 555; *Benj. Sales*, p. 80, § 78; 1 Pars. Cont. 523; *Tied. Sales*, § 52; 2 Kent, Comm. 468, (641,) note a; 2 Bl. Comm. 297; *Wheeler v. Wheeler*, 74 Amer. Dec. 421; *Fonville v. Casey*, 4 Amer. Dec. 559, and note.

It is argued that it is no property,—merely a gratuity from the state. So it is as regards Hays and the state; but when once the gift has vested, like any other property given, it is the property of Hays, the donee. It is argued that it is, like pension to a soldier, exempt from creditors. There is no analogy. The pension is exempt by provision of the act granting it, but there is no exemption here made by the constitution. So we hold that this right of Hays touching the land is property; not real, but personal,—a chose in action. Therefore it could pass under the assignment of Hays to Kidd. But what of Wiant's and Linn's executions, docketed as execution liens? Code, c. 141, § 2, says that every writ of fieri facias shall, in addition to the effect which it has under chapter 140 of this Code, be a lien from the time it is delivered to an officer to be executed upon all the personal estate of which the judgment debtor is possessed, or to which he is entitled, and upon all which he may acquire on or before the return day thereof, although not levied on, nor capable of being levied on, under that chapter. And then follows a provision that a purchaser shall not be affected by such lien unless the execution be docketed, as in said section provided; and the statute then provides that, if so docketed, it shall be an abiding and continuing lien against a purchaser, and have preference

over him. The executions constituted liens on the said property right of Hays, the execution debtor, arising from said land, as it was in existence when the executions were delivered to officers for execution. *Huling v. Cabell*, 9 W. Va. 522.

Linn's *fi. fa.*, which issued October 11, 1890, and was docketed February 13, 1891, has preference over Kidd's rights under his assignment. I find no execution of Wiant's docketed before June 4, 1891, and, that being after Kidd's assignment, Kidd has preference over Wiant, provided he be a purchaser for valuable consideration, bona fide, and without notice of Wiant's execution. Though the assignment was, after Wiant's execution, in the officer's hands, and before its return day, yet, the property being a chose not leviable, Kidd has preference over Wiant, if Kidd be such a bona fide purchaser without notice. The lien of a *fi. fa.* upon a chose is not under chapter 140, but under chapter 141, § 2; and, as this section excepts such purchaser, it is no difference that, when he purchased, the execution was in the officer's hands, and the return day had not passed. Opinion in *Evans v. Greenhow*, 15 Grat. 162. Some change was made in 1882 in chapter 141. As our Code now is, chapter 140 gives the writ of fieri facias a lien on leviable property, but not at all on property not leviable. Chapter 141 does this. Under chapter 140 the lien on leviable property begins when the fieri facias goes into the officer's hands, and ends with its return day, unless levied, in which case it continues to bind the property levied upon after its return day. If not levied, it would not bind the property in the hands of one purchasing it after the return day, under chapter 140, whether he had notice of the execution or not. I say under chapter 140. But chapter 141 makes the fieri facias a lien on property not leviable, and continues, if it does not create, the lien, under chapter 140, on leviable property after its return day, if the fieri facias be docketed, as required by section 2. The lien given by section 2, c. 141, as to property not leviable, like a chose in action, begins when it goes into the hands of the officer, but does not end with the return day. As to leviable property, one could not purchase it during the life of the execution, even without notice of it, but he could purchase unleviable property without notice, either before or after its return day, unless it be docketed, as section 2, c. 141, saves him from the lien it creates on unleviable property; but chapter 140 does not save him from the lien by it created as to leviable property. In other words, if the subject be unleviable property, like a chose, whether purchased within or after the lifetime of the fieri facias, and it be docketed, as required in section 2, c. 141, the lien is good against a purchaser, though he be a bona fide purchaser for value and without notice of the fieri

facias otherwise than by the docketing; but, if not docketed, it is not good against such bona fide purchaser for value without notice. As to leviable property, if purchased before the return day of the writ, its lien, though not docketed, is good, even against a bona fide purchaser for value without notice of it, because of chapter 140; but, if purchased after the return day of the writ of fieri facias, the lien is not good against a bona fide purchaser for value, unless so docketed, or unless he have notice of the writ; but, if either so docketed, or the purchaser have such notice, it is good against him.

The petition charged that Kidd's assignment was made with intent to defraud petitioners. This, I assume, was regarded by the court as immaterial, and as no ground to save the petition from demurrer, on the theory that the right assigned was not property in Hays, to which a creditor could set up a claim, and could not be the subject of a fraudulent alienation. Were this so, the position would be correct, as a creditor cannot say he has been defrauded by an assignment of anything that is not property of his debtor to which he can resort for satisfaction; but, as the thing assigned is to be regarded property liable to creditors, it follows that its fraudulent transfer could be assailed. Equity, under the statute avoiding fraudulent transfers, will reclaim and subject any species of the debtor's property, prospective or contingent,—all kinds of property, real, personal, legal, or equitable, vested, reversionary, or contingent estate,—subject to debts. It will subject property sometimes where the legal process cannot reach it. Equity is here not technical, but asks whether it is a thing of substantial value of the debtor, which in the facility and flexibility of its remedial procedure it can reach. *Wait, Fraud. Conv.* §§ 24, 25; *Bump, Fraud. Conv.* § 238. Certainly, equity would not allow the fraudulent transfer, if such it was, of hundreds of dollars, actual money in the hands of the court, coming from a sale of the land, having no longer a merely potential, but now an actual, existence, on any such theory that it was not property liable to creditors. If capable of assignment, it would, so far as its existence as property is concerned, be liable to creditors.

But it is contended that the proceeding in the name of the commissioner of school lands in the circuit court is not a suit with parties, but only an administrative proceeding by the state ex parte, to sell its own land,—only a method of converting its land into money,—and this contention is rested on *McClure v. Maitland*, 24 W. Va. 561, and, not being a suit, Wiant could not file his petition in the proceeding. The question in that case was whether the former owner was a proper party to the proceeding to sell, and whether he could complain of error in the proceeding, and maintain an appeal. It was held that the

proceeding was not judicial, in the sense that it involved litigation between parties. But this proposition, as applied to this case, can have no force, for two reasons: First. The act under which *McClure v. Maitland* was had made no provision for parties. The legislature, desiring to make the proceeding as effectual as possible, and pass good title, and protect the purchaser's title, as under ordinary decrees, by chapter 95, Acts 1882, (Code 1887, c. 105,) greatly changed the law touching the sale of forfeited lands for the benefit of the school fund, directing that the commissioners file a petition which must contain certain matters of allegation, naming the owners of the land by it sought to be sold, directing process to issue against the owners and all unknown persons having or claiming the land, and that it be served on them, or, in default of service, that a publication be made, and that the case be referred to a commissioner to report certain important matters, and that all the parties claimant appear before him, and that exceptions might be filed to it, and that a hearing take place on the report and exceptions, and a decree of sale be entered, if the land be found liable, and the sale reported to court for its action. There is an express provision that, if there be exceptions to the report, "the same proceedings shall be had in the case as if it were a suit in chancery." Now, why, with parties plaintiff and defendant, process, pleading, hearing between the parties, decree, etc., it is not, if not technically a chancery suit, yet a suit, I cannot see; a suit under a special statute, it is true, but none the less a suit. So, substantially, it was regarded in *Hays v. Camden's Heirs*, 18 S. E. 461, (decided this term.) Proceedings at rules take place as in ordinary and common-law suits. In some places it is called a "suit." But I know that it is said by those holding the other view that the question is not to be tested by the circumstances, such as I have alluded to, the presence of pleading, process, hearing, etc., but it must be tested by the nature of the proceeding; that is, that it is only an administrative process by the state, through an officer and court, to realize money on its own property. But to this I reply that though the state might make the proceeding such, and did in its acts up to 1882, yet, by its act in 1882, it changed the proceeding from one *ex parte* to one *inter partes*, and clothed the proceeding with all the habiliments of a suit; and still it did not proceed against the land, taking the fact of forfeiture as a concession, and simply at once sell the land, but it subjected its right and title under the supposed forfeiture to question and investigation, under the law, through a suit, called in all interested adversely to its claim, and gave them leave to contest its right, and made its claim the subject of litigation. Second. Suppose it is not a suit, as between the commissioner and the defendants. Still, claimants to the residue might

file their petition in the proceeding to obtain that residue, because, the money being in the court, they could in no other way get it, save by asking the court for it by petition; and I understand that always where money is in the hands of a court in any proceeding, which is claimed by parties, and on grounds outside that proceeding by attachment, execution, assignment, or otherwise, a petition may and must be filed. How, otherwise, can the right to it be asserted? And, as incidental, there can be parties defendant to the petition. It would be a petition as to the proceeding, seeking the fund, but not litigating anything involved between the parties to the proceeding; while, as to the parties interested in the fund, it would be a bill,—a suit. It must be filed in the cause, because it seeks a fund in custody of the law, and asks an order in that cause for leave to withdraw the fund; but in no other respect does it concern or become part of it. This petition can be called a "bill," as between its plaintiffs and defendants. It is a bill in equity to render effective the lien of a *fi. fa.* on a fund not leviable, which is a common function of equity, and also to annul a transfer of it, and settle right to it; and it is only filed in the proceeding because there the fund is. It is no litigation within the other proceeding. Said decree, so far as it sustains the demurrer of Kidd to Wiant's and Linn's petition, and dismisses it, and gives the surplus to Kidd, is reversed, and said demurrer is overruled, and the cause remanded for further proper proceedings.

HARTMAN et al. v. EVANS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 2, 1893.)

EQUITY PRACTICE—EXCEPTIONS TO ANSWER—DEED OF TRUST FOR SECURITY—USURY—RIGHTS OF GRANTOR TO DISCOVERY—EQUITABLE JURISDICTION.

1. When a plaintiff in equity files exceptions to an answer, the exceptions should be noted as filed, and at once be set down for argument.

2. If the exceptions to the answer are not well founded, it is not ground to reverse a decree that they were not set down to be argued, but the cause was heard and decided without passing upon them.

3. When a replication to the answer is entered or filed, the exceptions to the answer are treated as abandoned, and the answer deemed sufficient as to any discovery prayed for.

4. Evidence of lending, at a usurious rate of interest, to other persons, is not competent to prove a usurious rate in the case on trial.

5. Every presumption is made in favor of the correctness of the decision of the commissioner in chancery. If the testimony is conflicting, the court rarely interferes with his finding on the facts, provided he makes no error of law affecting the result.

6. Any borrower of money may exhibit his bill in equity against the lender, and compel a discovery on oath of the money really lent, and the interest or consideration of the same; and, if a deed of trust has been made to secure the payment of the debt, an injunction may be

awarded to prevent a sale thereunder during the pendency of the suit.

7. It is the duty of the trustee to look to the rights and interests of the trust debtor, as well as to those of the trust creditor, being the agent of both parties, and bound to act impartially between them.

8. Where there is, from any cause, an impediment to his making a fair and proper sale, (1) as where, from the fact of the deed of trust being one of long standing, or from any cause, the amount due and to be raised by a sale is uncertain; (2) where there are various deeds of trust or other incumbrances; (3) where the legal title is outstanding; (4) where there is a cloud upon the title,—the trustee may, of his own motion, apply to a court of equity to remove such impediment to a proper execution of the trust; and, if he should fail to do this, the party injured by his default has a right to make such application.

9. When the court has for any purpose properly taken jurisdiction of such case, it should proceed to have the trusts executed under its direction, and with its sanction, when the interests and rights of any party manifestly require it.

(Syllabus by the Court.)

Appeal from circuit court, Monongalia county; John M. Hagans, Judge.

Action by Joseph J. Hartman and Elliott Hartman against Thomas R. Evans and O. H. Dille, executors of James Evans, deceased, and others, for an injunction and other relief. There was decree for defendants, dismissing the bill, and plaintiffs appeal. Reversed.

Keck, Son & Fast, for appellants. A. B. Fleming and O. B. Dille, for appellees.

HOLT, J. This is an injunction brought by the Hartmans in the circuit court of Monongalia against Evans and others, executors of James Evans, deceased, to enjoin a sale under a deed of trust on lands to secure a debt to the testator. The executors of James Evans answered the bill, and plaintiffs excepted to the answer. Various depositions were taken on behalf of plaintiffs, and defendants excepted to them as incompetent. On the 24th day of February, 1891, the cause came on to be heard. The court, not passing upon the exceptions to defendants' answer, sustained defendants' exceptions to certain depositions of plaintiffs, and referred the cause to Commissioner Lazzell, to ascertain and report (1) the usury, if any, and amount in the trust debts; (2) how much, if anything, remained due on the trust debts. Additional testimony was taken by both plaintiffs and defendants, and, the cause coming on to be finally heard on April 12, 1892, upon the papers formerly read, orders, decrees made, report of Commissioner Lazzell, and exceptions thereto, the court decreed that the injunction awarded on May 18, 1890, be dissolved, and that plaintiffs' bill be dismissed, not passing directly on exceptions to answer or report, and the plaintiffs appealed.

Plaintiffs assign numerous errors, which may be conveniently examined under these four heads: First, in allowing the answer

to be filed, and not sustaining the exceptions thereto; second, in sustaining defendants' exceptions to certain depositions of plaintiffs; third, in not passing directly on the exceptions to the report of Commissioner Lazzell; fourth, for various errors in dismissing, finally, plaintiffs' bill, (and under this head the briefs are in the main taken up with the discussion of facts as to the question of usury and questions of chancery practice.) Our practice, starting with that of the high court of chancery of England, has been modified by various statutes, beginning with the act of 1748, until it reached its present state in the Code of 1868, giving us an inexpensive, expeditious, and simple mode of procedure, which needs but two slight changes to put it almost even with the most advanced Codes of Procedure, viz. shorten and abolish the rule days, and extend the power of the chancellor to take oral testimony at the hearing. An examination of our statutes on the subject extends through a period of 150 years. See Act Oct., 1748, 6 Hen. St. at Large, p. 207; Act Nov., 1753, Id. (Ed. 1794,) p. 345, § 38; Revisal of 1819, (1st Ed.) pp. 196-215. (Act Dec. 21, 1818;) Revisor's Rep. of Code 1849, p. 843; Code 1849, (Ed. 1860,) c. 171, p. 709, (Acts W. Va. 1863, c. 73;) Code W. Va. 1868, (Ed. 1891,) c. 125, p. 800. Our present law on exceptions to answers reads as follows: "When a plaintiff in equity files exceptions to an answer the exceptions shall at once be set down for argument." "When exceptions to an answer have been sustained if the defendant put in a second answer which is adjudged insufficient he shall be examined on interrogation and committed until he answers them." Code 1891, §§ 54, 55, c. 125. See Act Nov., 1753, (1 Code 1819, p. 214.) If the plaintiffs intended to insist on their exceptions, they should, by an order for that purpose, have had them set down for argument, or have brought them to the attention of the court, and had them disposed of as preliminary to any hearing of the cause. Where this is not done, or a general replication to the answer is entered, the exceptions to the answers are treated as abandoned, and the answer deemed sufficient as to any discovery prayed for. Story, Eq. Pl. § 877; citing Coop. Eq. Pl. 328. See Hughes v. Blake, 6 Wheat. 453; Clarke v. Tinsley, 4 Rand. (Va.) 250; Richardson v. Donehoo, 16 W. Va. 685; Rogers v. Verlander, 30 W. Va. 619-637, 5 S. E. 847; Burlew v. Quarrier, 16 W. Va. 108; Coleman v. Lyne, 4 Rand. (Va.) 454-457. The exception to the answer should be noted as filed. 1 Daniell, Ch. Pr. 763-775. The effect of entering a replication is to admit the sufficiency of the defendant's answer, and to exclude all exceptions thereto. 1 Bart. Ch. Pr. 417. Although there appears no order in the record noting the filing of the general replication, yet it is recited in the order of reference as one of the pleadings on which the cause is heard.

and that is sufficient; and, if the exceptions to the answer are not well founded, it is not ground to reverse a decree that they were not set down to be argued, but the case was heard and decided without passing upon them. *Goddin v. Vaughn*, 14 Grat. 102.

2. Sustaining defendants' exceptions to sundry depositions taken on behalf of plaintiffs. Under section 23, c. 130, Code, the court correctly sustained the exception taken to the depositions of plaintiffs, so far as they were examined as witnesses on their own behalf in regard to personal transactions and communications between them and James Evans, deceased, against the defendants as his executors. The other exception related to the deposition of four witnesses who testified that they had borrowed money of James Evans, deceased, at the rate of 8 per cent. On the part of plaintiffs it is contended that such evidence tended to show that it was the general habit of the testator to lend money at that rate of interest, and that proof of such habit would be competent as tending to show a lending at such rate in this instance. I think the court was right in excluding this testimony as immaterial. It does not belong to that class of facts which are proved by the concurrence of desire and opportunity to commit them. It is not such evidence as the law requires in cases of usury. It does not even establish habit. The general rule is that, when the issue is whether the party did a particular thing, it is not admissible to put in evidence that he did a similar thing at some other time; and nothing appears to withdraw this case from the operation of the rule. On the contrary, it is within the reason of the rule; it would be trying an irrelevant side issue, with the trial prolonged, and the real issue overridden and obscured.

3. That the court, by its final decree of April 12, 1892, simply dissolved the injunction, and dismissed plaintiffs' bill without passing upon plaintiffs' exceptions thereto, or defendants' exceptions, or upon the report itself, making no allusion to it whatever, except that it was a paper read at the hearing, although made and returned in obedience to the order of reference of the court of February 24, 1891. Ten witnesses gave their depositions, all called for plaintiffs except one. No evidence was taken before the commissioner. Defendants claimed that there was due their testator from the plaintiffs the sum of \$3,500, with interest from the 1st day of January, 1885, subject to a credit of \$200 as of January 13, 1890, and that it did not include any usurious interest. Plaintiffs claimed that it was usurious, and that there were credits not given, and that the correct balance, after purging it of usurious interest and giving them credits, left the correct balance of \$3,396.59, as of 1st January, 1890. The commissioner, among other things, says in his report as follows: "Owing to the nature and amount of evidence before

your commissioner, he has had considerable difficulty in ascertaining the facts sought by this decree of reference; but he has carefully and thoroughly examined all the evidence before him, and, from all the evidence in the case, it is the opinion of your commissioner that the plaintiffs paid to James Evans usurious interest at the rate of 8 per cent., in advance, for the years up to November 10, 1880." "It seems to me that after taking into consideration the allegations of the bill, the answer, the nature of the indorsements, and especially the order of Joseph Hartman to James Snyder, which was paid by George Johnson to James Evans, no other conclusion can be arrived at than the one I have arrived at, namely, that usury was charged by said Evans, and paid by plaintiffs, Joseph and Elliott Hartman;" and he gives as the true amount due from plaintiffs on the deed of trust to defendants, the executors of James Evans, \$4,322.35, as of May 13, 1891. He, however, makes other statements to meet "all the other views of the case." One is, \$4,837, credit January 13, 1890, by \$200, admitted in the answer to have been paid, leaves, on May 13, 1891, \$4,637; another, \$4,766.70; another is, \$4,479.77.

A short history of these transactions is as follows: On the 1st day of November, 1876, plaintiffs borrowed of Col. James Evans \$1,000, gave him their single bill of that date, due, with interest payable annually, in five years; and to secure the payment thereof they executed a deed of trust to defendant Marshall M. Dent, trustee, on two tracts of land,—one containing 69½ acres; the other 83½ acres,—duly acknowledged and admitted to record on January 1, 1881. They gave decedent a negotiable note for \$61.65, due in six months, with interest, for a balance of interest on the deed of trust. On November 5, 1877, they borrowed of Col. Evans the further sum of \$1,000, gave their note of that date, with interest payable annually, and due in five years, and, to secure this, executed a deed of trust of same date, whereby they granted to defendant Oliver H. Dille, trustee, the same two tracts of land, and two additional tracts,—one of 33 acres and 2 poles; the other of 13 acres. This also was duly acknowledged and admitted to record. On 1st November, 1881, they obtained a further loan,—this time of \$1,100,—and they executed to Col. Evans their single bill for the amount, dated November, 1881, bearing interest from November 1, 1881, payable November 1, 1882, with interest, and, to secure it, executed to Joseph Moreland, Esq., trustee, a deed of trust on the same four tracts of land. This was duly admitted to record. On the 1st day of January, 1885, the balance on these three deeds of trust was calculated, and found to be \$3,500, for which they executed to Col. Evans their bond of that date, payable on or before 1st January, 1886, and, to secure the

payment, conveyed the same four tracts of land to defendant Clarence B. Dille, trustee, which was also duly recorded. James Evans, the trust creditor, died on — day of —, 1889, leaving a will whereby he appointed his son Thomas R. Evans, and his two sons-in-law, Oliver H. Dille and John N. Dawson, his executors, who proved the will and qualified as executors, and thereupon requested and required the trustee, Clarence B. Dille, to advertise and sell the three tracts mentioned in the deed, the tract of 13½ acres having been released. The trustee accordingly advertised that he would, on the 26th of May, 1890, in front of the courthouse in Morgantown, W. Va., sell said three tracts for one-third cash in hand, one-third in a year, with interest, and the residue payable in two years, with interest, taking from the purchaser notes with good security, and retaining the legal title till the notes were paid. Thereupon plaintiffs brought this suit in equity, making the following defendants: Thomas R. Evans, Oliver H. Dille, and John N. Dawson, executors of the last will of James Evans, deceased, Clarence B. Dille, trustee, Marshall M. Dent, trustee, and Joseph Moreland, trustee,—setting out, *inter alia*, the above facts, and making exhibits of these trust deeds, etc. They charge the debt secured to be usurious; that the lands are very valuable, worth three times the debt claimed as due; that neither of said deeds of trust has been released; that the legal title is outstanding; that the amount due is not ascertained, nor the amount of usury. They therefore pray that said executors and trustees be made parties defendant; that they answer fully as to the 8 per cent. and certain other special interrogatories; that a preliminary injunction may be granted, restraining the sale under the trust deed until the legal title can be got in; that the real and true amount of money due under the trust deeds or deed be first ascertained by the court, according to the rules and practice of courts of chancery, the usury, if any, purged away, and, finally, that the court may take charge of and execute said trust, causing complete justice to be done, as to the court shall seem right. The temporary injunction was granted May 10, 1890. The defendants the executors answered, denying the usury and other charges as to the amount due, but say that they are informed and believe that the land is worth \$14,000, etc.

Our law on the subject of commissioners in chancery and their reports is found in chapter 129, p. 818, Code, (Ed. 1891.) Every commissioner shall examine and report upon such accounts and matters as may be referred to him by any court. After its completion he shall retain it 10 days for the examination of parties unless otherwise ordered by the court or agreed by the parties. Any party may inspect the report without taking a copy, and file exceptions thereto, and the

commissioner shall, with his report, return the exceptions, with such remarks thereon as he may deem pertinent, and the evidence relating thereto; but any party may except to such report at the first term after it is returned, or by leave of the court after such term. The 11 exceptions of defendants to this report bear no date, as they should have done, and there is nothing to show when they were filed, except that they were read at the final hearing, April 12, 1892, 11 months after it was filed. If the exceptions had been filed with the commissioner, he would have examined them, and made some additions, and perhaps corrections, to his report; such, for example, as a statement showing the amount due the executors on the theory that no usurious interest had been charged or paid. At any rate, the general convenience of such a practice is obvious, often obviating the delay of recommittal, and evidently contemplated by the statute as the general rule; and, for the same reason, the rule in many courts is that no exceptions to the commissioner's report can be made which were not taken before him. See *Story v. Livingston*, 13 Pet. 359; *McMicken v. Perrin*, 18 How. 510; *Sand, Eq.* 633; 1 *Fost. Fed. Pr.* § 315. A good commissioner is the right arm of the court, and his services are indispensable to the due administration of justice in cases like this. The investigations and conclusions of a man of sense and experience as a commissioner have been found to be entitled to great weight. Hence the reason of the rule that every presumption is in favor of the correctness of the decision of a master, and it is not usual to reject his findings, unless, upon examination, such findings are found to be unsupported or defective in some essential particular. See *Kimberly v. Arms*, 129 U. S. 512-524, 9 Sup. Ct. 353; citing *Callaghan v. Myers*, 128 U. S. 617-666, 9 Sup. Ct. 177; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351. See *Keck v. Alender*, 37 W. Va. 201, 16 S. E. 520; *Fry v. Feamster*, 38 W. Va. 454, 15 S. E. 253; *Roger v. O'Neal*, 33 W. Va. 159, 10 S. E. 375; *Fisher v. McNulty*, 30 W. Va. 195, 3 S. E. 593; *Smith v. Yoke*, 27 W. Va. 642; *Handy v. Scott*, 26 W. Va. 710; *Graham v. Graham*, 21 W. Va. 698; *Prichard v. Evans*, 31 W. Va. 137, 5 S. E. 461; *Boyd v. Gunnison*, 14 W. Va. 1; *Ward v. Ward*, 21 W. Va. 262; *Thompson v. Catlett*, 24 W. Va. 525; *Lynch v. Henry*, 25 W. Va. 416.

Our statute makes 6 per cent. the legal rate of interest for the loan or forbearance of money, or other thing of value, and forbids any person from taking, on any contract, money or other thing above the value of such rate, and makes all such contracts and assurances, made directly or indirectly, for a loan or forbearance of money at a greater rate, usurious as to such excess of interest agreed to be paid, and no further; and it provides for the trial of the questions: (1)

Was the contract assurance or other writing usurious? (2) If usurious, to what extent? (3) Whether or not interest has been paid on the contract or writing above 6 per cent., and, if so, to what extent? It also gives the borrower the right to exhibit his bill in equity against the lender, and compel him to discover upon oath the money or thing really lent, etc.; and if property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made or is apprehended, an injunction may be awarded to prevent such sale pending the suit. See Code, (Ed. 1891,) c. 96, p. 713. This was one of the purposes, and only one among others, for which this suit in equity was brought, and the injunction prayed for. The court, on hearing the cause on the pleadings and proofs then in, referred these questions as to usury, mentioned in the statute, to Commissioner Lazzell, and I cannot see any good reason in this record why such reference was not eminently proper; and, if we are to apply to the findings and conclusions of the commissioner the rule already announced, it is difficult to see why they should not be held to be, in the main, correct. Without going into details, it is only necessary to say that I do not think there is any clear and decided preponderance of testimony against his finding on the question of usury; at any rate, the court ought to pass directly upon the report.

But there are reasons why this cause should have been retained, and the trust executed under the direction of the court, no matter what conclusion the court may have reached in regard to the alleged usury. Trusts are especially the subject of equitable supervision, and courts of equity are always open, at the instance of the cestui que trust, to compel trustees to perform their duties. They will also interfere by injunction to restrain the improper exercise of the powers of the trustee, (1 Bart. Eq. Pr. 444,) whose duty it is to look to the interests of the trust debtor as well as those of the creditor. In deeds of trust, especially those of long standing, where the amount due and to be raised by a sale is uncertain, (Hogan v. Duke, 20 Grat. 244, 253,) where there are various deeds of trust or other incumbrances, (Horton v. Bond, 28 Grat. 815; Cole v. McRae, 6 Rand. [Va.] 644,) where the legal title is outstanding, (Rossett v. Fisher, 11 Grat. 492, 498,) where there is a cloud upon the title, (Lane v. Liddall, Gilmer, 130,) or, in conclusion, any impediment to a fair execution of the trust, the trustee, who is the agent of both parties, and bound to act impartially between them, may and ought of his own motion to apply to a court of equity for his own safety, as well as for the interest of those concerned, to remove the impediment and direct his conduct; and, if he should fail to do this, the party injured by his default has an unquestionable right to do so. Rossett v. Fisher, 11 Grat. 492, 498, opinion of Judge Moncure, who refers to 1 Lomax, Dig. 322-326; 1 Tuck.

Comm. bk. 2, pp. 101, 106; Quarles v. Lacy, 4 Munf. 251; Gay v. Hancock, 1 Rand. (Va.) 72; Chowning v. Cox, Id. 306; Gibson v. Jones, 5 Leigh, 370; Miller v. Argyle, Id. 460; Wilkins v. Gordon, 11 Leigh, 547. See opinion of same judge in Hogan v. Duke, 20 Grat. 224, 253. See opinion of Burks, J., in Horton v. Bond, 28 Grat. 815, 822, where the same principle is applied to decrees of sale. See, also, Shultz v. Hansbrough, 33 Grat. 567, 576, (opinion of Burks, J.) The loans in this case run through a period of ten years, were secured by four different deeds of trust, and as many different trustees all made defendants. It is true that the last deed of trust, dated January 1, 1885, to Clarence B. Dille, trustee, who was about to sell, recites the \$3,500 thereby secured as the balance due at that date, after deducting all credits, upon three deeds of trust theretofore executed by plaintiff, reciting them; but the creditor did not execute the deed of trust containing such recital, and, although he accepted it, no technical release was ever executed by him according to section 1, c. 76, of the Code, so that it might be a question whether the naked legal title to the two important tracts did not still stand vested in Marshall M. Dent, trustee in the deed dated November 10, 1876, and of the two smaller tracts in O. H. Dille, trustee. Again, Clarence B. Dille, trustee, advertised that he would sell the whole under the deed of trust, in his notice representing it as the only body of coal on the east side of the river for sale, underlaid with over 150 acres of coking coal. Now, it may be that this mineral might, of itself, bring enough to pay the trust debt, but the trustee, without some competent authority, to whose directions he could look for his guidance and protection, could not sell the mere "mineral right;" or it may be that one of the tracts would bring enough, and in either mode the trust debt might be fully satisfied, and the plaintiffs left still owners of their farm and home. The land is estimated to be worth \$14,000, and I infer from the record that the vein of coking coal constitutes a good part of such value. See Mickie v. Jeffries, 21 Grat. 334; Stove Works v. Gray, 9 W. Va. 469. See Bart. Ch. Pr. 446. The bill itself is framed, not only with reference to purging the trust debt of usurious interest, but alleges all these additional grounds for having the trust executed under the sanction and direction of the court; and for this plaintiffs expressly pray. Nor do defendants, in their answer, attempt to deny, explain, or remove any of these impediments to a sale in the county by the trustee; only they insist that the debt is all due, that there is no usury, and, if any such usurious interest had been taken by the testator, it was more than five years before the bringing of the suit, and they set up and rely on the bar. My construction of the third clause of section 6, c. 96, of the Code, is that the excess of interest paid is to be credited, as

long as any part of the usurious contract remains unpaid. This is a point, however, to which the commissioner's attention was not directed, and upon which he has not reported. We are of opinion, therefore, that the decree of April 12, 1892, is erroneous, and must be reversed, and that the cause must be remanded for further proceedings; the cause to be retained, and the trust executed, under the direction and sanction of the court.

POWERS v. COPE.

(Supreme Court of Georgia. Jan. 8, 1894.)

LANDLORD AND TENANT — CONTRACT — QUESTION FOR JURY — LIABILITY OF LANDLORD FOR REPAIRS.

1. Where premises are leased for one year by rent contract, with the privilege, at the tenant's option, to retain them the following year at such price as any one else would give, and this option was exercised, the tenant giving his notes for the second year's rent, and the contract for this year being otherwise in parol, it is a question for the jury, there being evidence on that subject, whether the parol contract embraced an agreement to apply certain terms of the previous rent contract to the second year's occupation or not.

2. A written contract, in which the tenant stipulates to make all needful repairs at his own expense, "except the putting on of a new roof, new doors, and new floor," exempts the landlord from making any repairs other than those expressly excepted, and even from making those, unless they are needed and called for by the tenant. If no new roof be needed or called for, the fact that new valleys or gutters, or some other repairs on the roof, became necessary, would not charge the landlord. The phrase "new roof" is not ambiguous.

3. If repairs to the sidewalk were embraced in the tenant's undertaking, they would not be chargeable to the landlord, though made at the latter's request; and if they were not so embraced, as the landlord did not stipulate in the rent contract concerning them, they were not matter for set-off, in resistance to a distress warrant for the rent, though the tenant might be entitled to maintain an action therefor.

4. There was evidence to warrant the verdict, and the court did not err in denying a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action by V. S. Cope against J. C. Powers to recover rent by distress warrant. There was a verdict for plaintiff, and a new trial denied. Defendant brings error. Affirmed.

The following is the official report:

Mrs. Cope obtained a distress warrant against Powers upon her affidavit alleging that he owed her \$750 for rent of the described premises in Macon; that \$150 of the same was due and unpaid; that the balance was not due, but would become due in certain installments; and that Powers was seeking to remove his goods from the premises. Powers defended, alleging he does not owe plaintiff any sum for rent. He rented the premises as a bar, and to do business therein. The house is wholly unfit for a business place, because it leaks so badly

it affords very little protection from water during rain. Further, because of this leakage, his goods, carpets, etc., have been damaged \$50, which is far more than the house is worth per month for rent, and he asks to recover this amount from plaintiff. Further, plaintiff has become liable to him, on account of the leaky condition of the house, \$650, for he leased the house for three years, with a view of using it for that time, has spent \$650 in repairing the inside of the house, plastering, etc., in order to make it decent and suitable for a place of business. but, on account of plaintiff's failure to keep the roof in proper condition, it leaks so badly that all of said work has been destroyed, the plastering has fallen off, and the wall paper fallen loose, thus rendering the house unsightly and unfit for business. Further, that he expended on the sidewalk, by direction of the chief of police, and the consent and request of plaintiff, \$22, which he asks to recover of her. He gave plaintiff notice of the defective condition of the roof, but, disregarding her obligation, she neglected and refused to repair it. He amended, amplifying his defense, and making more specific statements, and further alleging that he notified plaintiff that the floor and timbers under the floor were badly decayed and unfit for use, yet she refused to repair the same, and he was compelled to put a new floor and new sleepers under the floor, in order to make the house tenable, which cost him \$21, and which he seeks to recover. Also, that he was constructively evicted by plaintiff, because of her allowing the roof to become so leaky as to render the house untenable, and thus compelling him to leave the premises. There was a verdict for plaintiff for \$750, and, defendant's motion for a new trial being overruled, he excepts.

The motion contained the grounds that the verdict was contrary to law, evidence, etc., and that it was contrary to a specified portion of the charge, and the evidence applicable thereto. Also, because the court erred in charging: "If you believe from the evidence that it was understood and agreed between them that the terms of the written contract for the year 1892, ending August 1, 1892, should also apply to the renting of the year from August, 1892, to August, 1893, then the court charges you that Mr. Powers agreed in that contract to do all the work at his own expense, without deduction from the rental, which was necessary to keep the property in repair, including all miscellaneous work on doors, windows, locks, gas, water, fixtures, etc., and to do all and every sort and kind of work, to any extent whatever, necessary and proper to keep up the inside of said building in good repair, except the putting on of a new roof, new doors, and new floor." Alleged to be error, simply because a recital of the work was incorporated in the contract, and calculated to mislead the jury; a great many kinds of repairs be-

ing mentioned, about which there was no contract. Also, because the court did not explain to the jury how that contract affected the issues on trial. Error in construing the contract, in the charge, as follows: "A new roof would not mean the keeping of a portion of the roof in repair. A new roof would [not] mean the stopping of the leaks in a gutter." Alleged to be error, without going further, and telling the jury what was meant by the words "a new roof," as used in the contract, and as misleading. Also, in not charging, in this connection, that the words "a new roof," as used in the contract, meant if new material was used, as if it became necessary to cut out and put in a new valley, that that would be a new roof, in the sense used in the contract. Because the court erred in failing to charge that if the valley had become decayed, and it was necessary to cut the old one out and put in a new one, that would be a new roof, in the sense as used in the contract, and it would be plaintiff's duty to have that done; defendant contending that the valleys had so badly decayed that it was impossible to repair them, and that, in order to stop the leaks, it was necessary to put in a new valley. Error in charging: "The court charges you that, if you believe Powers fixed a sidewalk for Mrs. Cope from a notice from the chief of the police that she must fix it, that he cannot offset that against the claim for rent. He would have to resort to some other means. You will not consider any evidence, then, as to the amount paid out for the sidewalk." Alleged to be error because the item of fixing the sidewalk was fully pleaded and proven without objection from the court or plaintiff. Because the court erred in construing the contract between the parties to mean that a "new roof" meant an entire new roof, and also in submitting to the jury to say whether the words "a new roof" meant an entire new roof, or the use of new material, as new tin, in repairing the roof; the words "new roof," as used in the contract, being ambiguous. The contract in question was one of lease of the property for a year from September 1, 1891, to September 1, 1892, signed by plaintiff and defendant, and contained stipulations that Powers would keep the storehouse and kitchen in good repair during the continuance of the lease, ordinary wear and tear excepted; it being declared and agreed by him that the property, at the time of the execution of the lease, and at the time of the first occupation thereunder, was in good repair and condition; that he agreed to do all the work at his own expense, and without deduction from the rental price, necessary to keep in repair the building, "including all the miscellaneous work on the doors, windows, locks, gas, water, fixtures, roof, etc., and to do all and every sort and kind of work, to any extent whatever, necessary and proper to keep the inside of said building in

good repair, except the putting on of a new roof, new doors, and new floor."

L. D. Moore, for plaintiff in error. A. Proudfit, for defendant in error.

PER CURIAM. Judgment affirmed.

METROPOLITAN ST. R. CO. v. JOHNSON. JOHNSON v. METROPOLITAN ST. R. CO.

(Supreme Court of Georgia. April 3, 1893.)

WITNESS — EXAMINATION — ACTION BY HUSBAND FOR INJURIES TO WIFE — EVIDENCE — DAMAGES.

1. Where a question to a witness is objected to as leading, and the court, without directly sustaining the objection, suggests a better form, which is adopted by the examining counsel, there is in this no cause for a new trial.

2. On the trial of an action against a street-railroad company for damages to the plaintiff occasioned by negligent injury to his wife, sustained in consequence of running a dummy against her while she was endeavoring to cross a street in front of a train, it is not competent to prove what was the usual custom of pedestrians when they undertook to cross a street along which cars drawn by dummies were passing.

3. In an action by a husband for loss of his wife's services, occasioned by a tortious personal injury to her, he can recover the reasonable value of such services as have been lost to him from the time of the injury to the date of trial; and in calculating the amount the jury may take into consideration the nature of the services, and all the circumstances of the case. There need be no direct or express evidence of value, either by the day, week, month, or any other period of time, or of any aggregate sum. The peculiar relation which the wife sustains to her husband and his household takes her services out of the rules of law which apply to computing the value of services rendered by hirelings or ordinary servants.

(Syllabus by the Court.)

Error from city court, Atlanta county; Howard Van Epps, Judge.

Action by J. F. Johnson against the Metropolitan Street-Railroad Company to recover for damages resulting from personal injuries sustained by plaintiff's wife. There was judgment for plaintiff, and a new trial denied. Defendant brings error, and plaintiff assigns error by cross bill of exceptions. Affirmed.

N. J. & T. A. Hammond, for plaintiff in error. Burton Smith and W. H. Pope, for defendant in error.

BLECKLEY, C. J. 1. The court made no direct ruling as to whether the question objected to as leading was or was not so, but suggested what the presiding judge deemed a better form of question. This suggestion was adopted by counsel, and the question, in its original form, was not pressed. Surely no cause for a new trial can be found in this.

2. In trying the question of negligence by the company or by its engineer relatively to Mrs. Johnson on the particular occasion in controversy, and incidentally the question of

her contributory negligence, it was not competent evidence to show that the usual custom of pedestrians, as observed by the engineer, had been on former occasions to do thus and so. Their conduct would be no measure of diligence for Mrs. Johnson, because that measure is to be found, not in the conduct of such persons merely as the engineer had observed, but in the conduct of every prudent person who might be placed in like circumstances with those which environed Mrs. Johnson at the time of this occurrence. This standard was not one for proof by witnesses, but was already in the minds of the jurors. They were to compare her conduct with that standard, and not with a standard raised in the mind of the engineer, or which might be raised in their own minds by what he had noticed relatively to the usual conduct of certain unknown and unnamed persons, who may have been more or less diligent than prudent persons generally. Nor was the rejected evidence relevant touching the company's or the engineer's negligence, for the engineer was bound to anticipate that Mrs. Johnson would act as a prudent person, according to a legal or jury standard, and not merely according to the usual custom of those pedestrians whom he himself had personally observed.

3. The action being for a tortious personal injury to the plaintiff's wife, the court certainly did not err in charging the jury that, if the injury was committed, he could recover the reasonable value of her services which were lost to him during the period between the time of the injury and the date of trial. Without adjudicating the question, we will observe that our present opinion is that the court could have gone further in respect to time, so as to embrace any loss of service which would be reasonably certain to occur on account of the injury after the trial and during the probable existence of the coverture, the probable duration being measured by the continuance, according to the mortuary tables, of the joint lives of the matrimonial pair. Nor did the court err in charging that in calculating the amount of the damages the jury could take into consideration the nature of the wife's services, and all the circumstances of the case. When the loss of a wife's services, resulting from a personal injury to her, is to be compensated for, she is not to be treated as an ordinary servant or as a mere hireling. *Cooley, Torts, *226; Railroad Co. v. Goodman, 62 Pa. St. 329.* She sustains to her husband and his household a relation special and peculiar. Her place cannot be supplied. No other is capable of filling it. Some wives perform manual labor, others do not; yet the husbands of the latter, no less than those of the former, would certainly be entitled to compensation from wrongdoers for causing inability to perform service. The actual facts and circumstances of each case should guide the jury in esti-

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inating for themselves, in the light of their own observation and experience, and to the satisfaction of their own consciences, the amount which would fairly and justly compensate the plaintiff for his loss. Certainly some elements of loss, such as manual labor, would be subject to estimation by witnesses; and, if evidence of this kind were produced, of course the jury should consider it together with the other facts. But what we hold distinctly is that there need be no direct or express evidence of the value of the wife's services, either by the day, week, month, or any other period of time, or of any aggregate sum. The court committed no error in denying a new trial.

While the argument here was in progress, counsel for defendant in error expressed a willingness for the judgment to be reversed, and entered his consent to that effect in writing on the transcript of the record. This was done in the hope of a reversal on the cross bill of exceptions, and for the sake of the opportunity which that reversal would afford to recover in another trial more damages than the jury awarded by the verdict already rendered. But we are satisfied with that verdict, as was the court below, and consequently we leave it to stand. Judgment affirmed. Cross bill of exceptions dismissed.

COLLEY v. GATE CITY COFFIN CO.

(Supreme Court of Georgia. Nov. 6, 1893.)

INJURIES TO EMPLOYE — DEFECTIVE APPLIANCES — AMENDING DECLARATION — LIMITATION OF ACTIONS.

The action being by an employee against his employer for personal injuries alleged to have resulted from defective machinery and appliances which the employee was using in the line of his duty, the declaration is amendable, at the trial, by varying and amplifying the particulars in respect to which the machinery was defective, and in respect to the manner in which the injuries were inflicted, the amendment evidently relating to the same occasion, the same occurrence, the same injuries, and the same machinery referred to in the declaration. No new cause of action is introduced, either with reference to the statute of limitations or any other rule of law. The amendment offered being good in substance, and relevant, the court erred in rejecting it, and this error vitiated the trial, and rendered nonsuit, in which it resulted, erroneous.

(Syllabus by the Court.)

Error from city court of Atlanta: Howard Van Epps, Judge.

Action for personal injuries by John W. Colley against the Gate City Coffin Company. From a judgment of nonsuit, plaintiff brings error. Reversed.

The following is the official report:

On May 14, 1892, Colley filed his declaration, alleging: On May 7, 1890, he was in the employment of defendant, engaged in curving sides of boxes or for boxes, and discovered that the belt that ran the curve saw was off the pulley. The sand drum was run by the same shafting that ran the curving

saw, and petitioner had to adjust the belt from the tight pulley to the loose pulley in order to stop the shafting so that he could place the saw belt on the pulley; and, while attempting to adjust the belt, the hanger was torn loose from the floor, striking him with great force, breaking his collar bone in two places, and splitting the skin, besides breaking two ribs. He then set out his pain and suffering; that the injuries were permanent; his capacity to earn money reduced one-half; that he was able-bodied before the injury, and earned a certain sum per day, etc.; and further alleged he was in no wise to blame, but it was the result of gross negligence on the part of defendant. All the machinery was run by steam power, and the method adopted by him in attempting to adjust the belt was the usual and only way he knew how to adjust it, and was in keeping with directions that had been previously given him, or rather he did it as he had noticed others do it; and, but for the fact that the shafting was improperly and unsafely put up, the injury would not have happened. The countershafting was out of balance from being bent or improperly hung, and added to the cause of the injury. This defect was also unknown to him. He had only a very short experience in working with and managing machinery. He also alleged that this cause of action was sued to the December term, 1890, of the court, dismissed by order of the court on March 25, 1892, and renewed in the time required by law. Upon the trial plaintiff's counsel asked him as a witness to state how the hanger that held the countershafting to the floor was fastened to the floor. An objection to this was sustained, on the ground that there was no allegation in the declaration complaining of the fastening of the hangers. Plaintiff's counsel also asked him the question, "What made it break loose at that end?" and he answered: "I saw nothing to make it break loose. If it had been properly put to the floor, it would not have broken loose, I don't believe." On objection the court ruled this answer out, upon the ground that there was no allegation that it was not properly put to the floor. Plaintiff's counsel also asked one Ashley, who was an expert witness, to state how machinery on the order of this (indicating) should be attached to the floor. On objection the court held that under the declaration plaintiff could not attack the fastening of the hanger to the floor. Thereupon plaintiff offered to amend by adding to the declaration that the shafting or hangers were improperly or unsafely fastened down; that the same should have been bolted to the floor, or longer leg screws should have been used in fastening it down; that those used were entirely too short, and in this way the shafting or hangers were improperly and unsafely put up. The court refused to allow this amendment, making the following ruling: "The court recognizes the doctrine fully that a

plaintiff ordinarily, who has filed an action in time, may vary his averments by amendment with additional grounds of negligence. He may add additional grounds of negligence not suggested in the original declaration; and, if the original declaration was filed in time, the fact that such an amendment was offered after the lapse of the statutory time will not defeat its allowance. Under those circumstances, the amendment would relate back to the original action, and will be treated as if originally ingrafted upon it. I say I fully assent to that doctrine of law. But the case is different where the cause of action was barred at the time that the suit was brought. In this case this action was barred when this suit was brought, except in so far as it specifically revived or renewed the action of the original declaration. In the original declaration the ground of recovery was sought both upon the suggestion that the shafting was bent and out of balance, and also upon the ground that the hanger was insecurely fastened to the floor. The new declaration specifically assigns the ground of negligence to be that the shaft—I suppose it means the countershaft, though it does not say so—that the shaft was out of balance; and that the reason it was out of balance was because it was bent, or improperly hung. I hold that there is no allegation at all in this declaration which can be construed, upon the principles which govern the construction of pleadings, to be an allegation, even in general terms, that the hanger was not properly secured to the floor. That being true, the amendment offered now to an action barred when the suit was begun cannot be entertained." On this ruling the plaintiff assigned error, because the first declaration charged specifically that the hanger was insecurely fastened to the floor, and, there being enough in the second declaration to amend by, the hanger and shafting and countershafting being inseparable, the amendment should have been allowed, and the statute of limitations did not apply. He further assigned error upon the rejection of testimony as already stated, and upon the grant of a nonsuit on the close of his evidence.

R. R. Arnold, J. A. Van Winkle, and R. J. Jordan, for plaintiff in error. Hall & Hammond, for defendant in error.

LUMPKIN, J. The main errors complained of in the bill of exceptions were the rejection of an amendment offered to the plaintiff's declaration and the granting of a nonsuit. It is unnecessary to discuss the assignments of error with reference to the rejection of certain testimony which the plaintiff sought to introduce, because, if the amendment to the declaration had been allowed, the court would doubtless have admitted this evidence. The substance of the declaration and of the amendment offered

is set forth in the reporter's statement. The amendment should have been allowed, and the case should have been submitted to the jury. We have not, in deciding this case, paid any attention to the contents of a previous declaration filed by the plaintiff against the same defendant, because that declaration is not properly before this court. It was not introduced in evidence, nor was a copy of it attached as an exhibit to the present declaration, or its substance set out therein. Therefore the specification of the former declaration in the bill of exceptions as a part of the record of the present case was improper, and the judge had no authority to recognize or order it to be sent up as a part of such record. Taking the second declaration,—the one now before us,—and the amendment offered to it, the first question is, did the amendment set up a new and distinct cause of action, or was it merely an amplification of that contained in the declaration? There can be no doubt that this declaration is very loosely and imperfectly drawn. It would seem that with very slight effort or care the counsel who prepared it might have made it much more clear and satisfactory, and thus have relieved the trial court and this court of the labor and investigation unnecessarily imposed upon them in passing upon its sufficiency. It does, however, state that the plaintiff was an employe of the defendant; that he received serious personal injuries, which resulted from defective machinery and appliances which the employe was using in the line of his duty; that the plaintiff was in no wise to blame, and that the injuries were the result of the gross negligence of the defendant in improperly and unsafely putting up the shafting, which was a part of the machinery in question. The purpose of the amendment was undoubtedly to amplify, and to some extent vary, the particulars in respect to which the machinery was defective, and also in respect to the manner in which the injuries were inflicted. It is also quite clear that this amendment related to the same occasion, the same occurrence, and the same injuries referred to in the declaration, and consequently it does not introduce a new and distinct cause of action.

We will now inquire briefly as to the bearing of the statute of limitations upon this case as affects the question of amendment. The declaration having been filed more than two years after the injuries therein complained of, the plaintiff's right of action is barred, unless the present suit is in fact a renewal of a former one for the same cause of action, and was instituted within six months from the dismissal of the original suit. It will be observed the declaration alleges that the former action was brought to the December term, 1890, of the city court of Atlanta, and was dismissed on the 25th day of March, 1892, and that the

present suit, filed May 14, 1892, was a renewal of the original action. Under section 2932 of the Code, the present action was brought in time if, taking together the declaration and the amendment offered to it, they relate to the same cause of action as that for which the first suit was brought. Whether they do or not is a question of fact which could be easily settled by a comparison of the two declarations, but it was no obstacle to the allowance of the amendment that the action would have been barred if the present suit had been delayed until the time the amendment was offered, provided this suit itself was brought in time. *Verdery v. Barrett*, 89 Ga. 349, 15 S. E. 476. See, also, *Railway Co. v. Thomas*, 89 Ala. 294, 7 South. 762, in which it was held that amendments adding new averments of facts more clearly showing the negligence complained of, or otherwise altering the grounds of recovery, or varying the alleged mode in which the defendant had violated its duties, should be allowed; and that such amendments were not subject to the bar of the statute of limitations if the action was commenced within the time designated by the statute.

As to the effect of the plaintiff's failure to introduce the record of the former suit, and consequently to prove its existence or character, we will remark that it was incumbent on him to show that in point of fact the present suit was a renewal of the former one. This he could not do without putting the record in evidence, and, consequently, but for the error of the court in rejecting the amendment to the declaration, the granting of the nonsuit would have been undoubtedly right, on the ground that the plaintiff failed to take his case out of the statute of limitations. This error, however, vitiated the entire trial and its result. By the rejection of this amendment the plaintiff was cut off from making out his case. We have already suggested that this ruling deprived him of the benefit of some testimony which he actually sought to introduce, and it may be that it prevented his offering other testimony which might have sustained his action. At any rate, he was entitled to a trial upon his declaration as it would have been with the amendment allowed. He would then have had a full and fair opportunity to get his entire case fairly and squarely before the jury. The judgment granting the nonsuit was necessarily infected with the erroneous refusal to allow the amendment, and therefore it cannot stand. Judgment reversed.

COLEMAN v. EASTERLING.

(Supreme Court of Georgia. Nov. 20, 1893.)

SPECIFIC PERFORMANCE—PLEADINGS—TENDER.

The allegations of the petition seem sufficient to take the case out of the statute of

frauds upon the ground of part performance; but there being no distinct and definite averment as to the balance due by the plaintiff to the defendant, or of a tender thereof, this court cannot say the trial court erred in holding the petition did not set forth a state of facts which would entitle the plaintiff to the relief prayed for, or in dismissing the action. Under the petition as it stands, it does not appear that the plaintiff's cause of action had fully ripened. Had he made a proper tender before filing his petition, and alleged this fact, the question presented would have been different.

(Syllabus by the Court.)

Error from superior court, Tatnall county; C. C. Smith, Judge.

Action by D. W. Coleman against Jesse J. Easterling for specific performance of a contract, and other relief. From a judgment dismissing the action, plaintiff brings error. Affirmed.

The following is the official report:

Coleman filed his petition for accounting, injunction, and specific performance against Easterling. When the cause came on for trial, counsel for Easterling, stating that the answer to the petition could not be found, but that it had been filed, and that he desired to file a motion to dismiss the cause, did file an amendment to his answer, in which he alleged that the petitioner had not presented such a case as entitled him to the relief sought; that petitioner had not set out such a contract as the court would enforce, the contract being in respect to the sale of land, and existing in parol, and there being no part performance thereof, nor any act done in pursuance of the contract; and that, so far as petitioner undertook to set out a contract in writing, it appeared from the petition that said alleged contract was unsigned, and in violation of the statute of frauds. Petitioner was allowed to amend his petition, as will hereafter appear. The court sustained the motion to dismiss, and, to this ruling, petitioner excepts.

The petition alleged: Two tracts of land in Tatnall county, describing them, were sold at sheriff's sale, one of them on July 4, 1882, under an execution from the superior court against petitioner in favor of Hardwick, Sheppard and McDonald being the purchasers at the sale, in consideration of \$97.25. The other tract was sold by the sheriff on the first Tuesday in September, 1882, to McGee, for \$50, this sale being under a mortgage *fi. fa.* in favor of Perry against petitioner. Deeds were made by the sheriff to the purchasers. McGee made his purchase for Sheppard and McDonald, to whom he afterwards conveyed. Copies of the sheriff's deeds are attached. Before said sheriff's sales, petitioner had been for several years the owner and possessor of the lands, and the same were bought at the sheriff's sales by Sheppard and McDonald at his special request, he not then being able to meet the obligations; it being then and there agreed between him and them that they would hold the title as security for the money advanced

by them in buying the same, and also as security for other indebtedness due them by him; and in consideration thereof they permitted him to have possession of said lands after the sheriff's sales, and manage and treat the same as his own in all respects, he paying taxes thereon up to the present time. Sheppard and McDonald, during all the time they held the title as security, openly announced they would not sell the lands to any one except with petitioner's consent, and with the understanding that he might have the right to redeem them by paying the amount of the debt due. He has paid them the amount due on the purchase of the lands, holding their receipts therefor, but owed them other money, for which they still hold the title by his consent; and in the fall of 1887 they demanded of him a settlement and payment of the amount due them, offering to reconvey the title to him, or convey it to any one whom he might name, to be held as security for the money borrowed to pay them. He induced Easterling to advance him the money by paying it direct to them, and taking title from them as security therefor, and for any other sums which, in the business between him and Easterling, might become due to Easterling by him; and thereupon Easterling, at his special request, and under said agreement, which was in parol, took title to the land from them on February 9, 1888, paying them the \$332. Copy of this deed is annexed. The agreement between Easterling and petitioner was substantially as is set out in the paper annexed, marked "Exhibit D," and, after the deed was made to Easterling, he stated to petitioner he would put the contract between them in writing, giving him the two years agreed on to redeem the land in, which was assented to by petitioner; but said contract was never made by Easterling, though petitioner is informed and believes that the paper annexed, the original of which is in the hands of McGee, attorney at law, was drawn, by direction of Easterling, by McGee as Easterling's attorney; and Easterling has admitted to petitioner, at divers times since February 10, 1888, and to others, that petitioner had two years in which to redeem the lands in accordance with the understanding between him and petitioner; nor did Easterling ever deny that such was the contract until several months ago, and after the Savannah & Western Railway Company had surveyed its line through the land, greatly enhancing its value. In addition to the \$332 paid by Easterling, with interest thereon at 8 per cent., petitioner also owed him about \$280, with interest, the whole of which, it was understood and agreed between them, was to be secured to Easterling by the title to the lands which he obtained as above mentioned. In pursuance of the agreement between him and Easterling, petitioner proceeded in conformity therewith, in cutting, hauling, and drifting timber to the mills named therein, deliv-

ering the same to Easterling, who kept accounts of the same, and showed to petitioner, in the spring of 1888, that, while the business up to that time had been unprofitable to petitioner, there was yet a balance in his favor, on the timber so delivered, of \$48.40, which Easterling said he would pass to petitioner's credit; and it was then understood between them that petitioner was not to be compelled to cut and deliver to him any more timber under the contract at the then prices, it being an unprofitable business. Besides the \$48.40, there are various other amounts due him by Easterling to be put against his indebtedness to Easterling, in the way of overcharges, some of which have been admitted by Easterling, and for other items, the whole amounting to about \$125. He has never been able to get a full accounting with Easterling, but offered, about October 18, 1889, to pay him, upon an accounting between them, all the money due him by petitioner, which Easterling then declined, the offer being coupled with the demand on petitioner's part to have the title to the lands conveyed to him by Easterling; Easterling stating that he was willing to receive payment of the amount due him outside of the \$332, besides interest, named in the deed, but would not receive the \$332 and interest, and make title, as demanded. Petitioner is in possession of the land, and has been for several years before 1882 and since; has annually paid the taxes on the same; has made leases upon the same during 1889, for turpentine purposes; and has had a tenant on the land cultivating a portion of it,—the land lying on either side of petitioner's residence,—which is owned by him, and he exercising acts of ownership continuously over all of it. The land is worth about \$1,600, Easterling having offered to buy it from him, shortly before the time he took title from Sheppard and McDonald, and to pay him \$1,000 for it, and since then it has increased in value because of the location of the railroad mentioned. He has done all he could in order to comply with his contract with Easterling in good faith, and has been and is ready to come to an accounting with him, and pay him all he owes him; but Easterling refuses to receive it, sometimes declaring he is under no obligation to make title, and sometimes that he is waiting for the two years to expire, when he will dispose of the land as he sees fit. Petitioner prayed that Easterling might bring his deed into court; that he be enjoined from parting with the title to any one other than petitioner; that he be decreed to specifically perform his contract, and make deed to petitioner, upon payment by petitioner to him of the money found to be due by petitioner; and for general relief and process, and temporary restraining order.

Exhibit D, referred to, was in form a contract between Easterling and petitioner, dated February 10, 1888, but unsigned. It stated: In consideration of a promissory

note that day made and delivered to Easterling by petitioner, for amounts stated, with interest, and due two years after date, Easterling had bargained with petitioner the tracts of land, describing them; that Easterling agreed to allow petitioner to cut the timber growing thereon, and, if necessary, to make advancements to enable petitioner to cut, haul, and run the timber to two certain mills, at either of which the timber was to be delivered to Easterling, who was to take charge of it, have it sawed, carried to Darien, and sold, and, after deducting the expenses thereof, to credit upon the notes of petitioner the net proceeds of the sales, after deducting amounts advanced to petitioner to enable him to cut, haul, and run the timber to said mills; that petitioner agreed to cut all the marketable timber growing on the lands, and deliver it to Easterling at the places mentioned, as fast as he could, and in no event was the timber so cut to be petitioner's property until each note mentioned in the contract had been settled in full; that petitioner agreed for Easterling to take charge of all such timber, and after deducting the expenses mentioned, or the advances made, to then credit the net proceeds upon petitioner's notes; that petitioner agreed, in the event he cut any of the timber and failed to deliver it to Easterling at the places specified, to forfeit whatever amount he might have paid on the notes, and relinquish all claim he might have to the land unto Easterling, and, in the event he failed to pay the notes, with interest, by the time they were due, to forfeit whatever amount he might have paid by the cutting, hauling, or drifting timber, or otherwise, and also relinquish all claim he might have to the land by reason of any payments he might make to Easterling; and that Easterling agreed, if petitioner paid the notes when due, with money or anything he would accept in lieu thereof, he would make to petitioner title in fee simple to the land; otherwise, it was mutually agreed the contract should no longer be binding on Easterling.

The amendment to the petition alleged: Said written contract was not signed by the parties, because of the trust and confidence reposed by petitioner in Easterling. Petitioner relied upon the declaration made by Easterling to him that it made no difference whether it was signed or not, and Easterling finally, finding that further deception would not avail, declared that the paper had been destroyed. Said contract was prepared by McGee under Easterling's direction, and expressed the agreement made between the parties. In pursuance and in part performance of it, petitioner made his arrangements to cut, and did cut, timber until about July 1, 1888, cutting, hauling, drifting, and delivering to Easterling 300 pieces, worth \$900 or other large sum, which Easterling sold, and the exact net receipts from which are unknown to petitioner. Aft-

er Easterling found that petitioner had obtained from McGee a duplicate of said contract, Easterling admitted that he had said written contract; and petitioner charges that the contract so made was to have been presented by Easterling to him for signature, but, relying upon the assurance of Easterling that he would present it for signing, and have petitioner sign and deliver the notes petitioner was to give, petitioner went to work, cutting, hauling, and delivering the timber, and Easterling went on making advances for provisions and expenses in drifting and hauling the timber. In this way the mutual dealings continued during the timber season, which ended in July, 1888, when it was mutually agreed that, owing to the low prices of timber, the cutting would be discontinued. Thereupon it was agreed between them that the timber should be leased for turpentine purposes, and the rent therefor, or so much thereof as necessary, be applied to petitioner's indebtedness to Easterling; and in pursuance of this agreement the land was so leased, and the very money tendered to Easterling was in pursuance of the agreement to lease, and derived from the lease. This money so tendered was to pay principal and interest of the indebtedness due by petitioner to Easterling, and the tender is continued.

Garrard, Meldrim & Newman and H. J. McGee, for plaintiff in error. Hines, Shubrick & Felder, for defendant in error.

LUMPKIN, J. The reporter's statement sets forth, in substance, the allegations of the plaintiff's petition, to the dismissal of which he excepted. His contract with the defendant not being in writing, it was insisted that it was within the statute of frauds, and therefore not binding. The allegations of the petition, considered in connection with Exhibit D thereto, are perhaps sufficient to show there had been such a part performance by Coleman as would take the case out of the statute. The title to the lands was in Sheppard and McDonald, by virtue of deeds from the sheriff, who had sold the lands as the property of Coleman. They had agreed to hold the title as security for the purchase money, as well as for other indebtedness of Coleman to them, and to allow Coleman, who continued in possession, an opportunity to redeem the property. He induced Easterling to settle his indebtedness to Sheppard and McDonald, and to take from them a title to the lands as security, both for the money paid to them, and for any other sums which, in the business between Coleman and Easterling, might become due the latter; and, upon payment of the amount due to him, Easterling was to convey the property to Coleman, who, in the mean time, was to remain in possession, and who, in fact, did remain in possession. It was further agreed that Coleman was to

have two years in which to redeem the lands, and that he was to cut, haul, and deliver timber growing thereon at certain sawmills owned by Easterling, who was to convert the same into lumber, sell it, and, after deducting expenses, credit upon the indebtedness of Coleman to him the net proceeds of the sales. Coleman, in pursuance of this agreement, did cut and deliver large quantities of timber; and, though the business was not profitable, there was a small balance due to Coleman arising therefrom. The prosecution of this business was either abandoned or suspended, and Coleman thereupon agreed with Easterling to rent out the lands for turpentine purposes, and to apply the rents to the payment of his indebtedness to Easterling. Taking all these averments as true, it may be that, if the petition had been in other respects sufficient, it would have been proper to grant the relief prayed for. We think, however, that the petition is fatally defective because it fails either to distinctly and definitely allege what the balance due by Coleman to Easterling was, or to state any good reason why the plaintiff could not have ascertained and averred what this balance was. The petition is also defective because it does not aver that Coleman had tendered to Easterling any specified sum as the amount or balance due him, which would certainly be necessary in order to authorize a decree for specific performance. The following extracts from the plaintiff's pleadings contain about all that is material or pertinent concerning the balance due Easterling, or the alleged tender. Even a cursory reading will suffice to show they are altogether too vague and indefinite as to these essential matters. The petition alleges that the petitioner "has never been able to get a full accounting with the said Easterling, but has offered, through D. V. Coleman, on or about the 16th of October, 1889, to pay him, (the said Easterling,) upon an accounting between them, all the money, principal and interest, due him by this petitioner, which he then and there declined to do, and would not receive the money from this petitioner in full payment of all the debts due him, the said offer being coupled with the demand on the part of this petitioner to have the title to the foregoing lands conveyed to him by the said Easterling;" and also that petitioner "has done all he could in order to comply with his contract with the said Easterling in good faith; that he has been and is ready and willing to come to an accounting with him, and to pay to him all of the money due to him, as aforesaid, but the said Easterling refuses to receive it." The amendment alleges that the lands were leased for turpentine purposes, as agreed, and that "the very money tendered to Easterling was in pursuance of this agreement to lease, and was money derived from the lease. This money so tendered was to pay principal and interest of the indebtedness due by your petitioner

to defendant, and the tender is continued." Among other things, the petition prays that Easterling may be decreed "to come to an accounting with your petitioner, so that it can be ascertained exactly the sum of money that is due by your petitioner to him, (the said Easterling;)" and that petitioner "may receive a good and sufficient deed from the said defendant of the said lands hereinbefore set out, upon payment by this petitioner to said defendant of the sum of money so found to be due by him." We are therefore fully satisfied that the trial court committed no error in holding the petition insufficient in law. Indeed, under the petition as it stands, it does not appear that the plaintiff's action had fully ripened. If he could not ascertain the exact amount he owed Easterling, and which it would be incumbent upon him to pay, or offer to pay, before he would be entitled to demand a conveyance of the lands, he certainly could have ascertained approximately what that amount was, and ought to have tendered a sum at least sufficient to satisfy the indebtedness. This was necessary to complete his right to a conveyance, and consequently ought to have been done before the action was brought. If a proper tender had been made, and the petition had alleged this fact, the question presented would have been an entirely different one, and it is quite probable the trial judge would then have given the case other and appropriate direction. Judgment affirmed.

In re HARRIS.

(Supreme Court of Georgia. Dec. 18, 1893.)

HOMICIDE—FORM OF VERDICT.

The identical question made in this case as to the form of the verdict in a case of capital homicide was ruled in *West v. State*, 4 S. E. 325, 79 Ga. 773.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Ambrose Harris was tried for murder. The verdict was "Guilty," with a recommendation to the mercy of the court, instead of recommending confinement in the penitentiary for life. He filed an application for a writ of habeas corpus. Denied, and petitioner appeals. Affirmed.

W. E. Morrison, for plaintiff in error. W. W. Fraser, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

COOK v. STATE.

(Supreme Court of Georgia. Dec. 18, 1893.)

MANSLAUGHTER—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

There was no error in any of the charges complained of. The verdict was fully war-

ranted by the evidence, and the refusal of a new trial was undoubtedly right.

(Syllabus by the Court.)

Error from superior court, Houston county; C. L. Bartlett, Judge.

Robert Cook was convicted of involuntary manslaughter, and, a new trial having been denied, he brings error. Affirmed.

The following is the official report:

Robert Cook was indicted for the murder of Lee Turner, and was found guilty of involuntary manslaughter in the commission of an unlawful act. A motion for a new trial was overruled, and the defendant excepted. The evidence shows that the defendant, the deceased, and others were boys playing together, and were friendly. The defendant had a pistol, belonging to his father, (not a self-cocking pistol, but one that required the hammer to be pulled back,) and was handling it very recklessly, snapping it towards some of the others. He was remonstrated with by them, but presented the pistol at the deceased, fired, and killed him. According to the testimony of the brother of the deceased, the latter had just said, "I wouldn't do that way if my pa had a pistol," to which defendant replied, pointing the weapon at him, "Shut your damned mouth, or I'll shoot your damned brains out." Mose Cook testified that defendant said, "Hush, I'll shoot you," and fired the pistol. There was conflict in the evidence as to the age of defendant, his father testifying that he was not quite 12 years old at the time of the killing, and other evidence indicating that he was between 13 and 14 years old. The defendant claimed that he did not intend to shoot, and did not know the pistol was loaded. The motion for new trial alleges that the verdict is contrary to law and the evidence, and that the court erred in its charge to the jury; the parts of which excepted to being as follows: "If you believe he was under 14 and between 10 and 14, and that he did have sufficient mental capacity, intelligence, and will to know and distinguish between right and wrong with relation to the particular act, did know that it was wrong to shoot a man with a pistol, if that was the act in question, or to kill a man, why, then you would be authorized to conclude that he had sufficient mental capacity to distinguish between good and evil, and was responsible for his act, as though he was 14 years old." Error, because the law does not hold a person between 10 and 14 years to the same responsibility for crime as those who have reached the age of 14; and therefore the defendant would not be as responsible, even if he knew right from wrong, as he would if he had reached the latter age. "If a man kill another by shooting him with no regard for consequences, recklessly and carelessly,—as, if a man shoots into a crowd, not caring whether he killed anybody or not, or not intending to kill any particular person, but, recklessly of human life, shoots

into a crowd, and kill any one, his dearest friend or utter stranger,—the law will declare that killing to be murder, and would supply the malice from the reckless disregard of human life, and would call such a killing as that murder; and in a case like that it should not require there should exist any ill will or express malice. The law implies malice from the act, and declares that killing to be murder." "If a workman upon a house in a crowded street were to throw a heavy timber down upon the sidewalk when people were passing, and the tendency of such act was to destroy human life, and a person were to be killed in that way, even though a stranger to the workman, that would not be involuntary manslaughter, but would be murder." These two extracts are alleged to be erroneous, because unauthorized by the evidence and inapplicable to the case, no such issues being involved, and such instructions tending to mislead the jury. "Therefore, if you believe in this case that the defendant intentionally pointed a loaded pistol at the deceased, or pointed a pistol at him not knowing whether it was loaded, or believed it to be unloaded, not intending to kill him, and cocked it, and pulled the trigger, and fired, and killed him in that way, that would be involuntary manslaughter in the commission of an unlawful act." Error, because argumentative, and an intimation that the defendant was guilty of involuntary manslaughter. The court did not give the jury the right to decide for themselves that the defendant was guilty of that offense, but instructed them, if such facts were true, and were proved by the evidence, they could find him guilty thereof. "It could not be said to be an accident that a man should point a pistol at another, not intending to kill him, and should cock it, and pull the trigger, and fire. Such a killing would not be an accidental killing." Defendant contends that this was erroneous, because it did not submit his defense fairly to the jury; and that the court did not enlighten them on section 4302 of the Code, on which defendant relied; and that the court intimated that the killing could not have been accidental.

John R. Cooper, for plaintiff, in error. W. H. Felton, Jr., Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

SAVANNAH & O. CANAL CO. v. SUBURBAN & W. E. RY. CO.

(Supreme Court of Georgia. Dec. 18, 1893.)

RESTRAINING CONSTRUCTION OF BRIDGE OVER CANAL—DISCRETION OF COURT.

On the facts in the record, there was no abuse of discretion in denying the injunction prayed for.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action by the Savannah & Ogeechee Canal Company against the Suburban & West End Railway Company for an injunction. There was judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

The Savannah & Ogeechee Canal Company prayed that the Suburban & West End Railway Company be enjoined from attempting to build and construct a bridge over petitioner's canal, and from obstructing or in any manner interfering with the rights of the petitioner in the premises; and that, as the injury apprehended would be done if immediate remedy was not afforded, a temporary restraining order might issue. Also, that the defendant might be enjoined from attempting to build the approaches to the bridge over petitioner's right of way, and from operating its railroad over said bridge or its approaches. Upon the hearing injunction was denied, to which ruling petitioner excepted. The original petition was filed May 13, 1893. It alleged: Petitioner is a corporation, owning in fee simple a canal connecting the Savannah and Ogeechee rivers. Defendant is a corporation, created for the purpose of operating a street railroad in Savannah and to such suburban points as it may select. Defendant is about to construct a bridge over petitioner's canal, at a point immediately south of the intersection of the canal with the Louisville public road in Savannah, without any authority of law, or without even offering to compensate petitioner. If defendant is permitted to bridge the canal, petitioner will suffer irreparable damage. By amendment petitioner alleged: Defendant is about to build the approaches to its bridge over the right of way of petitioner, and is about to operate its railroad over the bridge, and over the approaches thereto. The amendment was filed May 20, 1893. Defendant answered: Under its charter it has the right to use any street in Savannah, and any public road in Chatham county, under the permission granted it by the mayor and aldermen of Savannah, or the county commissioners. It has obtained the permission from the mayor and aldermen for the use of Railroad street, a part of which is also known as the "Louisville Road," and by virtue of this permission has constructed a bridge across complainant's canal where the canal crosses Railroad street or Louisville road, the bridge being constructed within the width and limits of such street or road. Under its charter, defendant has the rights to construct and maintain bridges, and the bridge so constructed does not obstruct or impede free navigation of the canal. There has been no damage, irreparable or otherwise, to petitioner by the construction of the bridge. Defendant is absolutely solvent, and fully able to respond to any damages. Defendant denies that the approaches to the

bridge interfere with or are over any right of way of petitioner. On the contrary, the bridge is erected over the canal where the canal intersects Railroad street and the Louisville road, which two highways unite at the point where the canal intersects them, as shown by the plan of the locality attached. The street and road mentioned are public highways intersected by the canal, and petitioner has never had or acquired any right of way over or across said highways. The approaches to the bridge would not interfere with or obstruct the use of said street or road, or the crossing of them by any vehicle or person. The approaches have been laid out and will be so completed as not to interfere with or obstruct the use of the street or road in any manner. Said approaches will be within the highway, even with and alongside of the approaches to the city bridge across the canal, and contiguous to the city bridge, and will correspond in grade with the approaches to the city bridge, and cannot interfere with, hinder, or obstruct plaintiff any more than the approaches of the city bridge would. If the alleged right of way is claimed as a towpath, said approaches will not in any manner prevent the crossing of the same by any team or towline, but a continuous towpath is obstructed, within about 5 feet of defendant's bridge, by the bridges or arches of the Central Railroad & Banking Company, which span the canal about 15 feet north of the city bridge. Defendant says, on information and belief, that the Central Railroad & Banking Company is the principal, if not the sole, owner of the stock of petitioner, and is opposed to the building of defendant's road across the track of the Central Railroad on the Augusta road, although defendant has the charter right to lay its track in said public road, and to cross the track of the Central Railroad on grade level; and the opposition to crossing the canal is only a means adopted by the Central Railroad to frustrate the building of defendant's road. The stockholders of petitioner have ceased to keep the canal open for navigation, and have practically abandoned the canal as a means of navigation, except so much of the basin of the canal near the Ocean Steamship Company's wharves, which is used by the Central Railroad to facilitate the handling of freight and transfer of the same in connection with its management of the steamship company.

The case was heard below upon the petition and amendment and defendant's answers, and affidavits hereafter mentioned. On behalf of defendant was submitted an affidavit of Thomas that he is a civil engineer; that the map accompanying his affidavit is a correct delineation of the plan of the bridges of the Central Railroad and of the city of Savannah and of defendant across the canal, and their location in reference to the highways,—Railroad street on the east, and Louisville road on the west; that he is

the engineer of the defendant, and superintended the building of the bridge; that by actual measurement made by him the bridge is as long as, and three inches higher than, the bridge next thereto, erected by the city of Savannah or Chatham county, and used by the public to cross the canal where the canal intersects Railroad street and the Louisville road; that defendant's bridge is not an obstruction or an impediment to the free navigation of the canal; and that the bridge was built for at least a week prior to May 11, 1893. Also the affidavit of another civil engineer that the map or plan accompanying his affidavit was a correct delineation of the plan of the bridge of the railroad, of the city of Savannah, and of defendant, and their location in reference to the highway intersected by the canal. On behalf of the plaintiff there was introduced an affidavit that the map attached to the affidavit was a true representation of defendant's bridge over the canal at a point immediately south of the intersection of the canal with the Louisville road as it was on May 16, 1893; and that since that day to May 20, 1893, that status at that point had not been altered. Also, affidavit that the paper attached to the affidavit came from the custody of petitioner, and covered that part of the right of way lying between its basins and the Savannah river. This paper was the award of three appraisers,—one appointed by the Savannah, Altamaha & Ogeechee Canal Company, one appointed by Stiles, and one by the superior court,—as stated in the award, for the purpose of appraising the value of certain land belonging to Stiles, through which the canal passed, and awarding to him the price of the same. The award contained an appraisal of certain land described at valuations fixed in the award, and was signed by the appraisers March 14, 1837. It was accompanied by a certificate of a magistrate that the appraisers appeared before him and made oath to the award, and by an acknowledgment of legal service of the award and notice according to the statute by the secretary and treasurer of the canal company; also by certificate of the clerk of the superior court of Chatham county that the paper was a true copy of the award rendered, and that the original was of file and record in his office.

Lawton & Cunningham, for plaintiff in error. J. R. Saussy, S. L. Lazaron, and H. McAlpin, for defendant in error.

PER CURIAM. Judgment affirmed.

GEORGIA S. & F. R. CO. v. WILLIAMS.

(Supreme Court of Georgia. Jan. 8, 1894.)

NEGLIGENCE—PROXIMATE CAUSE.

1. Where a mule attached to a wagon being driven along a public road in the direction of a railroad crossing ran away, reached the

crossing, and, finding the same obstructed by a passing train, swerved aside, and ran parallel with the railroad for 150 yards, and, getting ahead of the train, attempted to cross in front of it at a private crossing, and the driver was killed by the train colliding with the wagon, there was no cause of action for the homicide, notwithstanding the servants of the company violated the statute in running too fast upon, and in approaching, the public crossing, and in not blowing the whistle, as required by the statute, this violation not being the proximate cause of the injury, it appearing by the evidence that those in charge of the train did all they could to stop after they discovered the mule was in the act of running away.

2. The court erred in not granting a new trial on the merits, irrespective of the alleged errors complained of in the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action by Annie Williams against the Georgia Southern & Florida Railroad Company to recover for the death of plaintiff's husband. There was a verdict for plaintiff, and, from a judgment denying a new trial, defendant brings error. Reversed.

The following is the official report:

Annie Williams sued the railroad company for damages from the homicide of her husband, Frederick. Her declaration alleged, in brief: Frederick was driving a one-horse wagon along the public road at what is known as "Flynn's Crossing," and, as he was crossing the railroad at said public crossing, the mule he was driving became frightened at a south-bound freight train, which was close to the crossing, he having no notice of the approaching train, no whistle having been blown, and the speed of the train not having been checked, as required by law; and the mule, being thus frightened, ran away along the side of the road for 300 yards, to where another road crosses the railroad, and, turning into this, the mule ran across the railroad, and the locomotive struck the wagon, demolishing it, and so wounding her husband that he died. He could not, by the use of ordinary care, have avoided the injury. Defendant did not use all ordinary and reasonable care and diligence, but failed to blow for the crossings, or either of them; the speed of the train was not so checked as to be stopped at the first crossing, nor was such care used as to the second crossing; and the runaway team was in view of defendant's servants, so as to give them full notice of Frederick's danger. Had the train been checked at the first crossing, as required by law, the accident would not have happened, for the engine would have been under such control as that defendant's servants could have avoided the accident at the second crossing. There was a verdict for plaintiff, and the defendant excepted to the refusal of a new trial.

Gustin, Guerry & Hall, for plaintiff in error. Preston & Giles and J. L. Hardeman, for defendant in error.

PER CURIAM. Judgment reversed.

SAVANNAH, F. & W. RY. CO. v. DU BOSE.
(Supreme Court of Georgia. Jan. 8, 1894.)

INJURIES TO EMPLOYE—DEFECTIVE APPLIANCES—
CONFLICTING EVIDENCE.

The evidence was conflicting, and there was no abuse of discretion in denying a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action for personal injuries by W. Du Bose against the Savannah, Florida & Western Railway Company. There was a verdict for plaintiff, and, a new trial having been denied, defendant brings error. Affirmed.

The following is the official report:

Du Bose sued the railway company for damages from personal injuries, alleging: While in the employment of the defendant, he was ordered by it to clean out the boiler of an engine, and while doing so, without fault on his part, was severely scalded. It was defendant's duty to furnish him with safe and suitable machinery and instrumentalities of labor, but it did not do so, for a certain cock on the engine was so defective and unsafe that the plug thereto blew out, causing him to be scalded. This defective condition of the machinery was unknown to him, and known to defendant, and could have been discovered and remedied by it. After the introduction of the evidence for plaintiff, defendant moved for a nonsuit, upon the grounds: The evidence showed plaintiff was not entitled to recover, in that he failed to show himself without fault, being an employe, and because he failed to show that the master did not exercise all ordinary and reasonable care in furnishing him with safe and suitable appliances for his work. This motion was overruled, and to this ruling defendant excepted pendente lite, and upon it assigned error in its final bill of exceptions. There was a verdict for the plaintiff for \$1,000, and, defendant's motion for a new trial being overruled, it excepts to such ruling. The grounds of the motion were that the verdict was contrary to law, to the evidence, and decidedly and strongly against the weight of the evidence and the principles of justice and equity. The plaintiff testified: "When hurt, I was working for the defendant, my duty being to wash out boilers. I had orders that the engine I was working on was to go out at eight o'clock, and it was my duty to get her ready in a very short time. When they fetched her in, she had about 110 pounds of steam on. She had a good deal of water. Both the injectors were on, cooling her down. I went underneath, and slackened up the blow-off cock. I thought it was in good order. I would not go under there if I thought it was not safe. Went to work there in 1873. When I took my wrench, and went underneath to slacken up the plug, I made half a turn, and as

soon as I did this the plug flew out. I always slacken the plug up so it would turn. The nut came off because it was stripped. Had no instructions not to go underneath the engine when it had 110 pounds of steam on. The plug in question was under the back driver,—the rear portion of the boiler. The plug works into the cock, which is three or four inches from the bottom of the boiler. I had to go underneath the engine to put the wrench on the nut. When I made half a turn, the nut slipped off and the plug flew out. That was the right way, and the only way it could be done. You cannot get the water out unless you slacken the plug. There are other plugs which you can open to let the water out, but it is dangerous to do that. That was the proper plug to turn, to get the water out of the boiler. I did not see anything on top of this plug. Don't know what became of the nut. Dropped the wrench, and everything else, in order to save myself, the best I could. If the nut had been in proper order, it would not have fallen off. When the plug came out, the water burst right out. I was underneath there, and tried to get out as soon as possible; but the hot water came upon me, and scalded me." The witness then stated the character of the injuries he sustained, time of his confinement to bed, loss of time from his work, and further testified: "I was 46 years old in June, 1892. [The injury occurred in December, 1889.] When I was injured, was in good health. Fired on the road before they took me to do that work. They put me in the roundhouse because they knew well enough I was careful. When injured, I was earning \$46 per month. Can't now do heavy work, and am getting \$6 per week. Told Foye I could not tell how I got hurt, except that the plug was damaged. Told him I did not know who was to blame. If the plug were examined in the usual way, I would not have been scalded. The threads that hold the nut were so worn and defective that when I made half a turn the whole thing dropped. It must have been weakness of the threads on the end of the plug. I did not tap the plug with a hammer, and did not tell Foye that I tapped and knocked the plug. The nut is to keep the plug down. If you knock it up, it will move. Turning the plug is for the purpose of letting the steam through. By turning the nut, the plug is in place. It will not move, but, if the nut comes off, the pressure of the steam will start the plug up. When this nut fell off, the steam threw the plug up. If the handle was on top of the plug, it would keep the plug down, even if you take the nut off. There was no handle on this plug. I knew that, but there was no danger, because the nut was on there, and I thought it was safe. The plug is as safe as can be, if the nut is sound on there. There was no danger of steam escaping, unless the plug moved. You have to move the

plug to let the steam escape, and have no right to tap the plug. I had no orders not to go underneath the engine when there was a quantity of steam on. The steam comes through the plug from the boiler. If the nut had been examined, I would not have gotten hurt. As long as the plug is in that position, that shuts the steam off from the boiler. If the plug turns the least bit, it would hurt me, but the pressure of steam will move it. The nut looked all right when I put the wrench on. Seemed to be in place, and in good order. I couldn't see if the threads were worn. Was boiler washer there about eight years. Crowley appointed me boiler washer, and Navy was the foreman when I got injured. I worked under him two or three years. He never gave me instructions about the quantity of steam, and he himself has gone under the engine to slacken the plug and let the water out. I had washed out this particular engine before, and at that time she was cold. If the nut is safe, there is no danger in turning it when there is a high pressure of steam in the boiler. That plug would hold 200-pounds pressure of steam. Couldn't loosen that plug without going underneath the engine. If the inspector had examined it when I washed it out before, I would not have gotten scalded. The engine came in about 4:30, and I undertook to wash it out because I had orders from the hostler, who said it was to go out about 8 o'clock, and told me to wash it out right away. The engine went out that night. I heard it. Don't know who told me. Many told me when I went to the roundhouse. I cannot give the name of a single person who told me she went out that night. It takes about two hours to wash out a boiler, when it is hot. On the last trial of this case, I testified I told Foye that I could not see that it was any fault of mine, or of the master mechanic. It was just a blind thing. Of course, they couldn't see it, a bit more than myself, unless they slackened it up." A witness for plaintiff also testified as to plaintiff's suffering from the injuries.

For the defendant, Navy testified that he appointed plaintiff boiler washer; that his instructions to boiler washers were to muffle the whistle, and get the pressure of steam down to about 10 or 15 pounds, so that the boiler would receive the water from the city hydrant, prior to opening the blow-off cock, and let the water out of the boiler. These instructions were given, for one reason, as a precaution for the boiler. He gave these instructions to plaintiff verbally, and, if they had been followed, plaintiff would not have been in danger. He (witness) heard of the injury about five or ten minutes after it occurred, as soon as he got to the roundhouse, where the engine was, and the engine at that time had steam on, though he could not say what the pressure was, because he could not get to the cab to see the gauge. If Du

Bose went underneath the engine with a wrench, and tried to loosen the nut, when there was high pressure of steam on, he did so in violation of witness' instructions. If he had followed the instructions, the steam pressure would have been low, and the accident would not have occurred. The plug moves up and down. Always found plaintiff a careful and reliable man. The instructions about cleaning out boilers were given,—when, witness did not remember, but before the accident occurred. He did not remember the circumstances connected with giving the plaintiff instructions. If the nut was in perfect condition, and screwed on, the pressure would be on the whole of it. In order for this plug to come out by reason of steam pressure, it would have to pass through the open space. The purpose of the nut is not to hold the plug down, but to keep the steam shut off. There is a handle which runs from the top of the plug up to the footboard, with a lever on it, and the engineer can turn the plug from the cab by means of this handle. As long as this plug is in position, no steam can escape from the boiler, because the pressure would be shut off, and it is necessary to turn the plug in order to let the steam escape. Turning the nut will not turn the plug, unless it is corroded, but, if the plug is tapped, it will fly out. The least tap to the plug would blow it out. One who is now night hostler for defendant, and was when plaintiff was injured, and who also washes out boilers, testified that he washed them out by blowing off steam first; that those were the instructions which Navy gave him, and Navy gave him the instructions before the plaintiff was injured; that the instructions were not to attempt to let the water off before all the steam was gone; that, to let the water out of the boiler, you have to open the blow-off cock; that you must let the steam off before you can let the cold water come into the boiler; that "we blow it off after we get the steam low enough to take the water from the city hydrant," and that he didn't know whether the same instructions were given to Du Bose; that the way you open the blow-off cock is to take a wrench, and slacken it up so as to turn the plug, and that will let the steam out; that the usual way to get at the blow-off cock is to stoop under the engine, and by doing this he would be discharging his full duty to the road; that you take your wrench, and turn the nut; that witness received his instructions several years before the accident to plaintiff; that slackening the nut won't turn the plug, but you slacken the nut for the purpose of opening the plug; that if you slacken the nut the plug would not blow up, unless you tapped it after the nut had been taken off altogether; that, even if you let the steam down, there would still be hot water in the boiler, sufficient to scald any man, if it went over him. Witness was

scalded once when there was but 20 pounds of pressure on. He went underneath the engine to tie up one of the mud plugs, and after he had fired the engine up, and it had commenced to make steam, the plug fell out, and he was scalded. There was testimony for defendant that instructions given men who washed out boilers prior to the time plaintiff was hurt were to reduce the steam pressure by muffling the whistle, and letting the steam escape in that way, before putting cold water into the boiler. It takes about an hour to cool off an engine in order to let cold water into it. There is hot water in the boiler after the steam has escaped through the whistle. If the steam had been blown off, and the plug were moved in any way, there would not be any pressure in the boiler to force the plug out. One who was in the roundhouse, at a little distance from plaintiff, at the time of the accident, heard the report of the steam, and went to the engine, but did not know what pressure of steam was on the engine. When he got there, the steam and water flew in every direction, and one could not get up to the cab. At that time the whistle was not muffled. He did not particularly examine it. This person was he who plaintiff had testified told plaintiff to wash out the boiler, at the time in question, right away. He testified that he turned the engine over to plaintiff, but did not give him any instructions about her. He didn't tell plaintiff she had got to go out that night. She did not go out that night, but went out the next morning. The accident did not prevent her going out that night. The railroad had had this engine over five years. A man can take a wrench, and stand aside, and let the water and steam out of the blow-off cock. It is necessary for a man to go under there to slacken the nut, and the proper way is to slacken it with a monkey wrench. It appeared from the evidence of another witness that if the plug were corroded, and it were necessary to move it, one would have to tap it underneath with a hammer, and then you could turn it with a wrench. That it takes a severe tap with a hammer to get it out; that witness had known a plug to stay in place when there was no nut on it, and the engine was running, but that was not a usual thing. Foye testified that plaintiff told him he (plaintiff) had gone under the engine to blow her out, and in loosening the plug found it a little hard, and tapped it with a hammer; it flew out and he was scalded; that he (witness) did not recall whether the plaintiff told him he had tapped it with a wrench or hammer; that witness' idea was that plaintiff had tapped it with something. Only knows, in a general way, the words plaintiff used on that occasion, and plaintiff did not say he was in any wise at fault.

In rebuttal, plaintiff testified that he muffled the whistle with waste, but the water blew the waste out; that they did not have

a clamp then, but have made clamps since; that he did not have a hammer at the time, but had a monkey wrench, and did not use one end of the wrench as a hammer; and that you could not hit anything with it; it would break.

Erwin, Du Bignon & Chisholm, for plaintiff in error. Garrard, Meldrim & Newman, for defendant in error.

PER CURIAM. Judgment affirmed.

SAVANNAH, F. & W. R. CO. v. FALVEY.

(Supreme Court of Georgia. Jan. 8, 1894.)

INJURIES TO EMPLOYEE—CONFLICTING EVIDENCE.

Although the evidence would well have warranted a finding for the defendant, it also warranted the verdict in favor of the plaintiff, the weighing and balancing of the whole being a matter for the jury. There was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonell, Judge.

Action for personal injuries by M. J. Falvey against the Savannah, Florida & Western Railroad Company. There was a verdict for plaintiff, and, a new trial having been denied, defendant brings error. Affirmed.

The following is the official report:

Falvey sued the railway company for damages from personal injuries, which he alleged he received while a locomotive fireman in its employment, from being compelled to jump from an engine upon which he was, in order to prevent a greater injury, which he feared he would receive from a collision which was imminent between said engine and a train ahead of it upon the same track. He alleged in his declaration that he acted under the advice and orders of the engineer of the train upon which he was fireman in so jumping, and that in jumping he was thrown against a switch stand, injuring his hip, back, and chest, causing him to expectorate blood, throwing him into convulsions, causing suppression of his urine, producing internal injuries, and making him a physical wreck. He obtained a verdict for \$2,370, and, defendant's motion for a new trial being overruled, it excepted. The grounds for the motion were: The verdict was contrary to law, to the evidence, strongly and decidedly against the weight of the evidence, without evidence to support it, and contrary to the principles of equity and justice. The evidence upon both sides was quite voluminous. That for the plaintiff was to the effect: The injury in question was done him on September 16, 1890. He was at that time, and had been for two years, a fireman for defendant. For two years before he began service as fireman in its employment, he was employed by it as a watchman, doing light work. In 1883 he had been hurt,

while a fireman on the Central Railroad, in a collision, sued that road, and his case against it was settled, and a considerable sum paid him. In that suit he claimed to be seriously injured; thought, then, that he was. It was some three or four years from the time of the injury on the Central road before he went to work on the Savannah, Florida & Western. His work as fireman for the latter road was heavy, engaging him late and early, and he was at work continuously as such fireman, doing double duty, and able to perform it. Before the injury for which he now sues he had recovered his health, had no peculiar movement of the heart, his breathing was perfect, his extremities were not cold, and he had no weakness of the bladder, nor trouble with his urine. About two hours previous to the collision now in question, he had received a slight injury from a stick of wood having been thrown on his arm, and told his engineer, after his arm was hurt, he could not fire. The engineer stopped the train, and told the conductor he must have another man, and told Falvey to go back to the cab, have a good rest, and attend to his arm; but Falvey did not go back, saying that he would be all right after a while. He bathed his arm in cold water. At the time the collision was about to take place, Falvey was piling wood in the tender of the engine, which was a part of his usual duty. The engineer had got a colored man to do the firing when Falvey was hurt. The train upon which Falvey was working collided with a train ahead of it, which had been neglected, left unflagged, and as to the presence of which warning had not been given, as should have been done, to the approaching train. When the engineer saw this train, he knew a collision was imminent, and called to Falvey, "Get off! Jump!" This was very early in the morning. It was foggy, and the engineer did not see the train ahead until he got up close to it. It was then too late to prevent a collision. When he spoke to Falvey, as last above stated, the train upon which Falvey was was running about 15 miles an hour, and there were about 25 cars in the train. Falvey got on the steps of the engine, and jumped off, or alighted. After Falvey got off, the engineer got on the same steps, and followed him. The engineer was carried forward, and both his arms slid on the ground, making a slight bruise on his arms, but not amounting to anything. According to Falvey's testimony, he, (Falvey,) in jumping, struck a switch stand, and sustained serious injuries of the kind mentioned in his declaration. The engineer testified that there was a switch stand in the neighborhood of where Falvey jumped, but whether Falvey struck it he only knew from what Falvey said. In a few seconds after Falvey and the engineer jumped, the collision took place, and broke up three cars in the train ahead of them. Upon the subject

of the injuries received by Falvey there was much testimony in his behalf, some of it by physicians, tending in the main to show that he was seriously hurt, though there was some evidence that he was disposed to magnify his injuries. Plaintiff was 33 years old when injured in the last collision mentioned, and was receiving, as wages, \$1.60 per day. Much evidence was introduced by the defendant, among the witnesses being a number of physicians, and the evidence for defendant tended very strongly to show that plaintiff sustained no serious injury whatever, but was attempting to feign having received serious hurts, or, in other words, that his case was a decided one of "malingering."

Erwin, Du Bignon & Chisholm, for plaintiff in error. Garrard, Meldrim & Newman, for defendant in error.

PER CURIAM. Judgment affirmed.

SMITH v. WALKER et al.

(Supreme Court of Georgia. Jan. 8, 1894.)

CHattel Mortgage — Foreclosure — Affidavit of Illegality.

1. Where an execution issued upon the foreclosure of a mortgage on personal property has been levied, an affidavit of illegality to such execution, alleging that the deponent is not legally indebted to the plaintiff in any amount, and that the mortgage foreclosed is utterly without consideration, and void, is, under section 3975 of the Code, good in substance, and it was error to dismiss the same on a general demurrer for want of sufficiency.

2. The jurat being no part of the affidavit, a general demurrer to the sufficiency of the affidavit will not reach a defect in the jurat, such as failure to add to the name of the person who administered the oath his official designation. The jurat is amendable. *Perkerson v. Veal*, 47 Ga. 92; *Thurmond v. Dickson*, 57 Ga. 153.

(Syllabus by the Court.)

Error from superior court, Crawford county; O. L. Bartlett, Judge.

Action by Walker & Gibson against R. D. Smith to foreclose a mortgage on personal property. There was judgment of foreclosure, and to the execution issued thereon defendant interposed an affidavit of illegality. The affidavit was filed under the Code, (section 3975,) providing that "when an execution shall issue upon the foreclosure of a mortgage on personal property * * *, the mortgagor, or his special agent, may file his affidavit of illegality to such execution, in which affidavit he may set up and avail himself of any defense which he might have set up, according to law, in an ordinary suit upon the demand secured by the mortgage, and which goes to show that the amount claimed it not due." From a judgment sustaining a demurrer to the affidavit, defendant brings error. Reversed.

The following is the official report:

A mortgage *fi. fa.* in favor of Walker & Gibson against Smith was levied upon prop-

erty described in the mortgage, and Smith interposed an affidavit of illegality. Plaintiff demurred to this affidavit for want of sufficiency, and the demurrer was sustained, to which ruling Smith excepted. The illegality was upon the grounds: Because affiant is not legally indebted to plaintiffs in any amount; because the mortgage foreclosed is utterly without consideration and void; because plaintiffs are proceeding for \$25.41 attorney's fees, which is illegal, the contract being made since the act of July 22, 1891, prohibiting the collection of attorney's fees; and because a portion of the mortgage is interest, and plaintiffs have foreclosed, and are proceeding for interest on interest..

W. S. Wallace, R. D. Smith, and J. H. Hall, for plaintiff in error. L. D. Moore, for defendants in error.

PER CURIAM. Judgment reversed.

KING et al. v. SEARS.

SEARS v. KING et al.

(Supreme Court of Georgia. April 17, 1893.)

Ejectment—Evidence—Tax Deed—Sufficiency of Authentication—Description—Who May Question Execution—Motion for New Trial—Time of Making—Appeal.

1. Where, for the purpose of authenticating a tax sale in a way to render the prescribed affidavit a substitute for other evidence, the statute required the mayor to make oath that all the notices and advertisements required by the act have been duly and regularly given, an affidavit, silent as to advertisements, but deposing that all the notices required by the act have been so given, is insufficient.

2. The description in a conveyance being in these terms: "A certain lot or parcel of land, lying and being within the incorporate limits of said city of Brunswick, and situate in that part known as 'Old Town.' For a more particular description of said lot or parcel of land, reference is hereby made to the plan of said city, executed by George R. Baldwin, civil engineer, by him signed, and dated May 25th, 1837,"—the plan referred to not being produced, nor its contents proved,—the description is too vague and uncertain to be applied definitely to any premises whatever, and no recovery could be had upon the deed, were it otherwise sufficient to pass title. Nor would the production of the plan aid the defective description in the deed, unless the plan shows only one lot or parcel in Old Town. If it shows more than one, the uncertainty as to which particular one was sold would remain, and be fatal.

3. A deed more than 30 years old, and coming from the proper custody, purporting to have been executed in another state, attested by one witness, certified by him as a commissioner of deeds for this state in that state, under his seal of office, as duly acknowledged before him by the maker, and recorded in this state more than 30 years ago, the land conveyed by it being situated in this state, and possession of the land by the grantees in the deed for several years being shown, is admissible in evidence without further proof of its execution. The want of two witnesses does not render the deed invalid or inoperative as a conveyance of the premises described in it.

4. A description in a deed in these terms: "All those six certain lots, pieces, or parcels of land situate, lying, and being in the town of

Brunswick, county of Glynn, and state of Georgia, heretofore, and up to the making of this indenture, owned by the parties of the first part, and known and distinguished on a certain map of the said town of Brunswick, made according to the survey of the said town, and recorded with the proper officer in the said county of Glynn, being the map mentioned and referred to in the several conveyances heretofore made, and duly recorded, of the property hereby conveyed, as water lot number twenty-seven and town lots numbers twenty-four, twenty-five, one hundred and fifty-four, three hundred and twenty-nine, three hundred and thirty," is sufficiently certain to show that the parcel designated as town lot No. 24 was meant to be conveyed; and the aid of extrinsic evidence may be invoked to identify that lot, and establish its precise location.

5. A stranger to a deed cannot urge, as an objection to its validity, that it was executed for the sole purpose of enabling the grantee to maintain an action of ejectment in the federal court to recover the premises from an adverse holder, the deed being made since the adoption of the Code, which abrogates the old law, prohibiting the conveyance of land pending an adverse possession. When a deed is offered in evidence, if the objection to its admission concedes that it was in fact executed and delivered, the objection should be overruled, unless the matter of the objection would, if established, render the deed inoperative for the purpose sought to be subserved by its introduction.

6. Under the evidence the jury could have found a title by prescription, but the charge of the court did not constrain them to pass on that question.

7. The plaintiff claiming under a conveyance from a prior occupant, who went in under color of title, and remained for less than seven years, whether a recovery could be had upon such prior possession alone and the deed to the plaintiff, against one who entered under claim of right, but who shows neither title nor lawful right, depends upon whether the plaintiff's grantor, on going out of actual possession, or afterwards, intended to abandon the premises, or whether he left with the intention to return, and remained in that mind until he conveyed to the plaintiff.

8. So long as the superior court is not finally adjourned for the term, the term continues, though other courts of the circuit be held in the mean time. A motion for a new trial may be filed in the recess as well as in open court. When so filed, it may be acted upon by the judge at any time during the term.

9. Where the judge certifies that the brief of evidence has been filed within the time prescribed by law, this will be taken as true, although there may be no signed entry of filing on the brief itself. The act of November 12, 1889, does not, in cases where the term continues longer than 30 days, require that the brief shall be approved within 30 days after the trial, but only that it shall be filed within that time, subject to approval.

(Syllabus by the Court.)

Error from superior court, Glynn county; J. L. Sweat, Judge.

Action in ejectment by Oceanna Sears against James F. King and others. There was a verdict for plaintiff, and a new trial denied. Defendants bring error, and plaintiff filed a cross bill of exceptions. Reversed.

The following is the official report:

The actual plaintiff below was Oceanna Sears. She obtained a verdict against King for the premises in dispute (the action being one of ejectment) on May 10, 1892, at the May term of the superior court of Glynn county.

On June 9, 1892, King filed his motion for new trial, together with a brief of the testimony. On June 10, 1892, and while the judge below was in Ware county, a rule nisi was granted, and an order taken that the grounds of the motion be examined, considered, revised, and approved on the hearing to be had on July 5, 1892, at Brunswick. On the same day an order was granted that defendant have until July 5th to prepare and file, under the approval of the court, a brief of the evidence in the case. On July 6, 1892, an order was passed, reciting that Glynn superior court, at the term at which the case was tried, to wit, "this present term," was in session for more than 30 days, and ordering that the plaintiff show cause instant, or as soon as counsel could be heard, why the judgment and verdict should not be set aside, and a new trial granted, etc. This order was passed in open court. When the motion for new trial was called up for hearing, respondent in the motion moved to dismiss it, which motion was overruled. The motion for new trial was also overruled; the order overruling it being headed, "In Glynn superior court, May term, 1892, held July 7, 1892," and to this ruling King excepted. To the ruling refusing to dismiss the motion for new trial, plaintiff excepted. The action was for the recovery of a tract in Brunswick, known "on the map or plan of that city made by George R. Baldwin in 1837 as Old Town lot number 24, and which is in the shape of a rectangle, measuring ninety by one hundred and eighty feet, bounded on the west by Bay street, east by Oglethorpe street, south by lot number 25, and north by lot number 23." The motion for new trial contained the general grounds that the verdict was contrary to law, evidence, etc.; also, because the court erred in overruling the objection of defendant to the deed of December 31, 1841, from U. Dart, mayor of Brunswick, to A. H. Merriam, the objection being upon the grounds: There is no execution or other authority for sale accompanying the deed. There is shown no authority for the making of such a sale as mentioned in the deed, or the execution of such a deed. There is shown and appears, neither upon the face of the deed or elsewhere, any compliance with any authority whatever. The deed does not appear to have been recorded as required by law, there being or appearing no proper certificate to that fact. The affidavit attached to, and in support of, the deed, on its face does not show compliance with the act recited in the face of the deed as authority for the sale, in that the affidavit states that the notices were given as required by the act, but does not state what notices were given, and does not state that the advertisements were published as required by the act. The deed in question was part of plaintiff's chain of title. It recited that by an act of the general assembly of December 26, 1837, amending an act to incorporate the town of Brunswick, it was

enacted that the mayor and council should make, or cause to be made, under oath, in March of each year, an equitable valuation of all property within the city, upon which they should assess and levy an equitable tax for city purposes, etc.; and whereas, by the act it was made the further duty of the mayor, after giving certain notices in the act specified of the assessment of the tax, and the same remaining unpaid at the expiration of said notices, then to cause the property to be advertised for sale, and sold to the highest and best bidder, on a certain day to be specified in the advertisement, provided the tax and other contingent expenses due on the property were not paid on or before the day of sale, and that the mayor should make title to the purchaser for the same, with the provision that the owner should have the right to redeem, all of which, by reference to the act, would more fully appear; and whereas, the mayor and council, in pursuance of the duties imposed upon them by said act, did in March, 1841, assess and levy an equitable tax for said year—\$1.87½—on a certain lot of land within the incorporate limits of the city of Brunswick, and in that part known as "Old Town," for a more particular description of which lot reference was made to the plan of the city executed by George R. Baldwin, civil engineer, May 25, 1837; and after giving due notice of the assessment and levy of the tax "in manner pointed out in said act," and no person coming forward to pay the same, said lot was then advertised to be sold in Brunswick on December 31, 1841, on which day it was set up and exposed to public sale, when it was knocked [down] to A. H. Merriam for four dollars, being the highest and best bidder that could be obtained: Therefore, in pursuance of the duties imposed upon him by the act, and in consideration of the four dollars, the mayor conveyed the lot to Merriam, reserving the right of the former owner to redeem. Accompanying this deed was the affidavit referred to, made by the mayor, to the effect that all the notices required by the act of December 26, 1837, so far as respected the property described, had been duly and regularly given. The deed was recorded in the office of the clerk of the superior court on August 31, 1843.

Another ground of the motion was: Error in overruling the objection of defendant to deed of October 27, 1852, from Henry and Harriet Merrill to Sylvester Mumford, which objection was upon the grounds: There is no description of the premises in dispute set out in the deed. There is but one witness to the deed. While there purports to be a certificate from one signing himself a commissioner of deeds for the state of Georgia, it is not in compliance with the law of this state, in that the deed must be attested by a commissioner of deeds for the state of Georgia, and this deed does not appear to have been signed before such commissioner, or by him attested. The deed in question was al-

so part of plaintiff's chain of title. It described the premises as all those six certain lots of land situated in Brunswick, Glynn county, Ga., theretofore owned by the parties of the first part, and known and distinguished on a certain map of the town of Brunswick, made according to the survey of the town, and recorded with the proper officer in the county of Glynn,—being the map mentioned and referred to in the several conveyances theretofore made, and duly recorded, of the property conveyed,—as water lot No. 27, and town lots Nos. 24, 25, etc. This deed concluded: "In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written." Then followed the signatures and seals of the makers of the deed, accompanied by the statement: "Sealed and delivered in the presence of C. I. Bushnell, as both parties." Following this was a certificate made in the state, city, and county of New York, to the effect that on October 27, 1852, before the subscriber, a commissioner in said state, appointed by the governor of Georgia to administer oaths, etc., and take acknowledgments of proof of deeds, etc., to be used or recorded in Georgia, and duly commissioned and sworn and dwelling in the city of New York, personally appeared the within-named Henry Merrill, "who has signed the within deed, who acknowledged that he signed, sealed, and delivered the same as his voluntary act and deed, for the uses and purposes therein mentioned; and at the same time and place also personally appeared Harriet S., wife of the said Henry Merrill, likewise a party to said deed, and, being duly examined by me separately and apart from her said husband, did declare that she did freely and voluntarily, and without any compulsion from her said husband, sign, seal, and deliver the within deed for the uses and purposes therein mentioned, with intention thereby to renounce, give up, and quitclaim her third and right of dower of, in, and to said lots of land within conveyed." This was signed by C. I. Bushnell, "Commissioner in the State of New York for the State of Georgia," and to it was attached his seal. As to the ground of objection that there was but one witness to this deed, the court below states that, from an inspection of the deed in passing upon its admissibility, the court found that the names were identical, and the handwriting the same, of C. I. Bushnell, the attesting witness, and who certified to his official capacity as commissioner of deeds for the state of Georgia; that on the day it purported to have been executed it was signed, sealed, and delivered in the presence of said C. I. Bushnell, who followed his attestation with his certificate and seal that he was a commissioner of deeds as aforesaid, duly appointed and qualified, on that day; and that, in addition, all parties who signed it acknowledged before him that it was their

deed, and that they signed, sealed, and delivered it for the purposes mentioned in the deed,—it was therefore admitted in evidence.

Another ground of the motion was because the court erred in overruling defendant's objection to the deed dated September 14, 1888, from Sylvester Mumford to Oceanna Sears, the objection being that the same was not duly and regularly attested, in that the defendant stated, and stood ready to prove, that the deed was witnessed by F. H. Harris, Esq., counsel for the plaintiff, and by John L. Harris, his son; that, at the time of the attestation, F. H. Harris was attorney for the plaintiff, and his son, John L., was under 21 years of age, and in the office of said F. H. in a ministerial capacity; and that the deed was made for the purpose of vesting the claim of title to the premises by Mumford to plaintiff, who at the time lived out of the state of Georgia, and in Michigan, for the sole purpose of maintaining an action of ejectment, for the premises in the federal court, where an action had been brought for the premises and dismissed by plaintiff; further, because F. H. Harris was not, when he attested the deed as a notary public of Glynn county, a notary public of said county, his commission having expired; and defendant offered to introduce evidence in support of said objection, and the statements made on which it was founded. The court overruled the objection, and the motion to show the facts recited, assigning as a reason therefor that said attack must be made, not before the court upon the admission and introduction of the deed, but before the jury after the deed should have been introduced, and admitted the deed in evidence without allowing, and refusing to allow, the defendant to prove certain matters before the court.

Error in reading to the jury from an act approved December 26, 1837, amending the act of December 29, 1836, incorporating the town of Brunswick, etc., the provisions of the act of 1837 as to the assessment of property for taxation, notice to be published in case of nonpayment of the tax assessed, and advertisement and sale of the property if the tax were not paid agreeably to the request in the notice, etc., and then charging: "The court charges you if you shall find in this case that a deed has been made to the premises in dispute, which is the foundation of the plaintiff's claim, under a tax sale made under the authority of this law, which the court has just read you, and that upon such deed you shall find the evidences required by this law, to wit, the oath or affidavit of the mayor executing the conveyance that the notices required by law had been duly and regularly given, then the court charges you that that would be conclusive evidence of the proper compliance with this law in the sale of the premises in dispute for taxes. The court charges you that you would be authorized, in examining that affidavit of the mayor, if you shall find

such affidavit upon this deed, to construe the term 'notices,' as used in that affidavit, as including the notices required by the act to be given of the advertisement of the sale of the property in question. The court charges you that a sale regularly and duly made under this law, and title executed under such sale, with an oath thereon showing such statements as go to show that the terms of the act have been complied with, would operate to divest the title to this property from the then owner of it, whoever that might have been, and to vest it in the purchaser of this property at such sale, and to whom the conveyance in question was made by the mayor of the city of Brunswick."

The motion to dismiss the motion for new trial was upon the following grounds: (1) Because it appeared from the record that the verdict was rendered on May 11, 1892, and it appeared from the minutes that on May 28, 1892, the court took a recess until July 5, 1892, and no order of the court was taken, granting time in which to prepare and file a motion for new trial; and, during the interim from May 28th to July 5th, there had been two superior courts in session in the Brunswick judicial circuit, presided over by the judge thereof, to wit, an adjourned term of Appling superior court and an adjourned term of Ware superior court; and the minutes of Glynn superior court showed that a special term of that court was held on June 13, 1892, as called by the judge for the purpose of granting charters; and therefore the motion to dismiss was made upon the ground that the movant failed to file the motion for new trial during the term at which the verdict was rendered, and within 30 days after the rendition of the verdict, and during term time, to wit, while the court was regularly in session. (2) Because there was no rule nisi authorized by law granted in the case, in that, while there was what purported to be a rule nisi attached to the motion for new trial, the same was signed by the judge in Ware county, and during the recess of Glynn superior court, the judge having no jurisdiction of the case, at said time and place, to grant the rule nisi. (3) Because there was no legal authority vested in the judge to grant a rule nisi, or do any other act connected with the motion, save at term time. (4) Because, under the law, a brief of the evidence must be filed as a part of the record for revision and approval by the court,—that is, it must be approved before it can become a brief of the evidence and part of the record,—and no brief of the evidence was filed under the approval of the court; what purported to be such brief having been filed on June 9, 1892, and the judge's order in reference thereto, giving time, having been granted in Ware county during the recess of Glynn superior court, and no legal brief of evidence being ever in fact filed before July 5, 1892. (5) Because movant had failed to comply with the law of motions for new

trials, as set forth in the Code and amendatory acts. In connection with this motion the judge below certified: "In Glynn superior court, May term, 1892. I do hereby certify that on the 28th day of May, 1892, all the jurors were discharged from further attendance upon court, and, on said day, court took a recess until the 5th day of July, 1892. I further certify that during the interim from the 28th day of May, 1892, I held two adjourned terms of superior court in the Brunswick judicial circuit, [that is] to say, Appling superior court, convening on June 20, 1892, and adjourning on June 24, 1892, and Ware superior court, convening on June 27, 1892, and adjourning on June 30, 1892, said terms being regularly adjourned terms of said court; and that I also granted two charters on June 13, 1892, it being recited in orders passed thereon that the same were granted at a special term of Glynn superior court for the granting of charters, notwithstanding the fact that the regular May term, 1892, of Glynn superior court had not been adjourned, but recessed as aforesaid. I further testify that the rule nisi, bearing date June 10, and the order granting time, bearing date June 10, 1892, were signed by me while at Waycross, Ware county, Georgia, and during the recess of the court as aforesaid."

Ira E. Smith, Courtland Symmes, and J. H. Lumpkin, for plaintiffs in error. Frank H. Harris, for defendant in error.

BLECKLEY, C. J. The premises sued for are described in the declaration thus: "A certain tract or parcel of land, situate, lying, and being in the city of Brunswick, said county and state, and known or designated on the map or plan of said city made by George R. Baldwin in the year 1837 as 'Old Town Lot Number Twenty Four, (24,)' and which is in the shape of a rectangle, measuring ninety by one hundred and eighty feet, and bounded on the west by Bay street, east by Oglethorpe street, south by lot number twenty-five, and north by lot number twenty-three." A demise was laid from Sylvester Mumford, and another from Oceanna Sears. Three deeds were introduced by the plaintiff,—the first from Dart, as mayor of the city of Brunswick, to Abiel H. Merriam, dated at the top December 31, 1841, and at the bottom January 31, 1842, and purporting to be based on a sale for city taxes for the year 1841, the sale being made on the 31st of December in that year. The second was a deed from Henry Merrill and Harriet Merrill to Sylvester Mumford, dated October 27, 1852. The third was a deed from Sylvester Mumford to Oceanna Sears, dated September 14, 1888. There was evidence that Merriam died intestate, leaving Harriet, his widow, his sole heir, and that she afterwards intermarried with Henry Merrill. There was also evidence tending to show title in Mumford un-

der the statute of limitations,—such title as would be called "prescription" had it arisen since the adoption of the Code; and the evidence showed with absolute certainty that Mumford had actual possession, if not for a term long enough to ripen a title under the statute of limitations, long enough to enable him or his vendee to recover against a wrongdoer on his prior possession alone, if that possession had not been abandoned. Looking to the merits of the whole case, we are of opinion that there could be no recovery on the paper title as such, and that, in consequence of errors in the charge of the court, the jury were not constrained to pass upon and decide the questions of fact on which title under the statute of limitations, or a right to recover on prior possession alone, would depend. The result is that there must be a new trial.

1. The first link in the paper title is the tax deed. No execution for taxes was introduced. The deed stood alone, save as it was supported by an affidavit of the mayor entered thereon; this affidavit being relied upon under the act of December 26, 1837, applicable to assessments and sales made for taxes in the city of Brunswick. That act required that "the mayor shall publish a notice containing a description of the property taxed, the amount of the tax assessed upon it, and the name of the supposed owner, if known to the mayor, requesting him to pay said taxes within eight weeks from the date of said notice, which notice shall be published six weeks in the city of Brunswick, and in one newspaper printed in Milledgeville six weeks; and if said tax shall not be paid agreeably to the request in said notice the mayor shall advertise the property upon which the tax has been assessed for sale, giving three months' notice of the time and place of sale, the amount of tax for which the same is to be sold, and the name of the supposed owner, if known to the mayor, together with a description of the property to be sold, which notice shall be published three months in the city of Brunswick, and the same length of time in one newspaper in the city of Savannah, and in one newspaper in the city of Milledgeville. * * * And the said mayor, at the time of executing the conveyance of sale or title to any property sold for taxes, shall make and subscribe thereon his oath or affirmation that all the notices and advertisements required by the act, respecting the property thus conveyed, have been duly and regularly given, which oath or affirmation shall ever after be deemed and taken as conclusive evidence of these facts in all the courts in this state." The affidavit which the mayor made and subscribed on the deed now in question declared that "all the notices required by the act of the general assembly of the state of Georgia, assented to on the 26th of December, A. D. 1837, entitled 'An act to incorporate the town of Bruna-

wick, and to extend its jurisdictional limits,' &c., &c., so far as respects the property within described, have been duly and regularly given." This affidavit was not a compliance with the requirement of the act. The mayor did not make and subscribe the oath which the act dictated, but one less comprehensive, both in letter and in substance. The notices had not only to be due and regular, but they had to be duly and regularly advertised. To give them proper contents, and to advertise them once, might be treated as giving them duly and regularly; but the mayor had to see and know that the advertising of them was continued, the first notice for six weeks in the city of Brunswick, and six weeks in one newspaper printed in Milledgeville, and the second notice for three months in the city of Brunswick, and three months in one newspaper in each of the cities of Savannah and Milledgeville. Suppose the mayor had been indicted for falsely swearing that all the advertisements required by the act had been duly and regularly given. It seems plain to us that he could successfully have defended himself against the charge by answering simply that he had not so sworn. He could have said the act itself makes a distinction between the notices and the advertisements, because it requires the oath to include both, and to declare that both were duly and regularly given. The affidavit omits advertisements. Why was that omission made if the mayor intended to do something different from what the act does,—that is, make the word "notices" include advertisements as well as notices? It is possible that advertisements might be construed both as including the notices to be advertised, and the prescribed publication of them by advertising, for to affirm that advertisements have been duly and regularly given could, without strain upon the language, be held to mean that they had the prescribed contents, and had been published through the prescribed medium, and for the length of time required. Be this as it may, it is enough that, in prescribing the terms of the oath or affirmation, notices were evidently treated by the legislature as the things to be advertised, and advertisements as the advertising or publication of them. In view of the legal strictness which is observed in manifesting the validity of all sales for municipal taxes where it is sought to divest the owner of his title by means of such sales, we are clear that the defective affidavit before us is no substitute, as matter of evidence, for due proof of a tax *fi. fa.*, the levy of the same, and of a due observance of all the preliminaries prescribed by the statute under which the sale was made, or purports to have been made. This deed, whether with or without the aid of the affidavit, affords no evidence of authority to sell for taxes.

2. Another infirmity of the deed, treating it as a basis of recovery in the present case,

is that it contains nothing showing its application to the premises now in dispute. Nothing but the general and vague description set out in the second headnote appears in the deed to identify its application to any particular premises whatever. The deed does not represent that the property was seized as that of any named owner, or that it was in the possession or occupation of any person. In truth, there is not the slightest hint or intimation in the whole instrument from which the least aid could be derived in applying the description to its subject-matter. Nor was the map or plan referred to in the description introduced in evidence. If it had been, the description would apply as well to one lot or parcel on it as to another; so that if, according to it, that part of Brunswick known as "Old Town" contains more than one lot or parcel,—and, as appears by the deed from Mumford to Mrs. Sears, it evidently does,—the uncertainty as to which particular one was sold would remain, and be fatal.

3. The ruling made in the third headnote applies to the deed from Henry and Harriet Merrill to Sylvester Mumford. That deed was admissible as an ancient document without proof of its execution. Its application to the premises in dispute is doubtful on the face of the deed itself, but it purports to convey a town lot in Brunswick of the same number as that sued for. With the requisite allunde evidence, the two lots might be shown to be identical, one with the other.

4. The exact terms of the description used in the last-mentioned deed are recited in the fourth headnote, and there is no impediment to invoking extrinsic evidence for the purpose of identifying the lot referred to as No. 24, and establishing its precise location in the town, or more properly the city, of Brunswick.

5. King, the defendant below in the action, was a stranger to the deed from Mumford to Mrs. Sears; and, though it was made pending his adverse possession, that would not render it invalid, because it was executed after the adoption of the Code, which abrogates the old law prohibiting the conveyance of land while held adversely to the maker of the deed. King, being a stranger to this deed, and, so far as appears, not holding under either of the parties to it, had no concern with their purpose in making it, though that purpose may have been to enable Mrs. Sears to bring and maintain an action of ejectment against him in the federal court to recover the premises. An inquiry into that matter might be relevant were the question raised in that court for the purpose of defeating a collusive action brought there as the result of contrivance by a mere colorable conveyance to give that court jurisdiction. But the jurisdiction of the superior court is not dependent upon the citizenship of the plaintiff, but upon the location of the

land within the county, and upon that alone. The objection to the deed, as to its attestation by one witness whose commission as notary public had expired, and who was, at the time, counsel for the grantee in the deed, and by another witness who was the minor son, and engaged in the law office, of the first witness, furnished no reason for excluding the deed as evidence. The objection, as stated, involved in itself a concession that the deed was in fact executed and delivered; and certainly the matter of the objection would not, if established, render the deed inoperative, or interfere with its legal effect as a muniment of title, for it would pass title as well without any attesting witness as with two or more, whether either of them was competent to attest it or not. Proper attestation is a requisite to prepare a deed for record, and either probate or official attestation is requisite for the same purpose. But, as we understand the objection, the point made was not that the deed was not in a condition to be recorded, but that it was not valid as a conveyance. Deed good with one attesting witness only. *Downs v. Younge*, 17 Ga. 295; *Lowe v. Allen*, 68 Ga. 225. Same as to mortgage. *Gardner v. Moore*, 51 Ga. 268. Deed good without any attesting witness. *Johnson v. Jones*, 87 Ga. 85, 13 S. E. 261. Same as to mortgage. *Marable v. Mayer*, 78 Ga. 60.

6. We have discovered no conclusive reason why the deed from the Merrills to Mumford would not serve as color of title to the premises in dispute, if, as matter of fact, the lot described as No. 24 be the same lot as that to which the declaration refers in each of the two demises which it contains. There is evidence that Mumford, by his tenant, had possession up to March, 1862. The tenant himself dates the beginning of this possession in the latter part of 1854, or early in 1855. Another witness dates the beginning one year earlier. Were the jury to accept the recollection of this witness as more reliable than that of the tenant himself, they could easily have found that the possession had continued for seven years before the first suspension of the statute of limitations by legislative act took place, which was December 14, 1861. If the tenant's statement is to be preferred as the more reliable, then the statutory title most probably did not ripen; for, while a suspension of the statute of limitations would not count against a possession of land held after the Code took effect, it would hold against a possession which terminated before January 1, 1863,—the time when the Code went into operation. It was the Code which brought in the element of prescription as distinguished from limitation; and, under the Code, prescrip-

tion, as it has been held, runs, though the statute of limitations be suspended. *Pollard v. Tait*, 38 Ga. 439. While, of course, prescription could be suspended by name, yet, being something merely analogous to, but not identical with, the statute of limitations, it is not suspended when the latter alone is mentioned in the suspending act. It was contended in the argument that, as the jury could have found from the evidence a title by "prescription," using the term for convenience, as we now use it under the Code, it mattered not whether a recovery could have been had upon the paper title, irrespective of the statute of limitations, or not. But it does matter, for under the charge of the court the jury were enabled to shun the question of prescription altogether. They were left free to find for the plaintiff on the paper title, when, as matter of law, that title was insufficient as a basis of recovery.

7. The same observation applies to another possible ground of recovery. Treating Mrs. Sears as claiming under her deed from Mumford, who went into possession under color of title, if he remained for less than seven years before the statute of limitations was suspended, a recovery might or might not be had upon such prior possession alone. (coupled with the deed from Mumford to Mrs. Sears,) as against King, the defendant, who seems to have entered under a claim of right, but shows neither title nor any lawful right. There being a demise both from Mumford and Mrs. Sears, or rather from each of them, his prior possession alone would be a basis of recovery if he never intended to abandon the premises; but, on finding that his tenant had gone out in time of the war, he intended to resume possession, and remained in that mind until he conveyed to Mrs. Sears. The animus revertendi would be matter for inquiry and determination by the jury on all the facts and circumstances of the case, and, if they found it existed, they might restore the possession to Mumford or his vendee, as against a mere wrongdoer, although Mumford had not shown either paper title or prescriptive title. But the charge of the court did not force the jury to pass on this question any more than it did on the question of prescriptive title. Under that charge the verdict may have been reached irrespective of whether the animus revertendi on the part of Mumford existed or not.

8, 9. The questions of practice involved in the cross bill of exceptions, and ruled upon, will be understood from headnotes 8 and 9, read in connection with the official report of the facts. The court erred in overruling the motion for a new trial. Judgment reversed. On cross bill, affirmed.

RICHMOND & D. R. CO. v. DE BUTTS.¹
(Supreme Court of Appeals of Virginia. Jan. 18, 1894.)

INJURY TO BRAKEMAN—LIABILITY OF RAILROAD COMPANY—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a brakeman, mounted a flat car to assist in side-tracking it, and, the train having backed into the siding, he cut the car loose, and signaled the train to leave it. Finding that the car did not clear the other track, he signaled the train to return and push the car in further. Plaintiff saw that the train was returning at fast speed, and put one foot between iron rails on the car and the end of the car, and kept the other foot on the outside so as to set the brake, and when the train struck the car the rails slipped forward and crushed his foot. Plaintiff signaled the engineer to lessen the speed of the train, but the latter could not see plaintiff on account of the position of the cars. If this signal had been made to a brakeman, who was in full view of plaintiff, it could have been communicated to the engineer. *Held*, that the plaintiff was negligent (1) in cutting off the car outside the clearance post, (2) in placing his foot in such position, and (3) in giving the signal to an engineer who he knew could not see him. Lewis, P., and Hinton, J., dissenting.

Error to circuit court, Culpeper county.

The plaintiff, Dulany F. De Butts, a brakeman in the employ of the Richmond & Danville Railroad Company, was injured while shifting a car, and, having sued the company, recovered a verdict against them of \$7,500, from a judgment for which amount the defendant obtained a writ of error. Reversed.

Wm. H. Payne, for plaintiff in error. F. L. Smith and Edmund Burke, for defendant in error.

LACY, J. This is a writ of error to a judgment of the circuit court of Culpeper county rendered on the 16th day of November, 1890. The action was for an injury received by the plaintiff, Dulany F. De Butts, the defendant in error here, against the Richmond & Danville Railroad Company, while in the employment of the company as brakeman at Culpeper Courthouse on the 25th day of December, 1889. Arriving at Culpeper Courthouse with a freight train on which he was employed, De Butts was directed to assist in side-tracking and dropping one of the cars of the train, which had been disabled for further travel on account of a hot box and a broken journal. De Butts mounted this car, and the train pulled up and backed into the siding. De Butts cut the car loose and signaled the train to pull up and leave it. Another brakeman of the same train was put in charge of the switch, which he locked with a key which he took from his pocket. De Butts finding as the train pulled out that the car was not within the distance, just signaled for the train to come back, his object being to have the car that he had cut loose, and on which he was standing, pushed fur-

ther into the side track within the distance post. The brakeman gave the signal to the engineer to come back, and he reversed and came back. The car on which De Butts was standing was a gondola, loaded with iron rails, which were somewhat shorter than the car, and there was a space between the end of the iron rails and the framing of the car. De Butts, seeing this, and thinking the train was coming rather fast, put one foot inside of the frame of the car and the end of these iron rails, and kept the other foot on the outside, so as to set the brake on the gondola car. When the train struck the stationary car loaded with iron rails the iron rails slipped forward on the floor of the car and caught De Butts' foot and hurt it, and hurt the other leg also. He was extricated from his position by the conductor, who was at the time in the office at the depot, sending a dispatch to the proper authorities to give information of the fact that the disabled car had been side-tracked there, and would be left behind when the train moved on to its destination. Being thus hurt, De Butts left the employment of the company, and brought this suit for damages for the stated injury. At the trial there was evidence adduced on both sides, and instructions asked by the defendant and refused by the court, and exceptions taken, and a motion to set aside the verdict by the defendant made and overruled and excepted to, and the evidence certified. There was a verdict for the plaintiff for \$7,500, upon which judgment was rendered, and the case brought here by writ of error by the defendant.

The evidence shows that the plaintiff in the action, the defendant in error, was injured seriously in the foot. And we must next consider whether the injury was caused by the negligence of the railroad company, and, if so caused, whether the plaintiff was innocent or himself guilty of negligence which contributed to the accident as a proximate cause, without which it would not have happened. The conductor of the train had gone into the office of the company, and left the engineer and crew to shift this car to the side track, while he sent a dispatch. If this can be considered negligence under the circumstances of this case, it is the sole indication thereof. But, if so, then the plaintiff, De Butts, was guilty of negligence—First, in cutting off this disabled car outside the distance post; secondly, in putting his foot inside a box car loaded with railroad iron,—iron rails,—against which a train was presently to bump by his own signals. Without these acts, or either of them, the accident in question would not have happened. It was the plain and well-understood duty of De Butts as brakeman to cut this train loose, and signal the train away after it had gotten inside the distance post. So well did he understand this duty that he needed no instructions to bring the train back when he discovered his own neg-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

lect of duty in leaving the car outside of the distance post. If he had observed this at the proper time, all would have been safe. He says he put his foot inside in front of this pile of heavy iron to keep from receiving an injury. Why would this foot be less likely to be hurt on the platform outside the car than the one foot he did leave outside, and which was not hurt? He says he signaled the engineer to stop, and was not obeyed; that the engineer could not be seen by him nor he by the engineer. Why did he signal the engineer, whom he could not see, and who therefore could not see him, in preference to the fellow brakeman, who he says stood at the switch, and was necessarily in full view of him, on an unobstructed track, only a few yards off? It was a lack of diligence, and in itself negligence, to give signals to a person out of sight, and then act as if they would be obeyed. We are of opinion that the negligence of the company is not established, and it is clear, we think, that the defendant in error was guilty of contributory negligence in putting his foot inside the box car in front of iron rails when he knew that the car was about to be struck by the train to move it, and especially so, as he himself says, when he saw that the train was coming back fast enough to strike hard. *Railroad Co. v. Risdon's Adm'r*, 87 Va. 335, 12 S. E. 786; *Railroad Co. v. Moore*, 78 Va. 96; *Clark v. Railroad Co.*, Id. 717; *O'Connell's Case*, 20 Md. 212; *Scally's Case*, 27 Md. 589; *Wonder's Case*, 32 Md. 419; *Railroad Co. v. Cottrell*, 83 Va. 519, 3 S. E. 123; *Railroad Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Improvement Co. v. Andrew*, 86 Va. 270, 9 S. E. 1015; *Tyler v. Sites' Adm'r*, (Va.) 13 S. E. 978, and cases cited. We are of opinion, therefore, that the plaintiff was not entitled to recover in this case. The judgment of the circuit court appealed from here must therefore be reversed and annulled, and the case remanded for a new trial.

LEWIS, P., and HINTON, J., dissenting.

SHIFFLETT et al. v. COMMONWEALTH.¹
(Supreme Court of Appeals of Virginia. Jan. 11, 1894.)

CRIMINAL LAW—PROSECUTION FOR MISDEMEANOR
—ABSENCE OF DEFENDANTS—JUDGMENT OF IMPRISONMENT.

1. Plaintiffs were jointly indicted for disturbing religious worship, were duly summoned, but no appearance made. The court entered an order amending the indictment against S. C., and making it read "S. S., alias S. C." *Held*, that the court could do this in such defendant's absence, under Code, § 3999, which provides that no indictment shall abate for any misnomer and gives the court power to amend the

same, but does not require the defendant to be present in order that this may be done.

2. Code, § 4012, declares that "in prosecution for misdemeanors not embraced by section 4010, after a summons has been executed ten days before the first day of the term, * * * the court may either award a *capias*, or proceed to trial, in the same manner as if the accused had appeared." *Held*, that it was proper to try defendants for a misdemeanor in their absence, without first awarding a *capias* for their arrest, when they had been duly summoned.

3. It is not error to enter a judgment calling for imprisonment in jail, in the absence of defendants charged with a misdemeanor, the rule of the common law requiring their presence having been changed by Code, § 4076.

4. When the accused is not in custody, it is not error to direct his arrest and confinement in jail for the nonpayment of a fine before a *fieri facias* has been issued; Code, § 726, giving the court this power.

5. Where a person has been duly summoned to answer a prosecution for a misdemeanor, and fails to be present, to proceed in his absence with the trial, and sentence him to imprisonment, is no violation of the constitutional provision which guaranties to the accused the right to be confronted with witnesses against him, he being deemed, in such case, to have waived said provision.

Error to circuit court, Greene county.

Scott Shifflett and another, having been convicted of disturbing religious worship, were sentenced to confinement in jail, and they bring error. Affirmed.

Field & Thomas and R. H. Pollard, for plaintiffs in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

LEWIS, P. The plaintiffs in error were jointly indicted, under section 3805 of the Code, for a disturbance of religious worship. A summons to answer the indictment duly issued, and was served upon them, but there was no appearance on the part of either of them. At the May term, 1892, the following order was entered in the case, viz.: "It appearing to the court that the indictment contains a misnomer, in this: that Scott Shifflett is called Scott Crawford, by which last name he is commonly known, but his true name is Scott Shifflett,—it is therefore ordered that the indictment be amended by striking out the name of 'Scott Crawford,' and in its place and stead inserting the name of 'Scott Shifflett, alias Scott Crawford,' which is accordingly done." At the same term it was ordered as follows: "It appearing to the court that a summons has been executed on each of the said defendants ten days before the present term of this court, and the commonwealth being ready for trial the court doth order that the trial proceed, though none of the defendants are present, in the same manner as though said defendants had appeared and pleaded not guilty." The trial thereupon proceeded, and the jury found the defendants guilty, fixing their punishment at four months' imprisonment in jail, and the payment of a fine of \$50 each, and there was judgment accordingly; and, on motion of the attorney for the com-

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

monwealth, a capias was awarded, commanding the arrest of the defendants, "and their delivery to the jailer of Greene county, to be by him safely kept in jail for the period of four months, and thereafter until the payment of the fine and costs adjudged, such additional confinement, however, not to exceed six months." The judgment of the county court having been affirmed by the circuit court of Greene county as to the plaintiffs in error here, a writ of error was awarded by one of the judges of this court.

1. The first objection is as to the action of the trial court in allowing the indictment to be amended in the absence of the defendants. This objection, however, is without merit, in view of the statute which provides that no indictment shall be abated for any misnomer of the accused, "but the court may, in case of a misnomer appearing before or in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact." Code, § 3990. The statute does not say the amendment shall be made only in the presence of the accused, and in the present case the amendment was not made until after the defendants had been summoned to answer the indictment, though we do not mean to decide that the amendment might not have been rightly made before the service of process. Upon that point it is unnecessary to express any opinion.

2. Nor was there error in proceeding to trial in the absence of the defendants. The argument is that, inasmuch as corporal punishment is attached to the offense charged in the indictment, a capias ought to have been awarded for the arrest of the defendants, and that it was illegal to order a trial in their absence. But here, too, all doubt is removed by the statute, which reads as follows: "In prosecutions for misdemeanors, in cases not embraced by section 4010, after a summons has been executed ten days before the first day of the term of the court, or if the accused was admitted to bail and make default, the court may either award a capias, or proceed to trial, in the same manner as if the accused had appeared and pleaded not guilty." Code, § 4012.

3. The next objection, viz. that the trial court erred in entering up judgment in the absence of the defendants, is also settled by statute, which displaces the rule of the common law that judgment for corporal punishment can be pronounced against a man only when he is personally present. Section 4076 of the Code provides that "no capias to hear judgment shall be necessary in any prosecution for a misdemeanor, but" that "the court may proceed to judgment in the absence of the accused; and" that, "if such judgment requires confinement in jail, the court may make such order as may be necessary for the arrest of the person against whom such judgment is, and for the execution thereof."

4. Another point is that "when the accused

is not in custody it is error to direct his arrest and confinement in jail for the nonpayment of a fine, until a *fi. fa.* has been issued." But section 726 of the Code empowers the court in which any judgment for a fine is rendered, going in whole or in part to the commonwealth, either of its own motion or at the instance of the attorney for the commonwealth, to commit the defendant to jail until the fine and costs are paid, or until the costs are paid where there is no fine, and provides, further, that the court, or the judge thereof in vacation, may direct the clerk to issue a capias pro fine, either before or after a return of a writ of *fi. fa.* Section 4071, however, provides that when a person is sentenced to confinement in jail a certain term, and afterwards, until he pay a fine, etc., such additional confinement shall in no case exceed six months from the end of said term; and this provision was observed in the present case.

5. Lastly, the objection that the defendants have not been constitutionally tried is as destitute of merit as the assignment of error already considered. The constitutional guaranty that "the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him," etc., is in no manner violated by any of the statutory provisions above mentioned. The appellants in the present case were given the opportunity, as the statute requires, to appear and defend, and their choice not to appear, but to make default, was a waiver of the constitutional provision now relied on. We are of opinion that the judgment of the circuit court is right, and must be affirmed.

DAVIS v. LEE CAMP NO. 1, C. V.¹

(Supreme Court of Appeals of Virginia. Jan. 11, 1894.)

CAMP OF CONFEDERATE VETERANS—POWER TO HOLD AND SELL LANDS—DEED.

Under section 1008, Code, every corporation, when not otherwise provided, has the right "to purchase, hold, and grant estate, real and personal." The defendant corporation, by special act, has power to hold land to provide a home for invalid Confederate veterans, provided that it shall not hold, at any one time, more than 500 acres. The government was vested in a board of visitors, who purchased land. At a regular meeting of the camp, the board of visitors was authorized to sell a portion of the tract purchased, if advisable. Subsequently the board of visitors sold the tract in question, which sale was ratified by both the board and the camp. *Held*, that the board of visitors had full power to make the sale, and the purchaser obtained a good title.

Appeal from chancery court of Richmond.

The defendant, Davis, purchased of the Lee Camp No. 1, C. V., a tract of land, and refused to accept a deed on the ground that the board of visitors who made the sale had no power to do so. In a suit brought by the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

camp for specific performance of the contract, a decree was made, holding said sale to have been regular, and requiring the defendant to complete his purchase, from which decree the defendant appealed. Affirmed.

The following is the opinion delivered by W. S. BARTON, Chancellor:

I have carefully considered the record and the arguments of counsel in this case. The arguments are able and elaborate, and have been of much assistance to me. By the general statute of this state, every corporation, in respect to which it is not otherwise provided, has the right to "purchase, hold, and grant estate, real and personal." This corporation, therefore, unless "it is otherwise provided," had the power to purchase, hold, and grant the land, the subject of this controversy, under the general law. There is no provision otherwise. The special act of incorporation, on the contrary, expressly provides that "said association may acquire title to and hold land for the purpose of providing a home," etc., "provided that it shall not hold at any time more than five hundred acres." The only restriction is as to the amount of land it may hold at one time. Section 1070, Code 1887, provides "that no incorporated company shall hold any more real estate than is proper for the purposes for which it is incorporated." The only reason, therefore, for the third section of the charter, seems to have been to prevent any trouble or doubt as to the amount of land to be held at any time, by the statutory provision that 500 acres might be proper for the purpose of the incorporation. We can well understand that there may have been in the minds of the projectors the idea of a farm, to be cultivated by the inmates of the home for their profit and occupation. In all this there is no other restriction upon the right and power of the corporation to "purchase, hold, and grant" realty, which are given by the general statute, and so affirmed by the charter itself. The purpose referred to in the third section of the charter is simply the general purpose for which the charter was granted. This general purpose or object is fully set forth in article 2 of the by-laws of the association before its incorporation, and is recited in the preamble of the act of incorporation, passed on March 13, 1884. By article 11 of regulations governing the board of visitors, who seem to be equivalent to a board of directors, the board is authorized to select a site at or near Richmond, to erect the necessary buildings, etc., the title to the property purchased to be in the camp, or lease, etc., till permanent quarters be provided. The corporation having realized a large amount of money through a bazaar held for it by ladies of Richmond, by donations from many persons in different states made to it for its general purposes and objects, determined to purchase a site for the home. Accordingly, in November, 1884, it purchased the land now known as the "Sol-

diers' Home," in which was included the part, the subject of controversy, which was conveyed to it in fee simple absolute, without any trust, limitation, or restriction of any kind whatsoever. It not being "otherwise provided" by the general statute, the charter of the corporation, or the deed of conveyance, I think the corporation has the full power of alienation, which, by the common law, is incident to the ownership, and is expressly given by the general statute, and by a necessary implication in its charter. Nor does the necessarily limited duration of time in which the object and purposes of the corporation can operate in any wise affect the title in a grantee of the corporation. There is such a thing as a fee simple for alienation and a determinable fee for enjoyment. The limited life of a corporation, whether by express provision in its charter, or by its repeal or forfeiture, does not affect the estate and title of a grantee.

At a regular meeting of the camp in August, 1887, a resolution was adopted, which had been offered at the June meeting and twice laid over, giving authority to the board of visitors to sell nine acres of the tract across the boulevard from the Soldiers' Home,—the land now the subject of controversy being a part of the nine acres,—should in the judgment of the board such sale be to the interest of the home. This was like such a resolution at a meeting of stockholders in an ordinary corporation, authorizing the board of directors to sell certain land. In March, 1889, the board of visitors, at a meeting thereof, appointed a committee of its own body to make the necessary arrangements and conduct the sale, which was done by the committee, its action approved and ratified by the board, and subsequently by the camp. Under similar circumstances a board of directors would have made the deed of conveyance. It may be questionable whether the board of visitors here could convey a satisfactory title; but I think there can be no doubt but that the corporation was bound by the action of the board of visitors, whom it had appointed its agent for the very purpose of sale, and, if it had refused to carry out the contract, a specific performance would have been ordered by the court. I do not think the subsequent ratifications made at the suggestion of counsel for the defendants, and in the form prepared by them, were necessary, except so far as to provide for the execution of the proper deeds by the proper officers. Upon the whole case, therefore, I am of the opinion that the plaintiff had the right to sell the land bought by the defendant, that the deed secures a proper title to the purchasers, and that they ought to be required to fulfill their contract. A decree may be prepared accordingly. My conclusion has been reached through much study and thought, but I have not considered it necessary to write out an elaborate opinion,—only to state the gen-

eral line of reasoning which has led me to the opinion above expressed.

John Howard, for appellant. Christian & Christian and Pegram & Stringfellow, for appellee.

PER CURIAM. For reasons stated in writing by the chancellor who decided this cause in the said chancery court, which opinion is copied in the record of this cause, there is no error in said decree.

HECKERT et al. v. HILE'S ADM'R et al.¹
(Supreme Court of Appeals of Virginia. Jan. 11, 1894.)

INVALID MARRIAGE—LEGITIMACY OF CHILDREN.

Under Code 1887, § 2554, declaring that "the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate," children by the second marriage of a man whose first wife had left him and gone to another state are legitimate, though born before the first marriage was dissolved. Fauntleroy, J., dissenting.

John E. Roller, for appellants. Sipe & Harris, for appellees.

LACY, J. This is an appeal from a decree of the circuit court of Rockingham county, rendered on the 26th day of October, 1889. The controversy in this case is between the children of Peter Hile by a lawful wife, who left her husband and went to the state of Michigan, and the children of the said Peter Hile by another woman, married by him during the lifetime of his first wife, who were born before the dissolution of the marriage of the first wife. The circuit court decreed that the first marriage was lawful, and the children legitimate; that the second marriage was null, but that the children of this null marriage were legitimate,—made so by our statute, (section 2554 of the Code of Virginia,) which declares that "the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate;" and that the second set of children, being legitimate, inherited from the father as the first set, the issue of the legal marriage. There can be no doubt of the correctness of this decision. The case comes within the plain provision of the statute cited above, which is of ancient date in this commonwealth, (Acts 1785, c. 60; Acts 1794, c. 93, § 19,) and was carefully considered and construed in 1804 in this court, in the case of *Stones v. Keeling*, 5 Call, 143,—a decision under which we have since rested. In that case the law was considered in every aspect under which it should be regarded, and was sustained and made effective.

But it is contended by the counsel for the appellants that a recent case in this court was substantially overruled *Stones v. Keeling*,

and they cite *Greenhow v. James*, 80 Va. 636; but we do not so regard it. That was the case of the illegitimate children of a white person by a negro, who left the state, and were married abroad. The distinction is sufficiently drawn in the opinion in that case; and in the case of *Stones v. Keeling*, supra, Judge Roane, who delivered one of the opinions in that case, does the same on page 148, saying: "The law concerning marriages is to be construed and understood in relation to those persons only to whom that law relates, and not to a class of persons clearly not within the idea of the legislature when contemplating the subject of marriage and legitimacy." The case of *Greenhow v. James* does not affect this case, nor the case of *Stones v. Keeling*, and the last-named case is a distinct authority on this case, and we think upon the plain terms of the law, and the reason of the legislature in enacting the same, is correct. We therefore affirm the decree of the circuit court of Rockingham county.

FAUNTLEROY, J., dissenting. LEWIS, P., and HINTON, J., absent.

PHILLIPS v. COMMONWEALTH.¹

(Supreme Court of Appeals of Virginia. Jan. 18, 1894.)

CRIMINAL LAW—CONTINUANCE—ILLNESS OF WITNESS.

Upon a second trial, after a previous conviction was set aside on appeal, defendant moved for a continuance from the May to the July term of court, on account of the absence of a witness who had been duly summoned, whose evidence was material, and who was detained on account of illness, but who, in defendant's opinion, was convalescent, and would be able to attend at the July term. The physician of the witness stated that there was little chance of his recovery, but that he might live. Held, that it was error not to grant the continuance, and that defendant was entitled to a new trial, it appearing that the witness had recovered.

Error to corporation court of Alexandria city.

One Phillips was convicted of murder, and brings error. Reversed.

Edmund Burke and E. S. Brent, for plaintiff in error. R. Taylor Scott, Atty. Gen., for the Commonwealth.

LACY, J. This is a writ of error to a judgment of the corporation court of Alexandria city, rendered on the 22d day of May, 1893. This is a prosecution against the plaintiff in error for murder, and the conviction herein is the second conviction of the said plaintiff in error. The first conviction, which was on the 27th day of January, 1892, was of murder in the first degree, and the

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

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accused was sentenced to be hanged; but on writ of error to this court on that conviction and sentence, on the 16th day of February, 1893, the said judgment was reversed and annulled, the verdict set aside, and a new trial awarded the plaintiff in error. Upon a second trial in the said corporation court of the city of Alexandria, the judgment was rendered which is now here the subject of review, whereby the accused was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of eight years.

The first assignment of error is the refusal of the trial court to continue the case on the ground of the absence of the witness Green, who was a member of the bar of that court, who had been duly summoned, and the summons returned executed, whose materiality was duly attested, and which was known to the court, he having testified at the first trial. It was proved by his attending physician that the said Green (the witness) was sick, with the chances against him as to his recovery, but there was a possibility of his recovery. The accused, in his affidavit, sets forth that the said Green was convalescent, and that he would, as he believed, be able to attend the July term, the trial taking place in May, and that he could not safely go to trial; that he has discovered additional evidence that the said Green could offer to the court, and that the motion was not made for delay, or to evade trial, but was bona fide, that he might meet and make defense to the charge brought against him; and it is stated upon the trial by the counsel that the said Green is now well, and able to attend court to testify. Under these circumstances, it is insisted by the plaintiff in error that the trial court ought to have granted the short continuance asked for, and that its refusal has resulted in a denial of justice.

The rule upon which the court proceeds in considering a motion for a continuance is well settled, and has often been the subject of decision in this court. In Hewitt's Case, 17 Grat. 629, Judge Moncure said, on this subject: "A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. As a general rule, when a witness or a party fails to appear at the time appointed for a trial, if such a party show that a subpoena for a witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides a reasonable time before the time for the trial, and shall swear that the witness is material, and that he

cannot safely go to trial without his testimony, a continuance ought to be granted. The party thus shows, prima facie, that he is not ready for trial, though he has used due diligence to be so; and, in the absence of anything to show the contrary, the court ought to give him credit for honesty of intention, and continue the case if there be reasonable ground to believe, that the attendance of the witness at the next term of the court can be secured, especially if the case has not been before continued for the same cause. But circumstances may satisfy the court that the real purpose of the party in moving for a continuance is to delay or evade the trial, and not to prepare for it, and in such case, of course, the motion ought to be overruled." See 3 Rob. Pr. (O. S.) pp. 140, 141. Savage, O. J., in *People v. Vermilyea*, 7 Cow. 383; *State v. Lewis*, 1 Bay. 1; *Com. v. Knapp*, 9 Pick. 515; *Roussell's Case*, 28 Grat. 936, opinion of Burk, J., citing and approving Judge Moncure's opinion in *Hewitt's Case*, supra; *Gwatkin v. Com.*, 10 Leigh. 687; *Walton's Case*, 32 Grat. 863, opinion of Judge Moncure, a case very similar to this; *Hook v. Nanny*, 4 Hen. & M. 157, note; *Higginbotham v. Chamberlayne*, 4 Munf. 547; *De Ford v. Hayes*, 6 Munf. 390; *Harris v. Harris*, 2 Leigh. 584; *Harman v. Howe*, 27 Grat. 676; *Bland & Giles County Judge Case*, 33 Grat. 447. The authorities on this subject are collated in an admirable article in 3 Amer. & Eng. Enc. Law, pp. 804, 821.

We are not unmindful that there have been two convictions by two juries herein. The first conviction has been annulled by this court as unlawful, and the same set aside. The case was sent back for a new trial to be had therein, and this new trial was to be without any prejudice from the first conviction, which is null. Upon the second trial, as upon the first, the accused was entitled to be fully heard. His witness was not dead, but sick; he might recover, (as he has done.) The accused swore to his materiality, and there is no ground, and none is alleged, to believe that he was not a material witness. We think the accused was entitled to be fully heard before he was condemned. An accused cannot be fairly tried until he has been fully heard under the established rules of law as set forth above, (*Welsh v. Com.*, 18 S. E. 273;) and the corporation court erred in overruling the motion of the accused for a continuance on the ground stated, and for that cause it must be reversed and annulled. It is not necessary to consider the exception based upon the action of the court in overruling the motion of the accused for a change of venue because of local prejudice, as an impartial jury, free from exception, was obtained from another county. Case reversed.

MORRISS v. VIRGINIA STATE INS. CO.¹
 (Supreme Court of Appeals of Virginia. Dec. 7, 1893.)

TRUST DEEDS—NOTICE OF SALE—PLACE OF SALE—EXERCISE OF POWER BY AGENT—EQUITY.

1. While it is a compliance with a deed of trust requiring a notice of "ten days at the least" to insert the advertisement on Sunday, the 4th, for a sale on the 15th, when the circumstances warrant equity in taking charge of the sale, the court should prescribe a notice of at least 30 days, not only in the newspaper, as directed by the deed, but by handbills.

2. Where a deed of trust contains no provision as to the place of the sale, this matter is in the discretion of the trustee, and, if either party is not satisfied with his decision, he may apply to equity for instructions prior to sale.

3. Where a deed of trust covering property on the outskirts of Richmond contained no provision as to the place of sale, and the trustee selected the city hall in Richmond, on the debtor's objection that, if the sale were made on the property, it would command a higher price, the debtor's wishes should be respected.

4. A deed of trust directing a sale, but not requiring, in terms, a subdivision, should be construed in reference to Code 1873, c. 113, § 6, requiring the trustee, in case of default, "to sell the property conveyed by the deed, or so much thereof as may be necessary;" and if the land will bring a better price by a sale in lots, and the owner so requests it, and the trustee refuses, the owner may control the trustee, in the exercise of his discretion, in equity.

5. Trustees in deeds of trust must act in person, and not by agent.

Lewis, P., dissenting.

Appeal from chancery court of Richmond.

The Virginia State Insurance Company, being the beneficiary under a deed of trust executed by one Morriss, requested the trustee to proceed with the sale, which the trustee did, but in such a manner as to be objectionable to the debtor in the matter of notice of sale and method of conducting the same. The debtor secured an injunction, which was dissolved, and an appeal is taken from said order of dissolution. Reversed.

Stiles & Holladay and Edmund Waddill, for appellant. Christian & Christian, for appellee.

LACY, J. This is an appeal from certain decrees herein, the last of which was rendered on the 31st day of October, 1893. The controversy between the parties to this appeal has arisen over the execution of a trust deed executed by the appellants to a certain trustee, conveying a tract of land in Henrico county, near the city of Richmond, containing 856 acres, to secure a debt due to the Virginia State Insurance Company of \$12,229.37. There were several abortive attempts at a sale, one on the premises, and another in the city of Richmond, when a sale was made at \$12,000, when, it appearing by affidavits that the price of \$12,000 was grossly inadequate, and in the opinion of numerous

persons, real-estate dealers and others, that the property was worth \$25,000, by consent of all parties the sale was set aside by the court, and a resale ordered. The trustee advertised the sale to take place at the door of the city hall in the city of Richmond, when the appellants procured an injunction, upon the ground that the property could not safely be sold in the city of Richmond with a reasonable expectation that it would bring a reasonable price, and that such a sale would result only in a sacrifice of the property; that it was a large farm near the city, situated in the county, and capable of subdivision into several valuable truck farms; that the trustee should not be allowed to sell the whole tract unless necessary to pay the debt due on it; that, if sold in bulk, it would not bring its value, whereas the record showed that it was worth \$25,000, and that land just across the road had recently sold for \$100 per acre, and this, by proper advertisement and judicious offering, might be sold as well; that the 10-days notice required by the deed had not been given; that the advertisement was inserted on Sunday, the 4th, to take place on the 15th instant; that this was not a compliance with the terms of the deed in letter or in "spirit;" and that the advertisement contains no notice of the terms of sale as to the residue after the cash payment has been paid and the debt discharged. This bill was answered, and a motion made to dissolve the injunction. Upon the hearing the court dissolved the injunction by decree in the cause on the 18th of October, 1892, but reserved all other questions, and, on motion of the plaintiffs, suspended the decree upon the usual terms for 10 days, to allow the plaintiffs to present their petition to this court for an appeal, which being done, the appeal was allowed.

In the first place, it appears that the advertisement was as long as the terms of the deed required,—“ten days at the least.”

The next question is as to the place of sale, and upon this question we will remark that the deed contained no stipulation as to the place where the sale should be made; and according to the rule established by the law, and to be found in the decisions of this court, this matter was left to the sound discretion of the trustee. *Shurtz v. Johnson*, 28 Grat. 657, and cases cited; *Walker v. Beauchler*, 27 Grat. 511, and cases cited. Mr. Barton says on this subject, (2 Bart. Ch. Pr. 446): “When the deed does not fix the place for the sale, the trustee may make it in any place which, in his discretion, he may select; but he should exercise that discretion fairly and prudently,” (citing *Shurtz v. Johnson*, supra;) and he cannot sell more of the trust subject than is necessary to satisfy the debt, unless the interest of the owners demand it, or they request it, or unless it would be injurious not to sell the whole. This rule, of course, relates to a divisible subject, the trustee's duty in every case being to act for

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

the best interest of all the parties. It is a settled principle in this court that trustees ought not to allow any urgency of the creditor to have an influence on their conduct, but that, whether they act under deeds of trust or under decrees of a court of chancery, they ought to consider themselves as impartial agents of both parties, and should act for the interest of the debtor as well as of the creditor, (*Quarles v. Lacy*, 4 Munf. 251;) and it is now incontrovertibly settled that a trustee is to be considered as the agent of both parties, bound to act impartially, and to disregard the suggestions of either inconsistent with that obligation, and that he has, in general, no greater powers touching his trust than a commissioner of a court of equity for a sale of lands under its decree, (*Lane v. Tidball*, Gilmer, 130; 4 Minor, Inst. 65; *Chowning v. Cox*, 1 Rand. (Va.) 311; 2 Minor, Inst. 285; 1 Lomax, Dig. 424.) Mr. Minor says, (2 Minor, Inst. 286:) "The general principle of his duty is to act justly, impartially, and discreetly, without permitting himself to be swayed to the one side or the other by the suggestions or persuasions of either party. He has been likened in this respect to the commissioner of the court of equity. He must conform to the terms of the deed in respect to the time and manner of giving notice, and the time and manner of sale, as well as in all other particulars, and in all points when the deed is silent he must govern himself by the general rule to sell to the best advantage, and with an impartial regard to the rights and interests of both parties." It is a principle also of such transactions that the trustee is charged with a personal confidence, and must therefore act in person and not by agent. 1 Lomax, Dig. 427; 1 Tuck. Comm. 108; *Harvey v. Steptoe*, 17 Grat. 289. It is the trustee's duty to forbear to sell, and to ask the aid and instructions of a court of equity, in all cases where the amount of the debt is unliquidated or in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when, for any reason, a sale is likely to be accompanied by a sacrifice of the property, which, at the cost of some delay, may be obviated. 2 Minor, Inst. 287; 1 Tuck. Comm. 106; *Lane v. Tidball*, supra; *Wilkins v. Gordon*, 11 Leigh, 547; *Miller v. Argyle*, 5 Leigh, 460; *Miller v. Trevillian*, 2 Rob. (Va.) 25; *Bryan v. Stump*, 8 Grat. 247. Judge Lomax, in his Digest, (volume 1, p. 425,) says: "These trustees may, of their own motion, apply to a court of equity to remove impediments in the way of a fair execution of their trust;" and, if the trustee fails to do so, the debtor may enjoin the sale, and ask the execution of the trust under and by the aid of a court of equity, and thus, to adopt the language of Lord Bacon, substitute for the private conscience of the trustee "the general conscience of the realm, which is chancery," which Justice Story says implies nothing more than

that a trustee who does not know his duty shall be at the pains to learn it.

As we have said, the deed is without directions as to the place where the sale shall be made, and the trustee must, in the exercise of a sound discretion, such as we have above referred to, select the place; and, if he shall be in doubt, he may apply to a court of equity for a determination of that question. If he determines for himself, and either party is not satisfied with his decision, he may apply to the court of equity to have it determined before the sale by the court, according to the circumstances of the case. That this question is determinable in the light of the circumstances of the particular case is clear under the decisions. In *Walker v. Beauchler*, supra, Judge Staples, speaking for the unanimous court, said: "It is very true the deed does not prescribe the place of sale, and much was therefore left to the discretion of the trustee. In the exercise of that discretion, it would seem clear that the sale ought certainly to have been made at least in the county where the property was situated." And in the subsequent case of *Shurtz v. Johnson*, supra, Judge Binks says, speaking of a sale of land situated in York county, Va.: "It thus appears that neither Baltimore nor any other place is specially designated in the deed as the place where the sale is to be made, but by the plainest implication the selection of such place is left to the discretion of the trustee, as is usual in deeds of this character. It may not be doubted, therefore, that the trustee had the power under the deed to make the sale at Baltimore, or at any other place which he, in his discretion, might select. The real and only question is whether he exercised that power fairly and prudently; in other words, whether he committed a breach of trust." Both of these two last-named cases were brought to invalidate the sale after it had been made. In the first the sale was set aside, and in the latter the sale was sustained. And, after the sale has been made, the court interposes with more reluctance than when it is applied to in the first instance, and before the sale is actually made. *Taylor v. King*, 6 Munf. 366; *Harris v. Harris*, Id. 368; *Gibson v. Jones*, 5 Leigh, 370; *Hughes v. Caldwell*, 11 Leigh, 348. In this case the trustee, in the exercise of his discretion, selected the place of sale outside of the county. The debtors, who claim that they have a tract of land worth at least \$25,000, and a debt on it of \$12,000, object to the place selected by the trustee, and, before the sale is made, insist that it ought to be made on the premises; that the land is worth a good deal more than the debt on it; that it is capable of advantageous subdivision, and that it ought to be sold in parcels; that it is not necessary to sell the whole to satisfy the debt, and that only so much ought to be sold as is necessary to

pay the debt on it; that its appearance and situation will increase the prospects of a good sale when the sale is made on the premises in view of the bidders. The trustee, in his notice, says: "There are few estates combining more elements of value than this. In the first place, it is a large estate, very near to the city of Richmond, on an excellent road, and embracing some of the finest trucking land in the county, the soil being similar to that of the noted vegetable section of Hanover county; then, again, its nearness to a growing city, such as Richmond now is, justifies the hope of a very largely increased value in a few years; and, again, it is said to contain inexhaustible quantities of the finest clay for pottery, fire brick, tiling, etc.;" and besides, he says, "embracing, besides the excellent highland, a quantity of Chickahominy low grounds, and a sufficiency of woodland." In view of the fact that such large interests are involved, the property being both extensive and valuable, and the debt being safely secured and bearing 7 per cent. interest, in reviewing the discretion of the trustee, and considering all the circumstances of the case, we are of opinion that the wishes of the debtor in this case ought to be so far respected as to make the sale on the premises, the deed not prescribing any other place, and that, before dissolving the injunction, the chancery court ought to have so directed, and its refusal to do so is error, for which the decree complained of must be reversed and annulled.

We are further of opinion that the land should be subdivided and sold in parcels; that no more may be sold than is necessary to pay the debt; and, when enough has been realized to pay the debt, no more ought to be sold. It is true that the deed simply directs the trustee to sell the property conveyed, but this must be taken in connection with the statute, chapter 113, § 6. Code 1873, which applies to this case, which provides, in such case, that when default shall have been made in the payment of the debt, or any part thereof, by the grantor, the trustee shall sell the property conveyed by the deed, or so much thereof as may be necessary. And Judge Moncure, speaking of this subject, and construing a similar law to this, says, in *Michie v. Jeffries*, 21 Grat. 347: "It is the duty of the trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him, in case of default, to sell the trust subject, without saying, 'or so much thereof as may be necessary to satisfy the purposes of the trust;'" the last part of the sentence, "to satisfy the purposes of the trust," being the phraseology of the law applicable to that case. Code 1860, c. 117, § 6. He adds: "That is always implied, unless a contrary intention plainly appears;" and again: "In saying 'under and by virtue of the trust deed,' the tract of land thereby conveyed to him is

to be construed and read as if the words 'or so much thereof as may be necessary' followed the words above mentioned. In saying 'under and by virtue of the trust deed,' all the terms of the deed, and of the law on which it is founded, are, in effect, embodied in the decree, except such as are expressly varied." To the same effect is *Terry v. Fitzgerald*, 32 Grat. 851; the opinion in that case saying: "We hold that it was the duty of the trustee to sell it in parcels, if by that mode it would bring the best price; and, although he has a discretion, it is a legal discretion, which is subject to the control of a court of equity; and if the land will bring a better price by dividing it and selling it in several lots, and the owner desires and requests it, and the trustee refuses, the owner thereby invokes the intervention and assistance of a court of equity, * * * to control him in the exercise of his discretion,"—citing Judge Moncure as saying, in *Crenshaw v. Seigfried*, 24 Grat. 272: "If the debtor desires that a particular and designated portion of the land, fully adequate by a sale for cash to produce the amount of the debt and expenses, such desire ought to be carried into effect. In this case the debtor does not insist that only a part of the land shall be sold, or object to selling the whole, if necessary for the payment of the debt and expenses, but only insists that it shall be laid off into particular and designated portions, having assurance that it will sell better, and will not require the sale of the whole to pay the debt and the expenses." In the same case it is said that the court having possession of the case ought, instead of dissolving the injunction, to have retained it, and directed the execution of the trust; and, further: "The court is of opinion, therefore, that the circuit court, instead of dissolving the injunction, should have continued it, retained the cause, and had the sale made under its supervision and direction." And we think that in this case the court ought not to have dissolved the injunction, but should have retained the case, and directed the sale to be made under its supervision, directing a division into portions, and making a sale only of so much as was necessary to satisfy the debt; and its refusal so to do, and its action in dissolving the injunction, was error for which, moreover, the decree of that court must be reversed and annulled.

As to the length of time that the land should be advertised before selling, the terms of the deed are not restrictive, except only so far as to prohibit a shorter notice than "ten days at the least," and in this case the court, in justice to the debtor, should prescribe a reasonable notice of at least 30 days, and not only in the newspaper, as directed by the deed, but by handbills posted and so distributed as to bring the best price attainable for the property, if these expenses are incurred at the instance and request of the debtor, as they do not diminish the amount

to be received by the creditor, and in no way impair his rights. It is right to add that in this case the creditor has been liberal and not unduly aggressive in enforcing his claim. It appears that he has been as anxious as the debtor to make the property bring the best price possible, and there is no proper criticism that can be, or ought to be, made upon him, nor upon the trustee, throughout these transactions. Much has been done in a mutual spirit of friendliness; but the parties have reached the point where divergence of interest has finally culminated in disagreement, and, the debtor seeking the aid of a court of equity, as he had a right to do, we have considered the rights of the parties as they now appear, and will reverse the decree for the stated reasons, and remand the cause to the chancery court, with directions to continue the injunction, and direct the proceedings of the trustee in order to a sale of the property and the payment of the creditor's debt as soon as it can be done, having regard to the just rights of all concerned.

RICHARDSON and HINTON, JJ., absent.
FAUNTLEROY, J., concurring in result

LEWIS, P., (dissenting.) The case, in my judgment, is so plain for affirmance that I shall be brief in the statement of my views in regard to it. In view of the evidence in the record and the settled law on the subject, it is rather a surprise that the decree appealed from should be reversed. Fortunately, however, the decision cannot be authority for any other case. *Whiting v. Town of West Point*, 88 Va. 905, 912, 14 S. E. 693. The principal grounds upon which the injunction was prayed for to prohibit the advertised sale were (1) that the sale ought to be made on the premises; (2) that the property ought to be sold in parcels; and (3) that the notice of sale was not sufficient,—the latter point being now abandoned.

The property is situate just outside the city limits. The place of sale is not prescribed in the deed of trust, but the provision is "that, in the event of a sale, the same shall be made after first advertising the time, place, and terms thereof for at least ten days in some newspaper published in the city of Richmond." And the statute provides that the trustee in a deed of trust which does not otherwise provide shall, when called upon to sell, make sale after first having given reasonable notice of the time and place of sale, which, of course, implies that in such a case the sale need not be upon the premises, but that it may be in any other suitable place the trustee, in his discretion, may select. Code, § 2442; 1 Bart. Ch. Pr. 448. The principle is that the trustee must exercise his discretion, so far as he has any, in an intelligent and reasonable manner. He must use every effort to sell the estate

under every possible advantage of time, place, and publicity. 2 Perry, Trusts, § 6020. This elementary principle was recognized in *Richards v. Holmes*, 18 How. 143. There the trustee in a deed of trust, having advertised the sale to take place on the premises, adjourned the sale to a different time and place, and this action was approved. The court, speaking by Mr. Justice Curtis, said: "We consider that a power to a trustee to sell at public auction after a certain public notice of the time and place of sale includes the power regularly to adjourn the sale to a different time and place, when in his discretion, fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property. If he has not this power, the elements or many unexpected occurrences may prevent an attendance of bidders, and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf, under the circumstances supposed, and which he may well be presumed to intend to confer on another." The case of *Johnson v. Dorsey*, 7 Gill, 269, is another authority in point. In that case, under a decree of foreclosure of a mortgage, a farm situate just outside the city of Baltimore was ordered to be sold, and the sale, which was made, not on the premises, but in the city, was upheld. Indeed, in *Shurtz v. Johnson*, 28 Grat. 657, a sale, by a trustee in Baltimore, of a farm situate in York county, this state, was sustained; and Judge Burks, in the course of his opinion, said: "I know of no law of this state forbidding such a sale, and no decision of any court has been cited sustaining the general proposition that a trustee who is invested with power to make sale of real estate for the payment of debts, without express limitations as to the place of sale, cannot lawfully make such sale at a place outside the territory, and beyond the jurisdiction of the state in which such real estate may be. The powers of the trustee must be determined from an examination of the deed under which he acted. * * * It appears that neither Baltimore nor any other place is specially designated in the deed as the place where the sale is to be made, but by the plainest implication the selection of such place is left to the discretion of the trustee, as is usual in deeds of this character." The learned judge also referred to *Walker v. Beauchler*, 27 Grat. 511, and pointed out the difference in the circumstances of the two cases. Indeed, Judge Staples, speaking for the court in the *Walker Case*, expressly stated that, when the place is not prescribed by the deed of trust, much is left to the discretion of the trustee. He lays down no such proposition as that in such a case the sale must, as matter of law, be on the premises, or even in the county; neither does he impugn the general principle stated by Judge Burks in the

Shurtz Case, but merely says that under the circumstances of the case with which he was dealing, the war being flagrant, the sale ought to have been at least in Alexandria county, where the property was situated, and not in Georgetown, outside the state. The case is, in fact, an authority for the principle that whether a trustee has fairly exercised his discretion depends upon the circumstances of the case,—a principle universally recognized, not only in regard to selecting the place of sale, but also as to selling the estate in whole or in parcels.

Now, remarkable to say, the conclusive and uncontradicted evidence on this point in the present case is utterly ignored in the opinion just announced. It is proven as the opinion of competent judges that the property will sell to better advantage in Richmond than on the premises. This is set out at large in the answers of the defendants, which were sworn to, and which were treated as affidavits on the motion to dissolve the injunction, there being no countervailing testimony. 1 Bart. Ch. Pr. 414; Muller's Adm'r v. Stone, 84 Va. 834, 6 S. E. 223. The answers aver that the premises are greatly out of repair, and by no means attractive in appearance. It is also stated that, at a previous sale on the premises under the deed of trust, the only bidders present were from the city; that the property, after extensive advertisement, was offered on that occasion both as a whole and in parcels, and that several thousand dollars more were bid for it as a whole than in parcels. Not enough, however, was bid either way to pay the secured debt, and the chancery court refused to confirm the sale. It is also averred that there is no reasonable ground to believe that the property will ever sell for the amount of the debt, which has greatly increased by the accumulation of interest. The answer of the trustee states that he would have indulged the appellants as to the place of sale had they expressed a preference (as they were given an opportunity to do) for the sale again to be on the premises. He also says that, in view of the fact that at the previous sale on the premises not more than a half dozen persons from the country attended, he considered the chance of an advantageous sale better if the property were offered in Richmond, and accordingly advertised the sale to take place in front of the city hall. Why, then, should the advertised sale be enjoined, instead of leaving the trustee to try the experiment of a sale in the city? Surely, no one could have been injured by such experiment, for, had the sale proceeded in the city without a just or satisfactory result, the chancellor could have refused to confirm it. The appellants thus had an ample remedy for the protection of their interests, without applying, as they did, to the judge of another court for an injunction to stop the sale. It is to the interest

of all parties that the property shall bring the best possible price, and, as it has once been offered on the premises without an adequate price being obtained, why should it not be offered in the city, where, according to the evidence, the chance of obtaining a fair price is better. It is extraordinary, as it seems to me, that the decree dissolving the injunction should be reversed, with arbitrary directions to sell on the premises and in parcels, in view of the result of the effort that has already been made to sell in that way, and all the other evidence in that case. It is perfectly apparent from the record that the object of the appellants is to obtain delay, and in the mean time to remain in possession and enjoyment of the property. Their appeal, in my judgment, is wholly without merit, and it is to be regretted that it should find favor in a court of justice. I am for affirming the decree.

STOCKS v. STATE.

(Supreme Court of Georgia. July 26, 1893.)

CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY PENDING TRIAL.

When, during the trial of a capital case, the mother of a juror died, it was not improper for the court to inform the juror of the fact, and to discharge him from further service in the case; and, after so doing, there was no error in declaring a mistrial, nor in overruling, at a subsequent trial, a plea of former jeopardy, based on these facts. It is immaterial whether the accused did or did not consent to the juror's being informed of his mother's death, or to the mistrial; the emergency authorizing the discharge of the juror, and thus ending the trial, being of a nature similar to one which would arise upon the serious sickness of a juror or of the presiding judge, or sickness in the family of either, requiring his personal care and attention, or from other cause which should be recognized as affording in law a sufficient necessity to warrant such action by the trial court. Bleckley, C. J., dissenting.

(Syllabus by the Court.)

Error from superior court, Fulton county: R. H. Clark, Judge.

Porter Stocks was convicted of murder, and brings error. Affirmed.

Arnold & Arnold and Glenn & Slaton, for plaintiff in error. C. D. Hill, Sol. Gen., and W. C. Glenn, for the State.

SIMMONS, J. It was a principle of the common law, announced by Blackstone to be "a universal maxim," that "no man is to be brought into jeopardy of his life more than once for the same offense." 4 Bl. Comm. 335. This principle was embodied in the constitution of the United States by the fifth amendment, and similar provisions exist in nearly, if not all, the states of the Union. In view of this principle, it became important, in the early days of English jurisprudence, to know when an accused person had, in a legal sense, been put in jeopardy. Some of the courts in England held that after a jury had been impaneled

and sworn, and charged with the case, they must return a verdict, and if, for any reason, they did not do so, the accused could not be again put on trial. Coke, in 1 Inst. 227b, says that "a jury sworn and charged in a case of life and member cannot be discharged by the court, but they ought to give a verdict;" and in 3 Inst. 110: "If any person be indicted for treason or of any felony or larceny, and thereupon a jury is returned and sworn, their verdict must be heard, and they cannot be discharged." The rule admitted of no exceptions, not even in case of the sickness or death of the prisoner or of a juror. Accordingly, we read of juries being carried from county to county in carts, in order that they might return a verdict before being discharged. The rule was so arbitrary, and the proceedings attendant upon it were so inconvenient and inhuman, that exceptions were, in the course of time, established. So we read in the leading case of *King v. Scalbert*, 2 Leach, 620, that, during the trial of the prisoner for murder, one of the jurors was seized with a fit, and carried from the court in an insensible state. A juror who examined him reported under oath that he thought he would not be able to attend the trial immediately. The jury were thereupon discharged, and another jury sworn, consisting of the former eleven and an additional one, and the prisoner was convicted. This case was followed and approved by all the judges, 18 years afterwards, in *Rex v. Edwards*, 3 Camp. 207; and the exception thus established is now recognized by all the courts, both in England and in this country. See 1 Lead. Crim. Cas. (Bennett's Notes,) 466. An exception to the rule was also made where the prisoner became ill during the trial. See the Case of *Meadow*, Fost. 76, which is the earliest case holding that a jury could be discharged on this account; and see *King v. Stevenson*, 2 Leach, 546. To these exceptions were added others, of a different character. Failure of the jury to agree upon a verdict before the expiration of the term of the court was eventually recognized as a sufficient ground for then discharging the jury, without the consent of the prisoner, and without prejudice to the further prosecution of the case. The contrary was held in two early cases in this country. *Spier's Case*, 1 Dev. 491, and *State v. Garrigues*, 1 Hayw. (N. C.) 241. But these cases were not followed, and it is now universally conceded that such an occurrence presents a case of legal necessity. Then came the exception which allowed the discharge of the jury before the end of the term, without the prisoner's consent, when it appeared to the court that they were unable to agree upon a verdict. On this point there was great conflict among the courts in this country, a number of very respectable courts holding that nothing short of the illness of the prisoner or of one of

the jury, or like physical necessity, would authorize the discharge of the jury without the consent of the prisoner; but the better opinion now seems to prevail that the court has the power to discharge them, after they have been out a sufficient length of time, and it appears that they are unable to agree. Another exception was that made in the case of *Nugent v. State*, (1833,) 4 Stew. & P. 72, where it was held that the sickness of the presiding judge was a sufficient ground for discharging the jury. This exception, so far as I have been able to ascertain, is now universally recognized by courts and text writers. In the case of *State v. Wiseman*, 68 N. C. 203, it appeared on the trial of the defendant for murder that one of the jurors had fraudulently procured himself to be put on the jury for the purpose of acquitting the accused. The judge withdrew the juror, and declared a mistrial. The supreme court, on appeal, held that this was proper, and that the defendant could be again placed on trial, and that this was so whether he was cognizant of the fraud or not. The discharge of the jury under these circumstances was placed on the ground of "legal necessity," or what was denominated "the necessity of doing justice." In the case of *Simmons v. U. S.*, 142 U. S. 148, 12 Sup. Ct. 171, it was held that "when it is made to appear to the court during the trial of a criminal case, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors, or any of them, are subject to such bias or prejudice as not to stand impartial between the government and the accused, the jury may be discharged, and the defendant put on trial by another jury; and the defendant is not thereby twice put in jeopardy, within the meaning of the fifth amendment to the constitution of the United States."

The foregoing instances are given more for the purpose of showing that the courts are not limited to exceptions already made, than because of any direct bearing those mentioned may have upon the case now in hand. All of these exceptions were founded upon the doctrine of necessity; but, in deciding as to what constitutes a necessity, the courts, as we have seen, have not been governed by an inflexible standard, and have not felt bound to confine themselves to physical or absolute necessity, but have extended the doctrine as the ends of justice seemed to require. The tendency, as was said by this court in the case of *Nolan v. State*, 55 Ga. 524, "has been to lower the standard so as to comprehend moral as well as physical necessity, and, in the region of the moral, to be content with very moderate tests." That which unfits a juror for the performance of his duty creates a legal necessity, and such unfitness may result from mental suffering

no less than from physical pain. As civilization and refinement have progressed, there has been a growing disposition on the part of the courts to recognize the influence of the feelings and emotions upon the mind, as producing this necessity. In the case of *Com. v. Fells*, 9 Leigh, 613, the court regarded the condition of a juror's wife, who was about to give birth to a child, as presenting a strong case of necessity. In the case of *State v. Tatman*, 59 Iowa, 471, 13 N. W. 632, while the defendant was on trial for a felony, the presiding judge received a telegram from his home to the effect that his wife was sick, and he thereupon adjourned the court until the following Friday, on which day he ordered a final adjournment. On the following Monday his wife died. At a subsequent term the defendant was again put on trial on the same indictment, and pleaded former jeopardy. The plea was overruled, and the supreme court affirmed the ruling. In *Hawes v. State*, 88 Ala. 60, 7 South. 302, it was held that the illness of a juror's wife presented such a necessity as authorized his discharge. See, also, *Parsons v. State*, 22 Ala. 53. A case which closely resembles the one we are now considering is that of *State v. Davis*, (1888,) 31 W. Va. 390, 7 S. E. 24, where information was imparted to one of the jurors, after the greater part of the evidence had been heard in a felony case, that his son had just died. It was held that a necessity existed for the discharge of the juror, and that he was properly discharged, and that the court could substitute another juror in his place, and proceed with the trial *de novo*.

We think the action of the court below in this case is sustainable upon sound principle, as well as upon authority. One whose mind is disturbed and distracted by sudden grief is certainly in no condition to discharge the grave and responsible duty of trying another for his life. What judge would be in a fit condition to preside on the trial of a capital case, upon being summoned to the deathbed of his wife, his child, or his mother? And would any court hold that a judge who is informed, while trying a case, that his wife has just died, cannot return to his home, and attend her funeral, but must go on with the trial? No man of ordinary sensibilities, it seems to me, would be in a proper state of mind to discharge his functions as a judge on the trial of a case, under such circumstances, and he should not be compelled to do so. As was said in the case of *State v. Tatman*, *supra*, "the law makes no such inhuman requirements." If what has been said is true as to a judge, it is equally true as to a juror. In order to perform his duty properly, he must give his close and undivided attention to the testimony, as delivered by each witness, and to the law, as given in charge by the court. He must carry both in his mind, and carefully apply the one to the other, and it is often necessary that he

should make nice distinctions in the application of the law. It is not to be expected that a juror will perform this duty properly, under the circumstances shown by the record in this case. The question to be considered is, not whether the juror, in view of the greater importance of trying the prisoner than of paying the last tribute of affection and respect to his departed mother, should put aside his grief, and proceed undisturbed in the performance of his duty, but whether, as a matter of fact, he is capable of doing this. If not, the ends of justice require that he be discharged from the jury. What was said by the court in the case of *State v. Davis*, *supra*, where the juror was discharged on account of the death of his son, will apply equally in the present case: "Observation teaches us, if, indeed, we have not learned from sad experience, that the natural result of information suddenly imparted to a father, of the death of a child, is to unfit him, for the time, to attend to business. It would have been cruel to have required the juror to remain on the jury, under such circumstances. His grief would naturally unfit him for the discharge of such an important duty. And if, as the court said in *Fell's Case*, the object of the trial is to obtain a fair, just, and impartial verdict, there is little prospect of it, under such circumstances. This is one of the cases spoken of in the opinion in that case, where a juror is, from the peculiar condition of his mind and feelings, manifestly disqualified from bestowing on the case that attention and impartial consideration which is necessary to a just verdict."

But it is said in the present case that the judge should not have informed the juror of his mother's death, and that, whether this was proper or not, it was unnecessary to have discharged the jury, as the trial could have been suspended, and the juror sent, in the charge of a bailiff, to attend the funeral. In reply to the first of these suggestions, I will say, for myself, that it would have been cruel and inhuman to have kept the juror confined, without the knowledge of his mother's death; and to have required him to remain in the charge of a bailiff while attending her funeral rites would have been equally so, when, according to the oath of the bailiff, he could not speak to the juror himself, or allow others to do so. To attend the funeral of a parent is regarded by the civilized world as a high and sacred duty, and funerals are often postponed to the last possible moment in order that some son or daughter from a distant place may attend. What would be thought at this day of a judge who would inform a juror that his wife or mother had just died, but that, in consequence of the duty imposed upon him to try a man for a criminal offense, he could not be excused, and must put aside his grief, and give his whole attention to the discharge of his duties? We are satisfied that under

the facts of this case the presiding judge had the power and authority to discharge the juror and declare a mistrial, and that the plea of former jeopardy was properly overruled.

Our constitution provides that "no person shall be put in jeopardy of life or liberty more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial." So it will be seen that the question which has so long agitated the courts in different states, as to the right of the judge to declare a mistrial, has been settled in this state by our organic law. The granting of a mistrial is the act of the judge. He alone can grant it, and he alone, in the exercise of a sound discretion, must determine what facts would be sufficient to authorize him to grant it. Where the jury fail to agree, he is to determine, from the length of time they have had the case under consideration, and by conferring with them, whether they will be able to agree or not. In declaring a mistrial, he must, as stated above, exercise a sound legal discretion. He cannot do it capriciously. If the facts which he finds and announces, in his judgment, show a legal necessity for a mistrial, a reviewing court will affirm his judgment. If no such necessity is shown, his judgment will be reversed. We have attempted to show, in the first division of this opinion, that the facts upon which the judge below, in the case at bar, acted, authorized him to declare a mistrial, and that he did not abuse his discretion. Judgment affirmed.

BLECKLEY, C. J., (dissenting.) 1. One of the main reasons, not only for all rules of trial, but for trial itself, is protection of the innocent. The law presumes every man innocent until the contrary legally appears. When an innocent man is on trial for a capital felony, his life is in peril. The duty of preserving an innocent life is higher, both morally and legally, than that of attending any funeral whatsoever. It follows that, when the mother of a juror dies pending the trial of a capital case, the true necessity which arises is absence from the funeral, not absence from the trial. The juror, being set apart and dedicated to the work of delivering the accused from deadly peril, is to be regarded as if in a far country, or confined in chains which cannot be broken. His public trust denies indulgence to his private sorrow. His sacred duty to the dead is canceled by the more sacred duty which he owes to the living.

2. Consent for a juror to be informed of the death of his mother involves consent to accept such service as he can render after the information has been communicated to him, but does not involve any consent that the jury may be discharged, and a mistrial declared. The plea of former jeopardy should have been sustained.

CENTRAL RAILROAD & BANKING CO. v. KENT.

(Supreme Court of Georgia. July 26, 1893.)

INJURIES TO EMPLOYEE—NEGLIGENCE—SUFFICIENCY OF EVIDENCE — DISMISSING ACTION BY APPELLATE COURT.

1. This case has already been twice before this court. According to the opinion of a majority of the court when it was decided the last time, there should not, upon the actual merits of the case, have been any recovery against the railroad company. A third verdict having been rendered in favor of the plaintiff below upon substantially the same facts, it must be set aside; and as it is manifest, in view of the repeated trials which have taken place, that the plaintiff can never show a materially different state of facts, direction is given that the case be dismissed.

2. Bleckley, C. J., dissenting: The evidence warranted the verdict, and, on the doctrine laid down in 10 S. E. 965, 84 Ga. 352, the finding ought to stand.

3. Where the plaintiff, by making a prima facie case of negligence, has put the defendant on a vindication of its diligence, and this vindication has been made in two successive trials, but the court below has failed to recognize it as complete in either instance, this court, in the exercise of its power to give direction, may decline to order a new trial, and instead thereof may direct that the action be dismissed. In the present case such direction was given in order to avoid the onerous, and apparently useless, trouble and expense to the defendant of vindicating its diligence a third time.

4. After giving such direction, this court, in its discretion, upon good cause shown, might at the same term modify its judgment; but, no such cause being shown in the present case, the motion to modify is denied.

(Syllabus by the Court.)

Error from superior court, Bibb county: A. L. Miller, Judge.

Action by S. J. Kent against the Central Railroad & Banking Company to recover for injuries sustained in an accident caused by a washout in the railroad while in defendant's employ as engineer. There was a verdict for plaintiff, and defendant brings error. Reversed and dismissed, and motion for reinstatement denied.

For former reports, see 10 S. E. 965, and 13 S. E. 502.

R. F. Lyon, for plaintiff in error. Dessau & Bartlett and A. O. Bacon, for defendant in error.

LUMPKIN, J. The main case was decided July 26, 1893. The first headnote expresses the view of it then entertained by Justice SIMMONS and the writer. The second headnote states the dissent of Chief Justice BLECKLEY to the judgment rendered. Afterwards, a motion for a rehearing was made by counsel for the defendant in error, for the purpose of asking a modification of the judgment in so far as it directed a dismissal of the case in the court below. This motion, by a unanimous judgment of the court, covered by the third and fourth headnotes, was denied September 30, 1893.

A brief discussion of the case upon its merits, and of the motion for a rehearing, will now be presented:

This case was first before this court at the October term, 1889. 84 Ga. 359, 10 S. E. 965. It was then held that the court below committed certain specified errors in ruling out testimony, and that the charge of the court did not prominently bring to the attention of the jury the point upon which the case should turn. A new trial was granted by this court, and, at the next hearing, a second verdict was rendered in favor of Mr. Kent, the plaintiff. A motion for a new trial was made and overruled, and the case was again brought to this court. 87 Ga. 402, 13 S. E. 502. After a most anxious and careful examination of the entire record, a majority of the court became fully satisfied that the plaintiff, upon the facts presented, was not entitled to a recovery—First, because it was manifest, beyond doubt, that the washout was caused by the act of God, unmixed with negligence on the part of the railroad company; and, second, because, in our judgment, the company had conclusively and satisfactorily shown that it had exercised all the diligence required of it by law in ascertaining the existence of the washout, and was not negligent in failing to discover it in time to give warning of its existence to Mr. Kent before the locomotive he was driving ran into it. In the opinion beginning on page 403 of the volume last cited, and on page 502, 13 S. E., the writer undertook to show, from the undisputed facts appearing in the record, that the washout was attributable alone to the act of God. The argument need not be repeated here, but, after a re-examination and the most deliberate consideration of it, there seems to be no doubt of its soundness and correctness. In the same opinion the writer quoted the fourth headnote of the previous decision, to be found in 84 Ga., on page 352, and 10 S. E., on page 965, and also the language of Justice BLANDFORD, on page 356 of that volume, and on page 966, 10 S. E., in which he said: "The question is, was the railroad company negligent in not knowing of the washout, so as to have given the plaintiff due notice and warning?" and on the same page added: "It seems to us the pressure of the whole case is upon this point," etc. Just below these words quoted from the opinion of Justice BLANDFORD, the writer, speaking for Justice SIMMONS and himself, said: "Trying the case by the test thus made, we are of the opinion that the railroad company has conclusively shown it exercised all that ordinary and reasonable care and diligence required of it by law,"—meaning, as is obvious, that the company had used the full degree of legal diligence in discovering the existence of the washout. 87 Ga. 405, 13 S. E. 503. Again, on page 407, 87 Ga., and page 503, 13 S. E., the following language was used: "Of course, if the company, by

its servants, had actually known of the washout, or the circumstances were such that it ought to have known of it in time to warn the approaching train, or if the facts showed that the company had any reason to apprehend danger at this point, and failed to provide against the same, then undoubtedly it would have been a case of such negligence on the part of the defendant as would entitle the plaintiff to recover. *But we do not think this negligence on the part of the company existed*, and are of the opinion that the proof shows to the contrary." There were no italics in the opinion from which the above quotation is taken, but they are used here to indicate that we were undertaking to deal with the question as to whether or not, according to the evidence, the company had, or ought to have had, knowledge of the washout in time to have given the plaintiff warning. The final conclusion upon this branch of the case is stated on pages 407 and 408, 87 Ga., and on page 503, 13 S. E., in the following words: "Our conclusion, therefore, is that, even upon the line suggested for a proper solution of this case in the opinion delivered by Justice BLANDFORD, above quoted, the verdict was unwarranted by the evidence, and ought not to stand."

It sufficiently appears from the foregoing that, when the decision reported in 87 Ga. and 13 S. E. was made, a majority of this court were convinced that, under the evidence as it then appeared in the record, in no view of the case was the plaintiff entitled to recover. In other words, we were fully satisfied that the washout which produced the calamity resulting in the plaintiff's injuries was caused by the act of God, and that there was no want of diligence on the part of the company in failing to discover it in time to give notice of it to the plaintiff. Accordingly, another new trial was granted, and it resulted in a third verdict, upon substantially the same facts, in favor of the plaintiff. At the last trial there was some additional evidence, but all the members of the court are satisfied that it does not in any material or substantial particular change or vary the case upon its actual merits, as it appeared when here the last time. Entertaining this view, Justice SIMMONS and the writer felt constrained to set the verdict aside, and also to order that the case be dismissed. All of us feel certain that the full truth of this case has been developed, and that further trials of it could not bring out anything new that would be material in substance. On each trial the plaintiff has undoubtedly made out a *prima facie* case. This it was easy to do, in view of the presumption of negligence raised by the law against railroad companies; but the majority are decidedly of the opinion that, on the last two trials at least, the company has conclusively and satisfactorily rebutted this presumption, and has shown itself free from all negligence or blame. It is manifest, we all think, that the plaintiff

can never show a materially different state of facts,—that is, can never show a state of facts that will, or should, break down what two of us regard as a perfect reply to the plaintiff's case. Of course, a court cannot, and should not, generally, undertake to foresee or predict what a party can or cannot prove; but after a case has been tried time after time, and this court, in view of all the records sent up, and of the character of the case, is fully satisfied that in the very nature of things nothing more can be shown which could or ought to change or affect the final result, we may with propriety say it is beyond the power of a particular party to show a materially different state of facts, especially when that party has all along been represented by able, faithful, and exceedingly diligent counsel, whose efforts in his behalf make it certain that they have brought out all in his favor, and all against the company, which could be proved, and who do not themselves suggest anything material in his favor, or against the company, which further investigation might bring to light. We mean to say that neither the record nor the argument of this case, either upon the merits or upon the motion to reinstate, suggests any reasonable ground to infer that there is any probability that upon another trial any new fact or circumstance would be elicited which could or ought to affect the result. The plaintiff and his witnesses are thoroughly committed to their theory and version of the case, and so are the defendant and its witnesses. All the witnesses who have testified more than once have, in the main, thus far been consistent with themselves, and the new evidence at the last trial did not add any material features to the case as already developed. The policy of the law requires that long and tedious litigation should come to an end, and the direction given in this case was made in accordance with this policy. See the cases cited below. The defendant, in two successive trials, has vindicated its diligence to the satisfaction of a majority of this court, and there is not the slightest reason to conjecture it would not do so again and again. To protract this litigation would not only unnecessarily impose on the defendant the trouble and expense of so doing, but would be profitless to the plaintiff himself. The CHIEF JUSTICE has never disagreed with Justice SIMMONS and the writer in holding that the washout which caused the calamity in this case was due to the act of God, and that the company was not negligent as to looking after the culvert and keeping it in order. His two dissents have been based solely on the opinion entertained by him that the evidence was sufficient to warrant the jury in finding that, after the washout occurred, there was sufficient time for the company to discover its existence, and give the plaintiff warning. He has not meant to convey the impression that the jury ought to have

so found, but he thinks they might have done so. This is the only point about which we have ever differed in the case. While his opinion on this question has undergone no change, yet, accepting as correct the judgment of the majority upon it, he agrees with us in denying the motion to reinstate the case, and in declining to modify the judgment rendered. Undoubtedly, it would, during the term at which it was rendered, be in the power of this court to modify a judgment upon good cause shown; but no such cause was shown in the present case, and, as already stated, none was even suggested by counsel for the defendant in error. Their position, as we understand it, is that this court had no power to give the direction it gave in this case. We hold otherwise, and are free from doubt in so doing. Section 218, par. 2, of the Code undoubtedly empowers this court to make a final disposition of a cause; and section 4284 expressly declares that it may "award such order and direction to the cause in the court below as may be consistent with the law and justice of the case." These sections certainly confer very large and ample powers upon this court; large enough, in our opinion, to authorize the direction given in the case at bar.

In *Harris v. Hull*, 70 Ga. 838, 839, Justice Hall said: "One great purpose in establishing this court was to terminate suits, and with this view it is made its duty, not only to grant judgments of affirmance or reversal, but any other order, direction, or decree required, and, if necessary, to make a final disposition of the cause, (Code, § 218;) and it is empowered to give to the cause in the court below such direction as may be consistent with the law and justice of the case, (Id. § 4284.) Litigation should never be protracted where this, with due regard to the rights of parties, can possibly be avoided. 'Interest reipublicae ut sit finis litium' is a maxim so old that its origin is hidden in a remote antiquity, and the policy which it inculcates is so essential as not to admit of question or dispute." Again, in *Robinson v. Wilkins*, 74 Ga. 47, one of the headnotes reads as follows: "The supreme court is authorized to make final disposition of a case, and to give it such direction as is consistent with the law and justice applicable to it, and as will prevent the unnecessary protraction of litigation;" and on page 50 the same learned justice says: "We have authority to make a final disposition of this cause, (Code, § 218,) and to that end to give to it such direction as is consistent with law and justice applicable to it, (Id. § 4284.) This, we think, has already been done, and we are unwilling to protract litigation in any case where it can be avoided, with due regard to the rights of parties." We do not mean to say that the two cases above cited correspond, as to the facts, with the one now before us, but the statements as to the powers of this court are clear, strong, and unequivocal. Of

course, the powers conferred by the two above-mentioned sections of the Code should be exercised with proper care and caution, and after careful search we find nothing in the past history or records of this court evincing any disposition on the part of those who have presided in it to exercise them otherwise. In the present case the two justices who gave the direction complained of are fully satisfied of its justice and propriety, and the court is unanimous as to its power to give the direction. Judgment in the main case reversed with direction; the CHIEF JUSTICE dissenting. Judgment on the motion to reinstate denied; all the justices concurring.

STATE v. MORROW.

(Supreme Court of South Carolina. Dec. 11, 1893.)

ABORTION—ADMINISTERING DRUG—JURISDICTION—PURCHASING DRUG OUTSIDE OF STATE.

1. Where the evidence excepted to is not incorporated into the record, its admission cannot be reviewed.

2. Since it is unlawful to prescribe for or advise or procure any woman with child to take any medicine, or to use any instrument or other means, with intent thereby to cause an abortion, (18 St. 547,) a person who gives a woman a drug with intent to cause her to abort may be convicted, though the abortion was in fact caused by the use of instruments.

3. The courts of South Carolina have jurisdiction of defendant for the offense of advising and procuring a woman of that state to take a drug with intent thereby of causing her to abort, (18 St. 547,) though the drug was procured by defendant in another state, and sent to the woman by mail.

Appeal from general sessions circuit court of Richland county; W. H. Wallace, Judge.

James H. Morrow was convicted of administering medicine to a woman with intent to cause an abortion, and appeals. Affirmed.

Following is the court's charge to the jury, together with its reasons for overruling the plea to jurisdiction:

"Gentlemen of the Jury: The real issue in the case, or issues, are within a narrow compass, and, when I have explained them to you, I will have nothing more to say. The indictment is brought under the following statute: 'That any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, substance, drug, or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with the intent thereby to cause or procure the miscarriage, or abortion, or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or such woman result, in whole or in part, therefrom, be deemed guilty of a felony.' There

are two counts in the indictment, one charging the defendant with having procured and advised the taking of a certain drug with the intent to produce abortion, and that, in consequence of such abortion, the death of the woman was produced. That is the first count. That is your first inquiry,—whether or not this defendant did that. If he did, he is guilty, under this act; if he did not, he is not guilty, under this first section of the act. In order to convict him under this act and on this indictment, you must be satisfied beyond a reasonable doubt of his guilt. You don't decide this case as you decide cases on the civil side of the court, by the preponderance of the testimony, because whenever a defendant is brought into court and tried on a charge of any violation of the criminal laws of the state, no matter how small or inferior the crime may be, he comes into court under the legal presumption of innocence. Every man, in other words, is presumed to be innocent until he is proven guilty; but, when the testimony in this case establishes his guilt beyond a reasonable doubt, then the presumption of innocence fades out of the case, and the jury must so find. But, unless that presumption of innocence is rebutted, it stands in lieu of proof of innocence; and it so stands until the weight of evidence satisfies the jury beyond a reasonable doubt of his guilt. And, when it does, then he must be found guilty; if it does not do that, he must be acquitted. The second count in the indictment is brought under the second clause or section of this statute, and that clause of the statute is as follows: 'That any person who shall administer to any woman with child, or prescribe, or procure, or provide for any such woman, or advise or procure any such woman to take, any medicine, drug, substance, or thing whatever, or shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, or abortion, or premature labor, of any such woman, shall, upon conviction thereof, be punished,' etc. That section is the same as the other, as far as it goes. The other provides that if the defendant shall do what is in this section, and the death of the woman result, then his crime is a felony. If he should do what this section provides, and no death should result therefrom, but only an intent to procure abortion is established against him, by the means recited in this statute, then the act does not declare that act to be a felony; and, in order to convict him of that, you will have to be satisfied beyond a reasonable doubt that he attempted to procure an abortion,—intended to do it,—by the means stated here in the section I have read to you. Those are the issues, Mr. Foreman and gentlemen,—those are the only issues. Whether they have been proven or not is for you to decide. Whether they have been proven beyond a reasonable doubt is for you to deter-

mine for yourselves. If you are satisfied beyond a reasonable doubt that either or both of these offenses are made out, you will have to convict him according to the degree of offense described in the act and set forth in the indictment. If you are not satisfied beyond a reasonable doubt that he procured an abortion, intending to do it by the means prescribed in the act, you will have to say 'Not guilty' on the first count. If you are of opinion, and are satisfied of it, beyond a reasonable doubt, that he attempted to procure an abortion,—intended to do it,—by the means set out here in this act, but that such means did not accomplish his purpose, but that the abortion was procured by other means, to which he was not a party, then you cannot convict him on the first count, but may on the second, if you are satisfied beyond a reasonable doubt.

"The solicitor asks me to charge you: 'That if the jury believe from the evidence, beyond a reasonable doubt, that the defendant, James H. Morrow, administered to Colie Fowler while with child, or prescribed or procured or provided for said woman while with child, or advised or procured said Colie Fowler, while with child, to take, any medicine, drug, substance, or thing whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of said Colie Fowler, he is guilty of the offense charged in the indictment.' I charge you that in its application to the second count in the indictment. That request does not contemplate the death of the woman. 'Second. That, under the second section of the act, it is not necessary to prove that the defendant actually administered the noxious drug, or actually advised the use of any instrument or any other means, to bring about an abortion; but that, if the jury believe beyond a reasonable doubt that, from the evidence in the case, the defendant, by his counsel and advice, induced the deceased to resort to any such means, or to make any such effort to bring about the abortion or premature birth, then the defendant is guilty under the second count of the indictment.' I charge you that. There is no difference of opinion on the other side in regard to it. I do not know that it is necessary I should say anything else to you. I have undertaken to make as clear as I could what the act is. I have undertaken to make clear to you what the real issue of the case is,—what you have to decide,—and that issue is one of fact. Did the defendant, by anything he did within the scope of the means described in the act, endeavor to procure abortion upon Colie Fowler, and that, in consequence of such intent and conduct upon his part, an abortion was produced, and death ensued? If you are satisfied beyond a reasonable doubt, he is guilty on the first count. If you are not satisfied beyond a reasonable doubt, you must acquit him on the first count. If you should acquit him on the first count, then you may inquire as to the

second count, which merely charges him with the intent and an effort to procure the abortion. If you are satisfied beyond a reasonable doubt that he did, then you must convict him on that count. If you are not satisfied beyond a reasonable doubt that he did, then you must acquit him on the second count. If you are not satisfied beyond a reasonable doubt that the defendant is guilty, why, you will have to say 'Not guilty.' If you are satisfied beyond a reasonable doubt that he is guilty on the first count, then you may simply write the word 'Guilty' on the back of the indictment, for that will include it. But if you are not satisfied beyond a reasonable doubt that he is guilty of the first count, and are satisfied beyond a reasonable doubt that he is guilty on the second count, then say 'Not guilty' on the first count, but 'Guilty' on the second count. If you are not satisfied beyond a reasonable doubt that he is guilty of either, say 'Not guilty.' Take the record."

Judge Melton, (addressing the court:) "The rule, as I understand it, is that the plea with reference to the jurisdiction of the court can be entertained at any time. Now, I beg to say to the court that I interposed the plea at the very first moment I could, because it couldn't be interposed except during the argument."

The Court: "That is not a matter for the jury, which is the reason I have said nothing to them about it. It is a matter entirely for the court. I may say I think the court has jurisdiction. I own there is room for difference of opinion about it; but, from what thinking I have been able to do in regard to it, I have reached the conclusion that the court has jurisdiction, for this reason: The act alleged was committed in this state. To illustrate: Suppose a man in a foreign jurisdiction should procure a firearm, and charge it with suitable ammunition, intending to use it against a person in this state. So far there is no crime, no offense, so far as I know, against the law of any foreign jurisdiction,—not a matter of which any foreign jurisdiction could take cognizance. But if he comes in this state, having prepared himself, formed his intention in a foreign jurisdiction, and executes his purpose here, the offense is committed here, and he is within the jurisdiction of this court. Suppose a man in a foreign jurisdiction prepares what is sometimes described as an 'infernal machine,' intending to use it upon a person in this state. His intention is formed, and the means of death are prepared in a foreign jurisdiction,—no offense committed still. But when he comes in this jurisdiction, or sends it into this jurisdiction, there is no offense if the implement is never delivered, if it couldn't be delivered by the express company, if it should be sent by means of that agency,—no offense committed. Only committed when the instrument is delivered, and perhaps the explosion took place; then the

offense is committed. No offense has been committed within the jurisdiction of any foreign power, of which that power could take cognizance,—nothing for which he could be tried. If he is not responsible here, he is not responsible anywhere. The application of this illustration to the case in hand, I think, is obvious. A man in a foreign jurisdiction—(we will take a supposititious case) only prepares the means of executing an unlawful purpose in this state, intending to do it, and it is transmitted by an agency. Up to that time no offense has been committed,—no offense within the jurisdiction of a foreign power whatever. He can't be tried there for what has been done. If he can't be tried here, he can't be tried anywhere. Suppose done in the state of New York. The state of New York cannot try a citizen of its own for a violation of the laws of this state; it can only try a citizen for the violation of its own laws. Upon the supposition that he has simply prepared the means of doing an unlawful act, intends to put them in operation, but has not done it, can't do it, must be something in which the court can act, something it can take hold of, in order to give the court jurisdiction to try him. The act is committed in this state, and is not committed until the delivery of the unlawful means for the unlawful purpose is accomplished. That's my view of it. I think this state would have jurisdiction of this offense if the facts alleged are true. [Addressing the jury:] You can retire, gentlemen."

Defendant's Exceptions.

"The defendant, James H. Morrow, excepts to the charge and rulings made by the Honorable William H. Wallace, presiding judge, on the trial of this case:

"(1) For that his honor held that the court of general sessions for Richland county, South Carolina, had jurisdiction to try and determine the charge against the defendant, James H. Morrow, for abortion, notwithstanding that it appeared in the evidence, and was undisputed, that the said James H. Morrow was not in this state at the time the alleged abortion was committed; and it did not appear that said defendant, James H. Morrow, 'inflicted any injury' upon the said Colle Fowler.

"(2) For that his honor ruled, in substance, that if the said James H. Morrow, being without this state, transmitted to the said Colle Fowler the means of bringing on an abortion, and advised its use, and the said Colle Fowler, without being thereto compelled by force or duress of any kind, made use of said means, by reason whereof she died, such bare transmission of the means of procuring an abortion, and suggestion to use the same, constitutes 'the infliction of an injury,' within the purview of the statutes of this state.

"(3) For that his honor held that the transmission by the said James H. Morrow, he

being at the time without the state, to the said Colle Fowler, being within the state, of the means of doing an unlawful act, is the doing of such unlawful act by the said James H. Morrow, if the said Colle Fowler thereafter made use of said means to her hurt.

"(4) For that his honor held that the courts of South Carolina have jurisdiction to try the said James H. Morrow for the crime of abortion, notwithstanding that the evidence, beyond dispute, established that said James H. Morrow committed no act in this state.

"(5) For that his honor held, in substance, that an act, viz. the procuring and forwarding an abortifacient, done by a person at the time without this state, and not criminal at the place where done, is a crime triable and punishable by the courts of this state if such abortifacient be used in this state, by the person to whom sent, with fatal results.

"(6) For that his honor held, in substance, that an act, viz. the procuring and forwarding an abortifacient, done by a person at the time without this state, and not criminal at the place where done, becomes a crime triable and punishable by the courts of this state if such abortifacient be used by the person to whom sent in this state, without regard to whether any result is produced or not by such use.

"(7) For that his honor held, in substance, that if the said James H. Morrow procured an abortifacient at a place beyond the territorial limits of the state of South Carolina, and forwarded the same to the said Colle Fowler, she being then within the limits of said state, and the said Colle Fowler thereupon, of her own free will, used the said abortifacient, without being thereto compelled by any force or duress or threats used towards her, such act of said defendant, James H. Morrow, is a crime, under the laws of this state, and can be tried and punished by the courts of South Carolina.

"(8) For that his honor held that a state statute creating an offense not known to the common law is entitled to extraterritorial respect.

"(9) For that his honor held that a state statute creating an offense not known to the common law can be violated by a citizen of another jurisdiction, being, at the time of the alleged violation, beyond the limits of the state wherein the said statute is of force.

"(10) For that his honor charged the jury that if they believed beyond a reasonable doubt that the defendant procured, or attempted or intended to procure, an abortion by any of the means set out and prescribed in the act on that subject, they must find a verdict of guilty on the first or second count, or generally, as the case might be; whereas he should have instructed the jury that the prosecution was limited in its evidence, and the jury, in arriving at their verdict, to the means (and the proof thereof) set forth in the indictment.

"(11) For that his honor overruled defend-

ant's objection to the indictment made upon the ground that the acts complained of in the first count thereof were not therein stated to have been done 'feloniously.'

"(12) For that his honor admitted as evidence, in reply, certain letters purporting to have been written by the defendant."

Melton & Melton and McDonald, Douglass & Obear, for appellant. P. H. Nelson and John G. Capers, for the State.

McIVER, C. J. The defendant in this case was indicted under the act of 1883, (18 St. 547,) entitled "An act to amend the criminal law by providing for the punishment of abortion." The only portions of that act pertinent to the present appeal are sections 1 and 2. Section 1 reads as follows: "That any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, or abortion, or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results, in whole or in part, therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not more than twenty years, nor less than five years." Section 2 is in the following language: "That any person who shall administer to any woman with child, or prescribe, or procure, or provide for any such woman, or advise or procure any such woman to take, any medicine, drug, substance, or thing whatever, or shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, or abortion, or premature labor, of any such woman, shall, upon conviction thereof, be punished by imprisonment in the penitentiary for a term not more than five years," etc.

The indictment contained two counts, the first charging that the defendant "unlawfully did suggest, advise, induce, and procure one Collie Fowler, a single woman, then and there being pregnant with child, to take divers quantities of a certain pernicious and destructive substance, drug, or medicine, in the form and shape of pills, with intent to cause or procure the abortion," etc., and proceeds to allege that, by the use of said means, the abortion was procured, and that the death of the said Collie Fowler was thereby caused. In the second count the charge is that the defendant "unlawfully did prescribe, procure, and advise one Collie Fowler, a single woman, then and there being pregnant with child, to take divers quantities of

a certain pernicious and destructive substance, drug, or medicine, in the form and shape of pills, with intent to cause or procure the abortion," etc.

The case came on for trial before his honor, Judge Wallace, and a jury, when there was much testimony taken, and, in the opening argument of the counsel for the defense, a plea to the jurisdiction of the court was interposed, upon grounds which will hereinafter appear; and, after argument thereon, the plea to the jurisdiction was overruled, and the case was submitted to the jury under the charge of the judge, which should be incorporated in the report of this case, together with his reasons for overruling the plea. The jury having rendered a verdict of guilty, and sentence having been passed upon the defendant, he appeals, upon the several exceptions set out in the record, which need not be repeated here, but which should likewise appear in the report of the case.

We propose to take up these exceptions in their inverse order. The twelfth exception imputes error in admitting as evidence, in reply, certain letters purporting to have been written by the defendant. This is manifestly based upon a misconception, for nothing of the kind appears either in the printed case or in the typewritten copy of the testimony filed in this court. Indeed, as no allusion was made to this exception in the argument of counsel for appellant, we suppose it was abandoned; but, whether abandoned or not, it certainly cannot be sustained, for the reason indicated.

The eleventh exception complains of error on the part of the circuit judge in overruling defendant's exception to the indictment, upon the ground that the acts charged in the first count are not charged to have been done "feloniously." Here, also, we are unable to find anything in the case upon which this exception can be based. It does not appear that the circuit judge was ever called upon to make, or did make, any ruling upon the subject. Besides, no such exception could be heard unless taken before the jury were sworn, (Act 1887; 19 St. 829;) and there is nothing to show that the exception was taken at the proper time. Indeed, we presume from the fact that no allusion is made in the argument submitted here to this exception that it is likewise abandoned, but, whether this is so or not, the exception must be overruled.

The tenth exception is somewhat misleading, and for that reason this exception is reproduced precisely as we find it in the record, with the italics there found: "For that his honor charged the jury that if they believed beyond a reasonable doubt that the defendant procured, or attempted or intended to procure, an abortion by *any of the means set out and prescribed in the act on that subject*, they must find a verdict of guilty on the first or second count, or gener-

ally, as the case might be; whereas he should have instructed the jury that the prosecution was limited in its evidence, and the jury, in arriving at their verdict, to the means (and the proof thereof) set forth in the indictment." The point of this exception, as we understand it, is that inasmuch as the statute under which this defendant was indicted contemplates two distinct and different means by which abortion may be caused,—viz. (1) by the use of drugs, and (2) by the use of instruments, involving the application of force,—and inasmuch as the indictment charges only the first, no evidence could properly be received tending to show the use of the second, and, if received, the jury should have been instructed that they could not find the defendant guilty if they believed that the abortion was caused, or attempted to be caused, by the use of instruments, involving some degree of force, and not by the use of drugs, as alleged in the indictment. To make this point available to the defendant, there should have been some request so to instruct the jury, and a refusal to grant such request. But no such request and no such refusal are to be found in the case. The copy of the testimony with which we have been furnished, in addition to the printed case, shows that there was no testimony offered by the prosecution tending to show that the abortion was either caused or attempted by the use of any other means than those set forth in the indictment; and it is a well-settled rule that the correctness of a judge's charge must be tested by its application to the case, as made by the pleadings and the evidence. The matter of the use of instruments, involving some degree of force, was introduced into the case by the defendant in his cross-examination of the witnesses for the prosecution, and in the examination of the witnesses for the defense, for the purpose, doubtless, of showing that the abortion was caused, or at least was more likely to have been caused, by the use of instruments, rather than by the use of the means set out in the indictment. It was a pure matter of defense, not embraced in the issue presented by the pleadings; and, if the defendant desired that the jury should be instructed as to the effect of such defense if made out by the evidence, his proper course was to present a request to that effect. But, in addition to this, the exception does not correctly represent the judge's charge. He did not say to the jury what he is represented to have said in that portion of the exception which is italicized. He did not use the word "any," which is the important word in the exception, necessary to raise the point upon which this exception is based. On the contrary, the judge, after setting out the first section of the act, under which the first count in the indictment was framed, and stating what was the charge in that count, proceeded to say: "That is your first in-

quiry,—whether or not this defendant did that. If he did, he is guilty, under this act; if he did not, he is not guilty, under this first section of the act." If he did what? Why, certainly if he did what was charged in the first count of the indictment, viz. cause the abortion by the use of drugs. But the judge did not stop there, for he immediately proceeded to say: "If he did not, he is not guilty." Could language make it plainer to the jury that, unless the defendant did what was charged in the first count, he could not be found guilty, no matter what else he may have done. So that this analysis shows that the jury were practically instructed, so far at least as the first count was concerned, precisely in accordance with such a request as would have been the proper mode of raising the point; and as the jury found a general verdict of guilty, which, of course, embraced the first count, if there was no error (as there evidently was none) in the instruction as to the first count, it would make no practical difference to the defendant even if there was error in the instruction as to the second count, which, however, we are not prepared to admit.

On examination of that portion of the charge which relates to the second count in the indictment, we find that the circuit judge, after setting out the second section of the act, and pointing out the difference between that and the first section, and declaring, in general terms, what would constitute a violation of section 2, proceeds to say that in order to convict the defendant, under that section, "you will have to be satisfied beyond a reasonable doubt that he attempted to procure an abortion,—intended to do it,—by the means stated here in the section I have read to you." This language, isolated from the context, would seem to afford some support for the position contended for by the appellant; but when it is taken in connection with the entire charge, as it must be, under the well-settled rule, it is apparent that it does not justify the position of the appellant, for in the very next paragraph we find that the jury, after being told what were the issues which they were to try, were instructed as follows: "If you are satisfied beyond a reasonable doubt that either or both of these offenses are made out, you will have to convict him according to the degree of offense described in the act and set forth in the indictment." (Italics ours.) Again, the jury were told: "If you are of opinion, and are satisfied of it, beyond a reasonable doubt, that he attempted to procure an abortion,—intended to do it,—by the means set out here in this act, but that such means did not accomplish his purpose, but that the abortion was procured by other means, to which he was not a party, then you cannot convict him on the first count, but may on the second, if you are satisfied beyond a reasonable doubt." This, followed by the approval and adoption

of the solicitor's first request to charge, as set out in the charge, shows that the judge did not intend to charge, and could not have been understood as charging, that the defendant could be convicted without the means of procuring the abortion, or attempting to procure it, being such as were set out in the indictment. Moreover, there was not the slightest evidence tending to show that the defendant either used or employed, or advised the use or employment, of any instrument, involving force, to cause the abortion; and, as the well-settled rule is that the charge of a circuit judge must be understood as applying to the case as made by the evidence, we cannot consider the charge here as open to the objection made by the tenth exception.

Again, even if the jury had believed that the abortion was in fact caused by the use of instruments, involving the application of some force, rather than by the drugs taken as alleged in the indictment, and had at the same time believed that the defendant had advised the use of such drugs, with intent to bring about abortion, the jury should still have rendered a verdict of guilty under the second count of the indictment; for it is quite clear that the second section of the act does not require that, in order to constitute the offense there denounced, the means resorted to should prove effective to accomplish the purpose intended. The offense consists in the use of the means mentioned in the act, with the intent to cause abortion, and it is immaterial whether such means effected the purpose intended or not. We are of opinion, therefore, that the tenth exception cannot be sustained.

All of the remaining exceptions, in different forms, impute error to the circuit judge in overruling the plea to the jurisdiction; but as the second and seventh exceptions seem to imply that it was necessary, in order to constitute the offense charged, that some force or duress of some kind should have been used to induce Colie Fowler to use the means resorted to for the purpose of causing the abortion, we will first consider the point thus made. To dispose of this point, it is quite sufficient to say that the act under which the defendant was indicted plainly does not contemplate any ingredient of that kind in the offense there made punishable in the manner therein prescribed. There is not a word in either section of the act which signifies that the legislature intended that the use of force or duress in any form was an element in the offense. On the contrary, the act plainly shows that no such element was contemplated as constituting any part of the offense. It is obvious from a mere reading of the act, and no argument can make it plainer. Indeed, this point was not mentioned in the argument.

The remaining exceptions may be considered together. The question which these exceptions present is thus stated in the argu-

ment of counsel for appellant: "Whether the court of general sessions for Richland county, S. C., had jurisdiction to try the defendant for his alleged violation of the statutes of this state; he having been, at the time of the commission of the only overt acts charged upon him, a citizen of, and actually in, another state." We do not think that this is a precisely accurate statement of the question as it is presented by the record in this case, for there was evidence tending to show that the defendant had had sexual intercourse with this unfortunate girl, likely to result in pregnancy; that when she discovered her condition, and communicated the same to defendant, he then formed the intention of using means to cause an abortion; that the intention thus conceived was attempted to be carried out by applying to a physician to know whether the drug which he had procured to effect his purpose would be sufficient to effect his object; and that such drug was taken by the girl at his instance and by his advice. True, he attempted to disguise what the jury under the evidence, might well have regarded as his real purpose, by saying to the physician that he had a little lady friend who had missed her regular monthly period, and desired to know what would be the best thing to bring it on; but his remark to the doctor that the girl was awfully scared about it, and would not have her condition known for anything in the world, coming, as it did, from a man who was in no wise related to the girl, and only temporarily resident in Columbia, would have well warranted the jury in concluding that the real object of the defendant was to obtain something that would cause abortion, and that he did procure a certain drug, which the girl used, by his advice, for the purpose of causing the abortion. All this occurred in the city of Columbia, in this state; and therefore it is not correct to say, as is said in the statement of the question above quoted from the argument for the appellant, that he was, at the time of the commission "of the only overt acts charged upon him, a citizen of, and actually in, another state." Under this view of the case, there would be no ground for the plea to the jurisdiction, and this would be conclusive of this appeal so far as the question of jurisdiction is concerned.

In deference, however, to the zeal and ability with which this appeal has been prosecuted, we will not decline to consider the question as it is formulated in the argument of counsel. For this purpose only, we will, for the present, disregard the testimony above alluded to as to what occurred in Columbia, and consider the case as if the only "overt acts," as they are somewhat incorrectly termed, were committed in the city of Washington, District of Columbia, though we must say it is somewhat difficult to separate the intention (which there was evidence tending to show was originally formed in Columbia) from the acts done in Washing-

ton in pursuance of such intention. Assuming, however, for the purposes of this discussion only, that there was no evidence of any act done, in pursuance of an intention to effect an abortion, except such acts as were done by the defendant in the city of Washington, then, if the acts there done were intended to take effect in this state, and did there actually take effect, we still think the court, in this state, had jurisdiction of the offense charged. The evidence leaves no doubt that, after the defendant left this state, and returned to Washington, he procured from a druggist there certain drugs in the shape of pills, which he sent, through the agency of the United States mail, to Colle Fowler, with the advice to use them for the purpose of bringing about an abortion; that she received the pills so sent, and used them according to the advice given her by the defendant; and that the abortion did take place, which resulted in the death of said Colle Fowler. Under this state of facts, the question is whether the courts of this state could take jurisdiction. There can be no doubt that it is the duty of a state to protect, as far as practicable, the lives and persons of its citizens and others temporarily resident therein against unlawful violence or injury, whether the person committing such violence or inflicting such injury be a citizen of this state at the time, or not. If such person go beyond the jurisdiction after committing the act, or be and remain beyond the limits of the state when the unlawful act is committed, it may be difficult, and oftentimes impossible, to obtain jurisdiction of the person of the party committing the act, which would be necessary to give jurisdiction. But jurisdiction of the person and jurisdiction of the subject-matter are two entirely distinct and different things; and where, as in this case, the party charged voluntarily returns to this state, and thereby submits his person to the jurisdiction of the courts of this state, we see no reason why he may not be tried and punished for any violation of the personal rights of any of the citizens of this state, entitled to the protection of its laws, even though the act by which such violation was caused was originally put in motion beyond the limits of the state, provided the effect thereby intended reached the person for whom it was intended while in this state. If the defendant procured the pills in Washington, and transmitted them by mail to the said Colle Fowler, with the advice for them to be taken for the purpose of bringing about an abortion, and she received and took them in this state, in contemplation of law it was the same thing as if the defendant, in person, had brought the pills to Columbia, and there delivered them to Colle Fowler; for while it is quite true, as a general proposition, that the principal is not liable criminally for the unlawful act of his agent, yet, if the act done by the agent is in pursuance of the authority of the principal,—done by

his authority,—the principal is liable. This doctrine has been expressly recognized and acted upon by the courts of this state in the case of *State v. Anone*, 2 Nott & McC. 27, where the owner of a store or shop was convicted of trading with a slave, though the act of trading was done by a clerk, in his employment, in the absence of the employer; the evidence being sufficient to show that such trading was authorized by the employer. The same doctrine was also fully recognized in the cases of *State v. Borgman*, Id. 34, and *State v. Williams*, 3 Hill, (S. C.) 94, though in the last two cases the defendants escaped conviction solely on the ground that the evidence was insufficient to show that the employer had authorized or directed the clerk to do the unlawful act charged. Upon the same principal, it seems to us that when the defendant procured the pills in Washington, and put them in the mail to be delivered to Colle Fowler in Columbia, for the unlawful purpose charged, it was, in contemplation of law, the same thing as if he had there delivered the pills, to the woman for whom they were intended, in his own proper person. Instead of coming in person to Columbia to deliver the pills, he simply employed the agency of the mail to do the act which he desired to have done, and which was done by his express authority and direction, in this state. So far as we are informed, there is no authority in this state as to the question of jurisdiction, but authorities elsewhere, which, though not binding upon us, are entitled to the most respectful consideration, have been cited to show error in overruling the plea to the jurisdiction. It seems to us that the authorities thus cited do not support defendant's contention; and, on the other hand, we find authorities elsewhere supporting the views which we have taken, as will be presently shown.

It is conceded in the argument for appellant, and properly conceded, as the authorities abundantly support the proposition, that "if one sends an infernal machine from one state to another, or shoots from one to another, and kills a human being, or sends poison from one state to another, to be administered to a person, and the result is the destruction of human life, such offender may be tried in the state where the death happened;" but the attempt is made by appellant's counsel to show that this proposition of law applies only in cases where the offense charged is an offense at common law, and does not apply in a case like the present, which is a mere statutory offense. It would unnecessarily protract this opinion to consider whether the crime of abortion was an offense at common law, or is a mere creature of statute,—a question which does not seem to be very clearly settled by the authorities; and we will assume for the present that abortion is a mere statutory offense, and proceed to consider whether the proposition above quoted from appellant's argu-

ment is limited to offenses at common law, and does not apply to cases like the present, in which, as we have assumed, the offense charged is of mere statutory origin. Two cases have been cited to sustain the distinction sought to be drawn by counsel for the appellant: *State v. Knight*, Tayl. (N. C.) 44, and *People v. Merrill*, 2 Parker, Crim. R. 590. An examination of *Knight's Case* will show that the facts are not fully reported, and the headnote shows that the only point there decided was that "the legislature of this state cannot define and punish crimes committed in another state,"—a proposition which no one will dispute. From reading the case it would appear that the defendant was indicted under a North Carolina statute, which recites in its preamble that there is reason to apprehend that evil-disposed persons, resident in the neighboring states, make a practice of counterfeiting bills of credit of the state, and, by themselves or emissaries, utter or vend the same, with an intention to defraud the citizens of this state, and proceeds to enact that all such persons shall be subject to the same modes of trial, and, upon conviction, to the same punishment, as if the offense had been committed within the limits of the state; but the case does not show that the defendant was charged with uttering or vending such counterfeit bills, either in person or by his emissaries, within the limits of the state of North Carolina. On the contrary, it may be inferred that the charge was for uttering or vending such counterfeit bills outside of the limits of the state, for the manifest object of the statute was to protect the credit of the state, and there is not a word in it that seems to contemplate that, in order to constitute the offense denounced, the circulation of such bills must be within the state. We are unable, therefore, to see what application the case has to the case now under consideration. In *Merrill's Case* the defendant was indicted for a violation of a statute declaring that any person who shall sell a person of color, who shall have been forcibly taken, inveigled, or kidnapped from the state of New York, shall, upon conviction, be punished as therein prescribed. It appeared that the defendant had inveigled a person of color from the state of New York to the city of Washington, and there sold him, and it was held that the courts of New York had no jurisdiction, because the offense charged was committed beyond the limits of the state of New York. It will be observed that the gist of the offense charged was the sale of the person falling within the class described in the statute, and, as that took place beyond the limits of the state of New York, it, of course, followed that the court of New York had no jurisdiction. The inveigling was no part of the offense charged in the count upon which the case turned, but was nothing more than one of the elements in the description of the person whose sale was forbidden by the sec-

tion under which that count of the indictment was framed; and there was another section in the same statute which made it a distinct offense to inveigle a person of color from the state with intent to sell him, under which the court said the courts of New York would have jurisdiction. We do not see, therefore, how appellant can derive any support from *Merrill's Case*. It seems to us that all of the cases cited by appellant's counsel to sustain the point now under consideration decide nothing more than the broad proposition, which no one will dispute, that the courts of one state cannot take jurisdiction of offenses committed in another state; but the question here is whether the offense was, in the eye of the law, committed within the limits of this state. It seems to us that the authorities which we will now cite sustain the view which we have taken, in a previous part of this opinion, that, in the eye of the law, the offense charged was really committed here, although the defendant, Morrow, was in the city of Washington when, through an innocent agent, the United States mail, he transmitted the drugs to Colie Fowler, while in this state, with intent to cause the abortion charged, and which, by his advice, were used by her here. In 1 Bish. Crim. Law, § 110, that eminent author says: "The general proposition, therefore, is that no man is to suffer criminally for what he does out of the territorial limits of the country; yet one who is personally out of the country may put in motion a force which takes effect in it, and in such a case he is answerable where the evil is done, though his presence is elsewhere. Thus, if a man, standing beyond the outer line of our territory, by discharging a ball over the line, kills another within it; or, himself being abroad, circulates, through an agent, libels here; or in like manner obtains goods by false pretenses; or does any other crime in our own locality against our laws,—he is punishable, though absent, the same as if he were present." Counsel for appellant questions this proposition, or rather the illustration given, so far as it implies, by the language "or does any other crime in our own locality against our laws," that the proposition is applicable to statutory as well as common-law offenses, and has undertaken to show that all the authorities cited by the author to sustain the text are either civil cases, or cases charging common-law offenses, except the case of *Barkhamstead v. Parsons*, 3 Conn. 1, which was a qui tam action. Conceding this to be true, we do not see how this can help the appellant, unless some authority can be found which recognizes the distinction sought to be drawn between statutory and common-law offenses in this respect; and we do not find any such authority, nor are we able to perceive any sufficient reason for any such distinction. The mere fact that the cases cited by Mr. Bishop to sustain the legal principles which he lays down happen to be cases

of the character claimed by appellant cannot affect the legal principle, which is, substantially, this: that a person may commit an offense within this state by putting in motion a force which takes effect here, or by acting through innocent agents here, although the party charged may never have been personally present in this state. To the same effect, see 1 Whart. Crim. Law, §§ 278, 604. These distinguished text writers are sustained by numerous cases, some of which we will cite. In *People v. Adams*, 3 Denio, 180, affirmed by the court of appeals in 1 N. Y. 173, the indictment substantially charged the defendant with obtaining money under false pretenses, in violation of a statute of the state of New York. The allegation, in substance, was that the defendant, by exhibiting a receipt, purporting to be signed by a forwarding agent in Ohio, for certain produce to be forwarded to certain commission merchants in the city of New York, to such merchants, induced them to accept drafts drawn on them by defendant against such produce, which the commission merchants afterwards had to pay out of their own funds, the receipt exhibited being false and fraudulent. The defendant filed a plea to the jurisdiction, alleging that he was a citizen of Ohio and resident in that state at the time of the transaction referred to, and never had been in the state of New York. To this plea a demurrer was interposed, and was sustained, the court holding the offense of obtaining money by false pretenses is committed where the false pretenses are successfully used, and where the money is obtained, and that though the defendant was absent from the state of New York when the money was obtained by him, through innocent agents in that state, employed by defendant, the offense charged was, in the eye of the law, committed by defendant in the state of New York, through his innocent agents, although he was absent from the state at the time, and hence the plea to the jurisdiction could not be sustained. This case was elaborately and ably argued by very distinguished counsel, and their arguments, which are fully reported in 3 Denio, present a full review of the authorities. The same doctrine is recognized in *Reg. v. Garrett*, 22 Eng. Law & Eq. 611, where Lord Campbell, then chief justice, said: "A person abroad may, by the employment as well of a conscious as of an unconscious agent, render himself amenable to the law of England when he comes within the jurisdiction of our courts." In *State v. Chaplin*, 17 Ark., at pages 565, 566, it is said: "It is not necessary in all cases that a man should be actually present in this state to make him amenable to our laws for a crime committed here. If the crime is the immediate result of his act, he may be made to answer for it in our courts, though actually absent from the state at the time he does the act, because he is constructively present, or present

in contemplation of law." And, again: "If a person absent from this state commits a crime here, through or by means of an innocent instrument or agent, it seems that the law would regard him as personally present, and hold him responsible for the offense." This case, as well as the case of *People v. Adams*, supra, recognizes the distinction between a case where a person abroad does an act here through a guilty agent and where the same act is done through an innocent agent or some inanimate agency; for in the former case, where the act is a felony, the guilty agent must be regarded as the principal felon, and the person abroad who employs him should be regarded as an accessory before the fact, and only punishable where he is actually is, at the time he incites his guilty agent to do the act, here. Hence the cases cited by appellant to sustain such a distinction are not applicable to this case, as there is no pretense that the agency employed by the defendant, Morrow, to transmit the drugs from Washington to Colle Fowler, in Columbia, was a guilty agent. To sustain the general doctrine which we have announced, that a person abroad may commit a crime here through the agency of innocent persons here or inanimate instruments, see *Rex v. Brissac*, 2 East, (New Ed.) 373; *Noyes v. State*, 41 N. J. Law, 418; *People v. Rathbun*, 21 Wend., at page 534. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN and POPE, JJ., concur.

LAWTON v. PERRY et al.

(Supreme Court of South Carolina. Dec. 11, 1893.)

ACTION ON JUDGMENT—MERGER—REVIVAL OF JUDGMENT.

1. Code, § 311, as amended by Act No. 124, 1885, p. 231, providing that nothing therein shall be construed to prevent an action on a judgment after 20 years from its date, and a recovery thereon, in case it shall be established by competent evidence that it, or some part of it, remains unpaid, applies to judgments obtained before, as well as after, November 25, 1873.

2. An action on a judgment obtained in 1871 may be maintained without first reviving it, where plaintiff does not seek to maintain a lien growing out of it.

3. Where a person brings an action on a judgment, which never was a lien on the land of the judgment debtor, against the heirs of the latter, instead of bringing an action to revive it, and make it a lien on the estate of deceased, and obtains a new judgment, the old judgment is merged in the new, and he is entitled to rank only as a creditor of the estate holding a debt of record.

4. Where, in an action on a judgment which constituted the only lien on the whole estate of the debtor at the time of his death, a new judgment is obtained against his heirs, the first judgment is not merged in the second, so as to let in subsequent judgment creditors to rank equally with plaintiff as a creditor of the estate. McIver, C. J., dissenting.

5. An action brought on a judgment by regular summons and complaint, wherein a money judgment alone is prayed for, is not in the nature of a *scire facias*.

6. The proper proceeding to revive a judgment is to issue a summons to renew execution.

Appeal from common pleas circuit court of Berkeley county; James F. Izlar, Judge.

Action by R. Rivers Lawton, administrator of the estate of James M. Lawton, deceased, against W. Hampton Perry, Josiah I. Perry, Susan M. Perry, Rosa B. Perry, Mary E. J. Perry, T. Smith Perry, H. P. Foster, R. W. Memminger, Jr., guardian ad litem, J. Lamb Perry, trustee, John Heins, and Robert Black, sheriff, to establish a judgment against the estate of J. I. Perry, deceased, to subject certain real estate descended to and in possession of deceased's heirs to payment of debts against the estate, and to set aside a certain judgment in favor of defendant J. Lamb Perry, trustee, against defendant H. P. Foster, as administrator of the estate of J. I. Perry, deceased. From the decree entered, all the parties except defendant Black, sheriff, appeal. Reversed.

W. St. Julien Jervey, for plaintiff. Mitchell & Smith, for defendant Foster. J. Lamb Perry, in pro. per. T. Moultrie Mordecai, for defendant Heins.

POPE, J. This action came on for trial before his honor Judge Izlar, being heard upon the pleadings and the testimony taken before Master Leland. The decree having been filed, appeals were taken therefrom by all the parties to the action except Robert Black, as sheriff. We do not know that we can present the matters of fact and matters of law herein involved in any juster manner than by reproducing, in its entirety, the decree of the circuit judge:

"This case was heard before me at the recent term of the court of common pleas for the county of Berkeley. The action is brought to establish a judgment against the estate of one J. I. Perry, deceased, and to subject real estate descended and in the possession of the heirs of said deceased to the payment of the debts of the ancestor, and to set aside a certain judgment obtained by the defendant J. Lamb Perry, trustee, against Henry P. Foster, as administrator of the estate of said J. I. Perry, deceased, on the ground of fraud and collusion in obtaining the same, and for injunction and general relief. The defendants answer, denying all fraud and collusion, and claiming that the judgment of the plaintiff, both under the statute affecting it and the circumstances surrounding it, is presumptively paid, and that the complaint should be dismissed. The case was referred to the master of Berkeley county to take the testimony, and report the same to the court. The testimony taken, so far as deemed admissible by me, establishes the following facts: On June 1, 1867, Thomas P.

Lockwood, trustee, obtained a judgment by confession in the court of common pleas for Colleton county against J. I. Perry for the sum of \$1,935.75, which was duly entered. Execution was issued on this judgment December 22, 1868, and levy made on certain real estate of the defendant. On April 3, 1871, James M. Lawton obtained a judgment in the court of common pleas for Charleston county against the said J. I. Perry for the sum of \$1,028.60. A transcript of this judgment was duly filed in the county of Colleton on the 5th day of April, 1871. No execution was ever issued on this judgment; neither was said judgment ever made a lien upon the property of the judgment debtor, by levy or otherwise. In April, 1871, an execution was issued on the judgment of Lockwood, trustee, and levy made thereafter upon certain real estate of said J. I. Perry, situate in the county of Colleton. On August 7, 1871, Lockwood, trustee, entered a receipt on the sheriff's execution book for \$100 on account of said judgment. On June 18, 1872, the defendant John Heins commenced an action against said J. I. Perry for foreclosure and sale of his interest in a tract of land situate in Colleton county, containing 617 acres. Decree of foreclosure and sale, made October 29, 1872; amount of mortgage debt, \$965.21. To this action Thomas P. Lockwood, trustee, was a party. Under this decree the mortgaged premises were sold. There was, after applying the proceeds of sale, a deficiency of \$665.22. For this deficiency, execution was issued and lodged with sheriff of Colleton county, July 1, 1874. No further steps seem to have been taken for the enforcement of this judgment. Thomas P. Lockwood died intestate in 1875. James M. Lawton died intestate in 1877. R. Rivers Lawton, the present plaintiff, administered upon the estate of James M. Lawton, deceased, September 29, 1877. J. I. Perry died intestate June 15, 1880, survived by his widow and several children. The widow died February 26, 1886. Present action commenced September 2, 1889, and lis pendens filed in Berkeley and Colleton counties. J. Lamb Perry appointed trustee in place of Lockwood, deceased, September 11, 1889. Henry P. Foster appointed administrator of estate of J. I. Perry, September 24, 1889. J. Lamb Perry commenced action against Henry P. Foster, administrator of the estate of J. I. Perry, on the judgment of Lockwood, Trustee, v. Perry, in the court of common pleas for Berkeley county, September 24, 1889. Judgment by default rendered against Henry P. Foster, administrator, for \$1,960.97, October 22, 1889, which, after entry, was transcribed to Colleton county, and execution issued thereon. Under this execution, a levy was made by the sheriff of Colleton county on certain of the real estate mentioned and described in the complaint herein. The sale under this levy was restrained by order made in the present action, after hear-

ing, November 30, 1889. Both James M. Lawton and J. I. Perry lived in Summer-ville for several years before their deaths. James M. Lawton was, for several years before his death, in reduced circumstances. J. I. Perry owned and possessed the real estate described in the complaint at the time of his death. His heirs are now in possession of the same. R. Rivers Lawton, present plaintiff, knew of the existence of the judgment of his father against J. I. Perry when obtained, and at the time of the death of his father, but did not think estate of Perry was sufficiently valuable to compensate for the costs of an action. J. I. Perry left no personal property excepting some household goods. No administration was taken out on his estate until 1889. Income from all the real estate of J. I. Perry received by his heirs insufficient to pay taxes on the same.

"Let us first consider the judgment of the plaintiff in the light of the testimony, and of the law applicable thereto. It is contended that this judgment is presumptively paid, notwithstanding twenty years have not elapsed since the original entry thereof, and consequently the plaintiff herein has no right of action, and that the complaint should be dismissed. We cannot concur in this view. The judgment is not presumed to be paid under the statute affecting it; neither do the facts and circumstances proven warrant the court in presuming it paid, when all the testimony is considered. Even after a judgment is presumptively paid, an action may be maintained upon it, and the presumption of payment be rebutted by proof and a recovery had thereon. Code, § 311, as amended by Act No. 124, 1885, p. 231. The language of the Code is as follows: 'Nothing herein shall be construed to prevent an action upon a judgment after the lapse of twenty years from the date of the original entry thereof, and a recovery thereon, in case it shall be established by competent and sufficient evidence that said judgment, or some part thereof, remains unsatisfied and due.' This language applies generally to all judgments, no matter when recovered, and not to a particular class of judgments. It would be absurd to confine this provision to judgments obtained after 1873 alone. Under the latter construction we would have the following result, namely, that judgments obtained after 1873 could be sued upon after twenty years, and a recovery had thereon, while judgments obtained between 1st March, 1870, and 25th November, 1873, could not be sued upon, even if the period of twenty years had not elapsed from the date of original entry thereof, and here, at most, presumptively paid. The presumption of payment in the former case is much stronger than the latter, if length of time alone is considered; and the language of the statutes relating to one class of judgments is certainly no more imperative than that relating to the other class. The present

action, as we have already said, is to establish the old judgment debt of James M. Lawton against J. I. Perry, and to subject real estate descended and in the possession of the heirs of the judgment debtor to the payment of the debts of their ancestor. The rule that a judgment creditor can only demand the aid of a court of equity after he has exhausted his legal remedy without satisfying his debt is only applicable *inter vivos*, and, as was said in *Ragsdale v. Holmes*, 1 S. C. 91, 'for the reason that the estate of the living debtor does not become assets for the payment of his debts until the exhaustion of the legal remedies is complete. The estate of a deceased debtor, or so much thereof as may be requisite for the payment of his debts, becomes assets from his decease. The primary mode of making them available is by an action at law, and recourse cannot be had to a creditors' bill where there is an adequate legal remedy; but where there is a devastavit, or threatened waste and insolvency, * * * unquestioned ground exists for the interference of equity.' The facts proven in this case clearly show that the personal assets of the estate of J. I. Perry, deceased, are wholly insufficient to pay and satisfy all of his just debts and liabilities, and that resort to the real estate must be had for that purpose; that there is a threatened waste of said assets, and other good grounds for equitable interference. The rule of law is well settled in this state that so long as land remains in the hands of the heir they are liable to be seized in execution under a judgment recovered against the heir for the debt of the ancestor, while, if the lands are not in the exclusive actual possession of the heirs entitled to them, they would be liable to be seized in execution under a judgment recovered against the executor or administrator. Now, it will be remembered that the judgment sought to be established in the present action against the heirs was recovered against the ancestor in his lifetime, but was never at any time made a lien upon any of the property of the judgment debtor, by levy or otherwise. In establishing this claim, held against the ancestor, against the heirs, the old judgment of James M. Lawton v. J. I. Perry is made the foundation of the action. The judgment must, therefore, necessarily be a new judgment, taking lien from its date. The same result would follow, so far as the lien is concerned, if the present action was treated as an action to show cause why the old judgment should not be revived, and execution issued to enforce the same. Otherwise, a judgment which never had a lien would be given a lien prior to subsequent judgment having lien from its entry,—a proposition not sustained by reason or authority. The proof is clear that the judgment of James M. Lawton v. J. I. Perry was duly obtained in the court of common pleas for Charleston county, and duly

transcribed to Colleton county; and the proof satisfies me that no part of said judgment has been paid. The mere fact that this judgment was never made a lien upon the property of the judgment debtor, by levy or otherwise, did not destroy the judgment debt, or invalidate the claim.

"We will next consider the judgment of *J. Lamb Perry, Trustee, v. Henry P. Foster, Administrator*. The plaintiff herein contends that the judgment is fraudulent and void, having been obtained by collusion of the parties, and should be set aside; and, further, if allowed to stand, the action in said case being an action of debt upon the former judgment of *Lockwood, Trustee, v. Perry*, and not an action in the nature of scire facias to revive the former judgment, the former judgment was merged in the latter, and the lien of the former lost. The defendants, on the other hand, contend that the writ of scire facias was abolished by the Code, and that there was no remedy by which the judgment of *Lockwood, Trustee, v. Perry*, could be revived save by action under the Code of Procedure; that the action of *Perry, Trustee, v. Foster, Administrator*, was in the nature of a writ of scire facias, and that the former judgment was not merged in the latter, or its lien lost; and that there was no fraud or collusion in obtaining the latter judgment. Before discussing the question of merger, it would be as well to dispose at once of the question of fraud and collusion. While the testimony does show a concert of action between the counsel representing certain of the defendants in regard to the proceedings for the appointment of a trustee in the place of *Lockwood*, and of an administrator of the estate of *J. I. Perry*, deceased, and an apparent haste in instituting the suit against *Foster*, administrator, we see nothing in so much of the testimony as we deem competent upon this issue that would warrant us in finding said judgment fraudulent and void. In considering the question of merger it becomes necessary, first, to determine what remedy, if any, has a judgment creditor now to revive a judgment obtained before the 1st of March, 1870. The defendants contend that the writ of scire facias was abolished by the Code, (section 424,) and that summons to show cause is only applicable to judgments obtained since the Code. This, so far as we know, is a new question. The language of section 424 is: 'The writ of scire facias, the writ of quo warranto, * * * are abolished; and the remedies heretofore obtainable in those forms may be obtained by civil actions under the provisions of this chapter.' It will be noted that the language is 'this chapter,' not 'this Code of Procedure.' A careful reading of the chapter must satisfy any one that there is no provision of the chapter applicable to a scire facias to revive a judgment. It may be, therefore, that the legislature did

not have in contemplation the writ of scire facias to revive a judgment, but only writs of scire facias, as relating to such public matters as are provided for in said chapter. If this be so, then the right to revive a judgment by writ of scire facias was not affected by section 424. Again, it has been held by our supreme court that a judgment obtained prior to the Code may be revived, under process to renew execution. *Patterson v. Baxley*, (S. C.) 11 S. E. 1066; *Leitner v. Metz*, 32 S. C. 383, 10 S. E. 1062. In these cases the process used was a summons to show cause why the execution should not be renewed. It is true the question now raised was not raised in those cases. There can be no doubt but that, under the Code, the execution upon a judgment obtained before 1870 may be renewed by summons to show cause. If this be so, and the renewal of such execution necessarily revives the judgment, what is there to prevent the revival of the judgment directly by such process? It will not be contended, we think, that that which can be done indirectly by summons to show cause cannot be done directly by said process. But while it may be doubted whether *J. Lamb Perry, trustee*, could have revived the *Lockwood* judgment, either by a writ of scire facias, as it heretofore existed, or by a summons to show cause under the Code, we are satisfied that said defendant had a complete remedy to revive his judgment, namely, by action under the Code of Procedure. By section 89 of the Code it is declared that there shall be in this state but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated 'a civil action.' By section 449, Code, it is declared that all rights of action given or secured by existing laws may be prosecuted in the manner provided by this Code of Procedure. Now, if the writ of scire facias was abolished by the Code of Procedure, both as a public and private remedy, (and we are of this opinion,) it only remains to show that a writ of scire facias, as it heretofore existed, was an action to bring it within the remedies given in the Code of Procedure. That scire facias, as it heretofore existed, was an action, is sustained by *Tidd, Pr. 982. Co. Litt. 2906. Judge Buller, in Winter v. Kretchman, 2 Term R. 46, says: 'It has been held in a variety of cases that a scire facias is an action.' A writ of scire facias could be pleaded to, the same as another action, and release of all actions was held to be a bar to the writ. It is not a new action, however, but a continuation of the old one; and the judgment rendered is not a new one for the debt and damages, but an order that execution issue to enforce the former judgment. The definition of an 'action,' given in section 2 of the Code, is certainly broad enough to include the proceeding by scire facias to revive a judgment, and to have*

execution thereon. It is, without doubt, a proceeding in a court of justice for the enforcement of a right. If the judgment is dormant, it is surely the right of the judgment creditor to have it revived; and, if unsatisfied, though not dormant, it is equally his right to have satisfaction thereof by execution. A *scire facias* to revive a judgment and have execution thereon being regarded as an action, sections 89, 449, Code, are applicable to the case, without resort to the saving clause in the last section. Allowing the remedy to be had by action, which before the Code could only be obtained by *scire facias*, is merely giving to section 449 a construction in accordance with the obvious import of said section. The party seeking to enforce his right by action under the Code should allege, in his complaint, substantially the same facts which were formerly required to be stated in the writ of *scire facias*, and the relief demanded should also be the same. 5 Walt, Pr. 637. Such proceeding is not an action on the judgment. An action on a judgment is an action to recover the amount on the judgment, as any other money demand would be recovered, the judgment being used only as the cause of action, and as evidence of the amount of the debt. Such action is in no sense a continuation of the former suit, but a new action, while *scire facias* was a remedy given to avoid the necessity of an action of debt upon the judgment. As was said by Justice McGowan in *Ex parte Witte*, 32 S. C. 228, 10 S. E. 950: 'We have always supposed that a *scire facias* on judgment must pursue the terms of the judgment; that it is a continuance of the action, and must conform to the record; that the authority to issue an execution on a judgment is derived from the original judgment, which, revived, continues its vitality, with other lien and other incidents, from the time of its rendition.' When an action in the nature of a writ of *scire facias* is the remedy resorted to, it is but a continuation of the former suit, and the first judgment is not merged in the revived judgment, and its former lien is preserved. But, it is otherwise when the action is that of debt on a judgment, or, in other words, when the former judgment is made the cause of action of the latter. In such case the former judgment is merged in the new judgment, and, being thus extinguished, its lien is lost. 'A new judgment recovered in an old one merges it, and lets in all subsequent rights.' 7 Walt, Act. & Def. 323, 324. In *Garvin v. Garvin*, 27 S. C. 477, 4 S. E. 148, Mr. Justice McGowan, speaking for the court, says: "'A judgment is extinguished when, being used as a cause of action; it grows into another judgment.'" *Freem. Judgm.* § 210. So, the Fox judgment would be merged in that of *Garvin v. Garvin* if the former was the cause of action of the latter.' See, also, *Freem. Judgm.* §§ 215-224.

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"We come now to consider what remedy the defendant Perry, trustee, pursued in regard to the Lockwood judgment. Was it an action in the nature of a writ of *scire facias*, or an action of debt on said judgment? To ascertain, reference must be had to the complaint in the case of *Perry, Trustee, v. Foster, Administrator*. It must appear from this complaint that the facts alleged are not substantially those which were formerly stated in a writ of *scire facias*. The relief demanded is not that the former judgment be revived, and that the plaintiff have execution thereon, but a money judgment for the amount of the Lockwood judgment, and interest and costs. The judgment rendered was a money judgment, in conformity with the prayer of the complaint. There is no order reviving a former judgment, and granting leave to issue execution to enforce the same. The action resorted to, as is clearly shown by the complaint, the place of trial, the judgment rendered, and the subsequent proceedings thereunder, was an action of debt upon the Lockwood judgment. To our mind, nothing seems clearer than that the Lockwood judgment was the cause of the Perry, trustee, judgment. This being the case, the former was, according to well-settled law, extinguished, and its lien lost. The lien of the latter judgment must therefore date from the 28th October, 1889. The former judgment, being the cause of action of the latter judgment, was properly admitted as a part of the record of the latter judgment; therefore, the rule that 'the defendant cannot avail himself of any matter of defense which is not stated in his answer, even though it should appear in his evidence,' was not violated. The view that we take of the case will dispense with the necessity of considering so much of the argument of the defendant as relates to the lien of judgment obtained before the Code, the manner of acquiring and reviving the same, and the duration of such liens. In the main, the law seems to be stated correctly. We deem it proper, however, to say that under the decisions of our supreme court we [are] of the opinion that the entry of a receipt upon the sheriff's execution book of a payment made or a judgment obtained, before 1870, would be a substantial compliance with the new rule of evidence created by the act of 1879, (now section 1831 of the General Statutes,) and would extend the lien of such judgment from the date of such entry. *Patterson v. Baxley*, (S. C.) 11 S. E. 1065.

"The defendant John Heins contends that the judgment owned by him, and the bond and mortgage on which it was predicated, are entitled to priority of payment over all the other debts or demands against the said J. I. Perry, deceased, save and except funeral and the expenses of last illness, expenses of administration, and debts due the public. The present judgment of this defendant is

for the deficiency of the mortgage debt. It does not clearly appear at what date this judgment for the deficiency was rendered. The execution to enforce this judgment was issued and lodged with the sheriff of Colleton county, July 1, 1873. At this time final judgments were not a lien upon the property of the judgment debtor. There was no testimony going to show that this judgment was ever made a lien upon the property of the judgment debtor, by levy or otherwise. The claim of the defendant must be governed by the same principles laid down as to the claim of the plaintiff herein. The evidence is, in our opinion, sufficient to establish the debt of this defendant as a valid and subsisting claim against the estate of J. I. Perry, deceased. We do not think, however, that this defendant is entitled to any priority of payment over the plaintiff and the defendant J. Lamb Perry, trustee. Under all the circumstances of this case, we are of the opinion that all these creditors are creditors in equal degree, and that neither of them has priority over the others; that the debts of these creditors are of equal nature, and must, in case of a deficiency of assets, be paid in average and proportion, as far as the assets of said intestate shall extend. See Gen. St. §§ 1895, 1926.

"The questions hereinbefore considered dispose of the main questions presented by the pleadings, and seriously relied on in the argument of counsel. It is therefore ordered and adjudged that the injunction heretofore granted be continued in full force and effect; that the master of Berkeley county do publish the usual notice to the creditors of J. I. Perry, deceased, intestate, to present and prove before him, within a certain specified time, their several and respective demands or be debarred payment; that the administrator of the estate of the said intestate do account [to] said master for all assets which have come into his hands as such administrator; that said master do report to this court of what said assets do consist, and the debts presented and proven before him, in their proper grade and order, as also upon the accounts of said administrator; that the real estate of said intestate mentioned and described in the complaint herein, and now in the possession of his heirs, is liable to sale for the payment of the debts of the ancestor; that the debts of the plaintiff and of the defendant J. Lamb Perry, trustee, and John Heins, established by this decree, be included in the schedule of debts presented and proven before said master according to their legal priority; that this decree shall not be construed to affect the homestead rights of the children of such intestate, if such rights exist; and that the plaintiff or other party have leave to apply for further orders at the foot of this decree on the coming in of the master's report on assets and debts."

To this decree of Judge Izlar the children

of J. I. Perry and their trustee filed the following grounds of appeal: "(1) That his honor erred in finding that the judgment held and claimed by the plaintiff, R. Rivers Lawton, administrator, was still subsisting and unpaid, whereas his honor should have found, from all the circumstances of the case, that the same was paid and extinguished; (2) that his honor erred in finding that the judgment held and claimed by the defendant John Heins was still subsisting and unpaid, whereas his honor should have found, from all the circumstances of the case, that the same was paid and extinguished; (3) that his honor should have held that the defendant John Heins held no judgment whatsoever enforceable at law, the same never having been entered up according to law; (4) that his honor should have held that the proceedings by the plaintiff, R. Rivers Lawton, administrator, could not have been brought until the judgment had been duly revived, so as to be enforceable at law."

J. Lamb Perry, trustee, filed the following grounds of appeal: "(1) That his honor erred in not finding that the judgment held by the defendant J. Lamb Perry, trustee, was the first lien upon all the lands and premises of the deceased, J. I. Perry; (2) that his honor should have found that the judgment held by the defendant J. Lamb Perry, trustee, was the continuation and revival of the judgment obtained by Thomas P. Lockwood, trustee, and as such was a valid, subsisting, unpaid judgment, first in point of lien and time, on all the property of the deceased, J. I. Perry; (3) that his honor should have found that the action upon the judgment recovered by Thomas P. Lockwood, trustee, by the defendant J. Lamb Perry, trustee, was the proper action to be brought to revive said first judgment, and render the same enforceable by an execution at law; that such action did not operate to merge the two judgments, but that the first judgment retained all its incidents of lien and rank, and was enforceable through the medium of the second judgment; (4) that his honor should have held that the proceeds of the sales of the deceased's (J. I. Perry's) property must be first applied to the payment in full of the judgment so held by the defendant J. Lamb Perry, trustee."

R. R. Lawton, as administrator, filed the following grounds of appeal: "(1) That his honor failed to find that all testimony relating to the judgment of Lockwood, Trustee, v. Perry was irrelevant under the pleadings; (2) that his honor erred in holding that the judgment of J. Lamb Perry, Trustee, v. Foster, Administrator, was valid, the same having been obtained with the intent to hinder, delay, and defraud creditors; (3) that his honor erred in holding that plaintiff must share in equal proportion with the other creditors, whereas he should have found that the plaintiff had the first claim upon the lands of Josiah I. Perry in possession of his

heirs; (4) that his honor erred in finding that the judgment of October, 1889, was a valid judgment; (5) that his honor erred in not holding that such judgment was not contrary to the statute of 13 Eliz., (Gen. St. § 1786); (6) that his honor erred in not holding that the judgment of J. I. Perry, Trustee, v. H. P. Foster, Administrator, merged the judgment of Lockwood, Trustee, v. J. I. Perry, and rendered it of no effect."

John Heins submitted the following grounds of appeal: "(1) That his honor failed to find that all the testimony relating to the judgment of Lockwood, Trustee, v. Perry was irrelevant under the pleadings; (2) that his honor erred in holding that the judgment of J. Lamb Perry, Trustee, v. Foster, Administrator, was valid, the same having been obtained with intent to hinder, delay, and defraud creditors; (3) that his honor erred in finding that the judgment of October, 1889, was a valid judgment; (4) that his honor erred in holding that such judgment was not contrary to the statute of 13 Eliz., (Gen. St. § 1786); (5) that his honor erred in not holding that the judgment of J. L. Perry, Trustee, v. H. P. Foster, Trustee, merged in the judgment of Lockwood, Trustee, v. J. I. Perry, and rendered it of no effect."

The questions of law suggested by this appeal present matters brimful of interest, and the very able and exhaustive discussion of such questions by the circuit judge must serve as an explanation of the reproduction of the entire decree in this opinion. We cannot promise to do more than briefly refer to and decide these questions, as the time allotted for the preparation of the opinions of this court in cases heard at our last term is so near exhausted we are forced to adopt this course, but it is with some reluctance that we do so. We propose to arrange all the questions of the appeal about three propositions: (1) Did the circuit judge err in his findings of fact and conclusions of law touching the judgment of James M. Lawton v. Josiah I. Perry? (2) Did the circuit judge err in a similar way in reference to judgment of John Heins v. Josiah I. Perry? (3) Did the circuit judge err, in a similar way, in regard to the judgment of J. Lamb Perry, Trustee, v. H. P. Foster, Administrator?

1. The object of the plaintiff's action, as indicated by the allegations of his complaint, both original and amended, as well as the prayer for judgment, was, among other things, to obtain a judgment against the heirs at law of Josiah I. Perry, deceased, for \$1,026.00, with interest thereon from the 3d day of April, A. D. 1871, upon a judgment obtained at that date against their ancestor, Josiah I. Perry, deceased, in his lifetime. This plaintiff had two remedies against the heirs of Josiah I. Perry, deceased. On the one hand, he might have brought an action against these heirs to revive the judgment, and make it a lien upon the estate of Josiah I. Perry, deceased; or, on the other hand, he had the

right to use the judgment obtained against J. I. Perry in his lifetime as a cause of action in an action against his heirs at law. He chose the latter remedy. At law—we mean on the law side of the court—there was no necessity to make the personal representative of J. I. Perry, deceased, a party in such an action against the heirs. However, in equity, such personal representative was a necessary party. In the case at bar, although the plaintiff exhibited his complaint in equity without at first making the personal representative of the estate of J. I. Perry, deceased, a party to the action, yet, by leave of court obtained, this defect was cured. The defendants insist that the judgment obtained against J. I. Perry in his lifetime furnished no cause of action, because they allege that, by operation of law, such judgment was presumptively paid, although 20 years had not elapsed from its original entry (April, 1871) to the commencement of this action, (on 7th September, 1889.) We cannot sustain this view, being entirely satisfied with the conclusion of the circuit judge on this point. The circumstances put in evidence to warrant a plea of payment were not sufficient. Appellants also claim that the plaintiff could not bring this action until he had first revived his judgment. We must overrule this view also. If the plaintiff had sought to maintain a lien growing out of the judgment obtained in 1871, the view of appellants would have been sound; for the question has been decided that, there being no lien allowed to judgments obtained between the 1st March, 1870, and the 25th November, 1873, no such lien under such judgments could be obtained except by following the requirements of the statute of 25th November, 1873, wherein is laid down the mode for obtaining such a lien. *Alsobrook v. Watts*, 19 S. C. 544, 545. Confessedly, no such steps were taken in this case. We think, however, that the plaintiff, Lawton, as administrator, having elected to sue upon his judgment obtained in 1871 as a cause of action, is only entitled to rank as a creditor of the estate of J. I. Perry, deceased, holding a debt of record. 2 Black, Judgm. § 958. " * * * And an action to recover the amount of a judgment, with interest, in which a summons is issued and served as on a money demand, is an action on the judgment, and not an action to revive it." We think this view is sustained by our own decision of *Garvin v. Garvin*, 27 S. C. 472-477, 4 S. E. 148.

2. As to the Heins judgment, we must reverse the conclusion reached by the circuit judge. This court has quite recently, in the two cases of *Parr v. Lindler*, (S. C.) 18 S. E. 636, and *Cook v. Jennings*, (S. C.) 18 S. E. 640, held that no judgment arising in an action to foreclose a mortgage, wherein the mortgaged property is ordered to be sold, exists for any deficiency of the mortgage debt after the proceeds of sale of the mort-

gaged property have been applied thereto, until an order of the court has been had, on the report of the officer making the sale, showing what deficiency exists, for a judgment for such deficiency, with leave to enforce its collection by an execution. In the case at bar no report was made to the court of any such deficiency of John Heins' debt, and no order of judgment for such deficiency was granted. Hence there is no such judgment in favor of John Heins against the estate of Perry, deceased.

3. We confess, frankly, that the solution of the questions raised as to the rank of the judgment presented by J. Lamb Perry as trustee (who was substituted as such trustee for Thomas P. Lockwood, the deceased trustee, against the estate of Perry) has been difficult, and it was mainly because of these difficult questions that a rehearing of the appeal herein was ordered. However, before proceeding to the consideration of the matter of difficulty as to this claim, it may be stated that we are entirely satisfied with the conclusions of the circuit judge wherein he announced that the testimony failed to establish the existence of fraud, or collusion, or impropriety in the conduct of any of the parties connected with the judgment obtained in October, 1889, by J. Lamb Perry, as trustee, against H. P. Foster, as administrator of the estate of Josiah I. Perry, deceased. All the parties or their attorneys did in connection with this judgment was to put their house in order to resist any advantage over them by the plaintiff in the action at bar. And we include in this, our conclusion, all reference to the statute of 13 Eliz.

Let us now turn to the serious questions presented in connection with this judgment. It seems that while Lockwood was the trustee of the estate belonging to the children of Josiah I. Perry, now deceased, and in the lifetime of said Josiah I. Perry, to wit, in 1867, he obtained a judgment against said Perry for more than \$1,900. Not only so, but execution was issued upon such judgment in 1868, and again in 1871. When this judgment was obtained, under the laws of this commonwealth, it had a lien, from its entry, upon the whole estate, real and personal, of the judgment debtor. This lien, however, would have expired in 1887,—that is, after 20 years from its entry had elapsed,—but for the payment of \$100 in part payment thereof, which payment was duly entered of record, as required by law, in June, 1871. By this payment the existence and lien of this judgment were extended in full force until June, 1891. Now, the judgment debtor, Perry, died in 1890. At that date this judgment, in the name of Lockwood as trustee, was the only lien upon his entire estate, and under our laws, in the administration of the estate, real and personal, of Perry, deceased, this judgment had a preference as to its payment. So that if

the trustee, who held this judgment, had seen proper to present it, in its plight as it was in 1867, with the payment of \$100 thereon in June, 1871, in the action now at bar, unquestionably the judgment would still have retained its lien and preference, for the action at bar was commenced in September, 1889, a period less than 20 years from June, 1871. But unfortunately, after J. Lamb Perry had been substituted for Lockwood as trustee of the Perry children, and a lis pendens had been filed in the action at bar, the said J. Lamb Perry, as such trustee, instituted an action on the judgment obtained in 1867, as a cause of action against Henry P. Foster, as administrator of the estate of Josiah I. Perry, deceased, and this action ripened into judgment, 24th October, 1889. When he attempted to set up this judgment obtained in October, 1889, with all the liens and rank of the judgment of 1867, it was urged that by the doctrine of merger the judgment of 1889 had absorbed all there was in the judgment of 1867, and that there was no longer such an entity as the judgment of 1867. If this last conclusion could be reached, Judge Izlar was in error in not giving the Lawton judgment a preference in rank over all other creditors. It is urged before us in behalf of Perry, trustee, that his action was in the nature of a *scire facias*, which was the process in existence in this state prior to 1st March, 1870, as the mode by which a judgment and execution thereunder were revived; and not only so, but that, the Code having abolished the writ of *scire facias* in this state, the action instituted by Perry, Trustee, v. Foster, as administrator, in September, 1889, was the only mode by which he could revive the judgment of 1867; that thereby the lien and rank of this judgment was preserved; and that, if these views are unsound, that it would be too harsh a rule to hold the doctrine of merger as destructive of the lien and rank of the judgment of 1867. We cannot sustain the view of Perry, trustee, as to the action commenced by him in 1889 being in the nature of a *scire facias*. His action was by regular summons and complaint, wherein a money judgment alone is prayed for. As was said by Mr. Justice McGowan in *Ex parte Witte*, 32 S. C. 228, 10 S. E. 950: "We have always supposed that a *scire facias* on judgment must pursue the terms of the judgment; that it is a continuance of the action, and must conform to the record; that the authority to issue an execution on a judgment is derived from the original judgment, which, revived, continues its vitality with other liens and other incidents from the time of its rendition." His next position—that his action was the only mode under the laws of this state whereby he might revive his judgment of 1867—is equally untenable, in the light of the repeated decisions of this court. The true course of Perry, as trustee, to revive

his judgment, was to issue a summons under the Code to renew execution. This, when granted, revived the judgment. *Adams v. Richardson*, 32 S. C. 139, 10 S. E. 931; *Wood v. Milling*, 32 S. C. 378, 10 S. E. 1081; *Leitner v. Metz*, 32 S. C. 383, 10 S. E. 1082.

But let us examine this *Perry*, trustee, judgment with relation to the judgment obtained in 1867. To our minds it seems clear that, as a general proposition, it is true that a judgment between the same parties, or their privies, when used as a cause of action which ripens into a new judgment, is merged in the last judgment. *Garvin v. Garvin*, 27 S. C. 477, 4 S. E. 148. As was said by Mr. Justice McGowan in the case just cited: "A judgment is extinguished when, being used as a cause for action, it grows into another action." See, also, *Freem. Judgm.* §§ 215-217; 2 *Black, Judgm.* § 264. It will be noticed that one of the primary effects of a judgment is to establish a new debt. 2 *Black, Judgm.* § 267; *Freem. Judgm.* § 217. This view is easily appreciated when the cause of action was of a lower dignity than a debt by judgment. A promissory note or a debt by bond, when reduced to judgment, became a debt of record. Thus, a debt of lower rank is made one of a higher grade. Usually it happens that the cause of action is so completely absorbed in the judgment that it is not competent longer to consider such cause of action apart from the judgment. This is not universally the case, however. When a creditor of a deceased debtor obtains judgment against the personal representative of the debtor in any contest between creditors of such deceased debtor as to rank, such rank is determined by the condition of the debt at the death of the debtor. Not only so, but, when a mortgage is used as a cause of action which ripens into a judgment, such mortgage is not so merged in the judgment that it loses its lien. *Pence v. Armstrong*, 95 Ind. 191. So, in this state, in the case of *Hardin v. Melton*, 28 S. C. 47, 4 S. E. 805, and 9 S. E. 423, it was held that the holder of a judgment against a deceased debtor who, in obedience to a call for creditors under an action to call in creditors and marshal the estate, etc., rendered in his claim by judgment, and had his decree against his debtor's estate, should not be deprived of the lien of his original judgment. As the doctrine is stated by Mr. Freeman in section 217 in his work on Judgments: "Every judgment is, for most purposes, to be regarded as a new debt; the chief, and perhaps the only, exception being in cases when the technical operation of the doctrine of merger would produce manifest hardship. * * *" As to the same matter, when considered by Mr. Black in the second volume of his work on Judgments, (section 677,) that author says: "One of the most important results of the merger of a cause of action in the judgment recovered upon it is that thereby a new debt

is created. * * * But whether the nature of the new debt is affected by the nature of the old claim; whether the judgment is independent of the characteristics of the cause of action it has absorbed; whether two judgments must be differently considered, and differently enforced, on account of a diversity in the nature of the demands on which they are severally founded,—these are questions upon which the authorities exhibit much variety of opinion. * * * On the other hand, it has been broadly declared that, whenever justice requires it, a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new debt." When *Perry*, as trustee, obtained his judgment against *Foster*, as administrator, upon the judgment of 1867 as a cause of action, such last judgment (that of 1867) had a lien on the deceased debtor's estate, created in the lifetime of the last named. So far as to dignity or rank between the judgments, (that of 1867 and 1889,) they were the equal, one of the other, for each was a judgment. There was therefore no new dignity created. Would it not be a hardship to declare this judgment of *Perry*, trustee, obtained in 1889, to have destroyed that of 1867? It seems to us that it should fall among the exceptions to the general rule, and not affecting the general rule. It follows, therefore, that the circuit judge was in error when he decreed that the claims of *Perry*, as trustee, on the one side, and *Lawton*, as administrator, on the other side, are of equal rank, and should be paid ratably. He should have held *Perry*, as trustee, entitled to set up the lien of his judgment obtained in 1867 as the first lien on all the property of *Josiah I. Perry*, deceased. It follows, therefore, that the circuit decree must be modified. It is the judgment of this court that the circuit judgment be modified as herein required, and in all other respects affirmed. Let the cause be remanded to the circuit court for such further proceedings as may be necessary.

McGOWAN, J., concurs.

McIVER, O. J. I dissent from so much of this opinion as relates to the rank given to the *Perry*, trustee, judgment, and will hereafter give my reasons in writing. In all other respects I concur.

MOORMAN et al. v. ARTHUR et al.
SAME v. TOWN OF DANVILLE et al.¹
(Supreme Court of Appeals of Virginia. Jan. 25, 1894.)

SALE IN BANKRUPTCY PROCEEDINGS — INNOCENT PURCHASERS — RESULTING TRUST — PROCEEDING TO ESTABLISH — EVIDENCE — LACHES.

1. Where complainants seek to prove that land was purchased with trust funds belonging

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

to them; that it was sold by the court, with knowledge of this fact, to pay the trustee's individual debts; and that purchasers at said sale had constructive information of said trust,—their claim is one of which a court of equity alone has jurisdiction.

2. Where land purchased by an administrator with money of his decedent was sold, to pay the administrator's private debts, to purchasers with notice, a trust in the land resulted to the widow and children of the decedent as if there had been no conversion, and not to the administrator, or creditors of the estate.

3. A sale of land by a federal court in bankruptcy proceedings is not binding on persons claiming an interest in the land, who do not appear, and are not served with any process or notice.

4. Nor are such persons precluded from attacking said sale because the bankrupt was the administrator of the estate through which they claim.

5. Rev. St. U. S. § 5057, providing that no action shall be brought by or against an assignee in bankruptcy in regard to any property transferrable to or vested in the assignee after two years from the accrual of the cause of action, does not apply to suits against purchasers from the assignee.

6. In 1870 certain property belonging to complainants and their mother was sold in bankruptcy proceedings as the property of another, and the eldest of the complainants in a suit attacking the sale became of age October 15, 1877, but was not informed of his rights in the property until April, 1886, and commenced the suit within the next year. *Held*, that complainants were not guilty of laches, but that their mother, who, with full knowledge of the facts, waited the above time before asserting her claims, was without remedy.

7. In a suit to establish a resulting trust it was contended that two of the defendants were incompetent to testify because they were parties to the suit and to the transactions under review, that they co-operated with the trustee in a devastavit, and were liable over to the other defendants. They were brought into the suit upon motion, and without a review by the court as to the necessity for such action. No relief was sought against them, and they were released by decrees in bankruptcy from all liability in the matter. *Held*, that they were competent to testify.

8. A resulting trust must arise at the time of the execution of the conveyance, and payment subsequent to the purchase will not, by relation, attach a trust to the original purchase.

9. To prove that certain land was purchased by an administrator with trust funds, three witnesses for plaintiffs testified that the administrator at the time of and after the purchase (25 years before the suit) declared that he made it as an investment for funds of the estate; but their evidence was contradictory in many details, and it seemed improbable that the administrator had funds belonging to the estate at that time. The administrator subsequently took the bankrupt act, and in a schedule attached to his petition in the bankruptcy proceedings stated that he purchased the land with funds of the estate, and that he held it in trust for the heirs, his grandchildren. No steps were taken to enforce this trust, and the administrator subsequently treated the land as his own, and made it the chief basis of credit to secure a favorable commutation of his wife's dower interest. *Held*, that the trust was not established.

10. To a petition in bankruptcy there was attached an inventory of the petitioner's estate, in which there was a declaration that one of the pieces of land had been purchased with trust money, and had been held by the petitioner in trust for the heirs, his grandchildren, though it stood in his own name. Rev. St. U.

S. § 5053, provides that "no property held by the bankrupt in trust shall pass by the assignment," and section 5016 provides that the "inventory must contain an accurate statement of all the petitioner's estate, * * * and whether there are any, and if so, what incumbrances thereon." *Held*, that purchasers of said land at a sale in such proceedings were not charged with notice of said trust.

11. Such declaration in favor of the declarant's grandchildren and against his creditors, made when he was not only insolvent, but in bankruptcy, are not admissible as declarations against title.

Appeal from circuit court of city of Danville; S. G. Whittle, Judge.

Bill by William A. Moorman and others against T. J. Arthur and others. Bill by same complainants against the town of Danville and others. From a decree dismissing said suits, plaintiffs appeal. Affirmed.

The opinion of the lower court (Whittle, J.) was as follows:

"These causes are of more than ordinary importance, both on account of the value of the property in controversy and of the legal questions involved; and they have been argued elaborately and with very great ability. The first-named cause was instituted November 11, 1886; the second, April 25, 1887. By a decree of the — term, 18—, they were ordered to be heard together. They were so argued, and will be so considered. The complainants are William A. Moorman, Samuel J. Moorman, and James C. Moorman, sons and heirs at law of James C. Moorman, deceased. The substantial defendants are purchasers immediate and mediate of the real estate sold under orders of the district court of the United States for the then district of Virginia in *Re W. W. Keen, bankrupt*. There is a discrepancy in the allegations of the bills in the two causes as to the property claimed, or rather as to the origin of the claim; the pleader in the second-named cause, it would seem, endeavoring to meet or conform to the facts developed by the evidence in cause No. 1. With this exception, which will be noticed later on, the allegations of the bills are substantially the same. They are that James C. Moorman departed this life in Pittsylvania county, October 18, 1863, seised of valuable real estate, and with large personal property, leaving him surviving a widow, Nannie C. Moorman, and complainants, (who at the death of their father were all infants,) William A. Moorman, having been born October 15, 1856; Samuel J. Moorman, June 20, 1858; and James C. Moorman, May 31, 1863. That the widow intermarried with one Charles Dougherty, October 29, 1867, and departed this life September 7, 1872, after the birth of a child, which died in early infancy; and that her husband, Charles Dougherty, is still living. That at the November term, 1863, of the county court of Pittsylvania county, W. W. Keen, the father of Nannie C. Moorman, and the grandfather of complainants, qualified as the administrator of the estate of James C. Moorman, deceased, executing

bond as such security in the penalty of \$300,000. That said administrator promptly began to collect the assets of the estate, and within twelve months from his qualification made sales of tobacco amounting to \$30,000, and by February 1, 1865, made other sales of tobacco to the amount of \$53,433.71, and, in addition, realized large amounts of cash from other assets of the estate. That, being unable to find satisfactory investment for these funds, (they say, in cause No. 2, he consulted and advised with his partner, James M. Walker, as to a proper investment,) in the fall of 1863, or during the year 1864, he purchased 262½ acres of land from Decatur Jones as an investment of said funds, paying \$30,000 in cash of the moneys of said estate therefor, but took no conveyance of title. That in 1863 he sold Dr. T. D. F. Guerrant about 92½ acres of land, lying almost wholly in the town of Danville, in the extreme western part thereof, on Dan river. That Guerrant paid the purchase price in full, and took immediate possession of the property, renting a portion of it in 1864 to J. J. Hankins, but neglected to take a conveyance. That during the year 1864 W. W. Keen concluded to repurchase said 92½ acres of Guerrant for the benefit of complainants and their mother, Nannie C. Moorman, and during that year exchanged with Guerrant the 262½ acres, theretofore purchased of Decatur Jones therefor, said Guerrant taking possession of the latter, and said Keen, as administrator, occupying and cultivating the farm for the benefit of complainants and their mother. That W. W. Keen had purchased the 92½-acre tract from James M. Walker, who, along with said Keen, as W. W. Keen & Co., had purchased it from E. F. Keen. That W. W. Keen did not convey the property to Guerrant, and when the exchange was made did not change the title on the deed books, because he did not know how he could convey real property to himself as administrator. He therefore held the 92½ acres of land in his own name, but for the benefit and as the property of the estate of James C. Moorman, deceased. On February 6, 1867, Decatur Jones conveyed the 262½-acre tract to Guerrant. That on October 15, 1867, W. W. Keen went into bankruptcy, his petition bearing date October 5th of that year. Said petition was duly sworn to, and accompanying it were Schedules A and B, showing respectively his liabilities and assets. As the 92½-acre tract stood in his name he was compelled to return the same in his Schedule B 1, and did so, but set forth in said schedule that, 'in the year 1863 or 1864, petitioner, being the administrator of James Moorman, deceased, the general manager of his estate, and the father of his widow, and having in his hands large sums of Confederate money arising from sales of tobacco belonging to said estate, and becoming aware of the rapid depreciation of said money, and knowing of no investment

which he could safely make in stocks or other securities, determined to invest a portion of the same in real estate for the benefit of said estate. Shortly after he purchased of Decatur Jones a tract of land lying in Pittsylvania county, Va., containing about 262½ acres, for the sum of \$30,000 in Confederate currency, which he paid in cash, which tract of land I had intended to cultivate, with the slaves belonging to said estate. Finding, however, that the interest of the estate would not be promoted by such a course, I exchanged the said tract of land with a certain T. D. F. Guerrant for a tract of land mostly within the corporate limits of the town of Danville, with good improvements, and to which there is attached a public ferry across Dan river. The said exchange was an even one. No title having been made to petitioner by Decatur Jones for the tract of land purchased of him at the time of said exchange, he, by direction of petitioner, conveyed the same to the said Guerrant. The ninety-two acre tract referred to had been sold to said Guerrant by the petitioner, but not conveyed before said exchange was made. After said exchange the petitioner still held title to said land in his own name. His only reason for so doing was that he did not consider it competent for him to hold this land by deed as administrator, (as has been stated.) The tract of land was obtained in exchange for a tract which had been purchased with money belonging to said Moorman's estate, and has since been held as the property of said estate.' (The bills give extracts from the statement in B 1. The foregoing is the statement in full.) That, thus, W. W. Keen did not surrender said property in bankruptcy, having no beneficial interest in it, and none that, under the laws of the United States, could or did pass to his assignees or trustees in bankruptcy. In the bill in cause No. 2 the allegations in relation to the real estate in question are that some time prior to the fall of 1863 E. F. Keen sold to W. W. Keen and James M. Walker, as W. W. Keen & Co., a tract or several tracts of land situated now in the corporate limits of Danville, and which embraces the land in controversy, put them into the immediate possession, but did not make them a deed thereto until January 22, 1864, which was recorded December 11, 1865. That, in the fall of 1863, W. W. Keen, by and with the consent of James M. Walker, sold a part of said property to Dr. T. D. F. Guerrant, to wit, that part lying between what was known as the Lower Ferry road, the Upper Ferry road, James Thomas' line, and Branch street, of the town of Danville, and so inclosed there, situate in the northwest corner of said town, as shown in the plat exhibited, and put him in the possession and occupancy thereof, receiving in payment therefor the full payment in tobacco and slaves, but made said Guerrant no deed of conveyance. They there set out an exchange

of the 262½ acres purchased by W. W. Keen of Decatur Jones with Guerrant for the lot above described, and say that all of said several transfers were known to and acquiesced in by James M. Walker. That said Decatur Jones had not made W. W. Keen a deed, nor was there any deed made to Keen by Walker at that time, nor by W. W. Keen & Co. to Guerrant, nor by Guerrant to Keen, it being in time of war, when men could not transact business with customary regard to the requirements of law. But the payment of the purchase money was complete, and possession was delivered. That Keen directed Jones to convey title to the 262½-acre tract to Guerrant, which, as stated, was done by deed bearing date February 6, 1867, and recorded June 21, 1867, but that Guerrant had had possession since 1864. That on November 15, 1865, after Keen had taken possession of the land sold to Guerrant, and exchanged by him to Keen, as administrator of James C. Moorman, deceased, and which possession was for the benefit of said estate, Walker conveyed to Keen his interest therein, and also his interest in several adjacent tracts, being all the property conveyed to W. W. Keen & Co. by E. F. Keen. That Keen took title in his own name for the reason given in the bill in cause No. 1, but contemporaneously advised his daughter, Nannie C. Moorman, and his family, and Decatur Jones and his wife, Harriett Jones, a sister of W. W. Keen, and Guerrant, and Walker. That at the time Walker conveyed said entire tract to W. W. Keen he had received largely over the \$30,000 he had paid Jones for the 262½-acre tract,—indeed, he had received from the sales of manufactured tobacco belonging to the estate of his decedent alone net cash to the amount of \$83,921.88; and he therefore increased the amount of land he got of said Guerrant, and held for said estate all the balance of that so conveyed to him by Walker; and thus, from November 15, 1865, said W. W. Keen occupied and held, for the benefit of said estate of James C. Moorman, deceased, having exchanged for a part thereof the said Jones farm, and received payment for the balance out of the said funds in his hands as administrator, the entire property so conveyed to W. W. Keen & Co., and this he did openly and notoriously; that neither complainants nor their mother nor her husband were made parties to the proceedings in bankruptcy, and that the record therein does not show any title to the property in controversy other or different from what is set forth in the statement in Schedule B 1. That on January 15, 1868, the creditors of W. W. Keen, a bankrupt, selected W. G. Banks and Charles L. Powell as trustees of the estate, which selection having been approved by the court, said W. W. Keen, by deed dated March 13, 1868, conveyed to said trustees 'all his estate and effects absolutely, to have and to hold in the same manner, and

with the same rights in all respects, as the said Keen would have had or held the same if no proceedings in bankruptcy had been taken against him.' That on June 1, 1869, said bankrupt conveyed to said trustees 'each and all of the various lots, tracts, and parcels of land, whether lying in the town of Danville, county of Pittsylvania, or state of Georgia, which were listed or surrendered by the said Keen in said schedule in bankruptcy, wherein a more particular description thereof will be found,' which deed was duly recorded in the clerk's office of the hustings court of Danville. That on December 4, 1869, W. G. Banks and J. D. Coles, as special commissioners, were ordered to sell the real estate of said bankrupt, including 'house and a tract of land of about ninety acres, to which is attached a ferry over Dan river, in Pittsylvania county, Virginia.' That January 14, 1870, an order was made to the same effect, and February 25, 1870, John A. Herndon divided said tract of land into 19 lots, aggregating 91 acres and 56 poles, and returned a plat to said commissioners. On March 1, 1870, the sales were made after due advertisement, were reported to court November 15, 1870, and December 3, 1870, duly confirmed. That the purchase money has all been paid, and title conveyed, and that the original purchasers have sold and resold and subdivided the land until the names of the present owners are numberless, and many of them cannot be discovered. That some time in 1884 complainants brought suit to recover a lot of land of which their father died seised, and advised their counsel that they had heard vague rumors that they were entitled to other lands somewhere in Danville, and employed said attorneys to represent them in all matters concerning their father's estate. That in 1886 said attorneys were examining a title to a lot within the boundary of said property, and were employed to look through said W. W. Keen's bankrupt papers. They discovered the statement on Schedule B 1, and refused to pass the title. They then advised complainants of their discovery, who were thus for the first time informed of their rights in 1886. That the purchase of Decatur Jones and the exchange with Guerrant were made when there were only two judgments docketed against W. W. Keen, aggregating, principal and interest, \$2,000, and that these were liens upon other lands of Keen, and did not bind either the 262½ or the 92½ acre tracts, and were satisfied and paid out of other lands of said Keen. That the facts detailed constituted W. W. Keen a trustee for complainants and their mother, and they set forth what they conceive to be the respective interests of themselves and Dougherty, the husband of their mother, in the land. That by the bankrupt act the 92½ acres did not pass, and could not have passed, under the control and jurisdiction of the district court, and that neither of the deeds referred to carried said

property to the trustees of W. W. Keen, bankrupt. That said district court had no jurisdiction to order the sale of said land, or any part of it, and that the sales and conveyances made under its orders were void. That the purchasers were advised of complainant's title fully and absolutely by said proceedings and records. That complainants were infants at the date of the sales, and, while they had heard hints from members of W. W. Keen's family that the said 92½ acres of land belonged to and should have been conveyed to them, they never knew that they had any chance to recover the same until within a few months past; that W. W. Keen is dead, and the legal title to said land is outstanding in his heirs.

"In cause No. 2 the bill undertakes to meet the matters of defense relied on by the defendants in cause No. 1. And they say that the defendants, who are named, and those made defendants as unknown parties, are in possession of parts of the said land which was sold by W. W. Keen & Co. to Guerrant, and by him exchanged to W. W. Keen for the estate of Moorman, lying between the Lower Ferry road, the Upper Ferry road, James Thomas' line, and Branch street, and derived title under direct or mesne conveyance from Banks and Coles, commissioners as aforesaid; thus confining their claim to that portion of the 92½ acres embraced within the boundaries aforesaid. That at the time of the investment of the personality into land Nannie C. Moorman was discover, and knew thereof, and assented thereto. That when she intermarried with Dougherty her interest was an equitable estate of one-third in the realty. That upon the birth of a child Dougherty became tenant by the curtesy initiate in said one-third, which, upon the death of his wife, became an estate by the curtesy consummate. They conclude by making all who are known to be interested parties defendant, but waive answers under oath, ask that an inquiry be had as to the unknown claimants, and pray that all deeds and conveyances be set aside, that a deed be made to them to said property, that they be paid and reimbursed for the rents and profits, and for general relief. The infant defendants answer by guardian ad litem. The administrator de bonis non of W. W. Keen, deceased, files a formal answer, and his heirs at law disclaim all interest in the subject-matter of litigation. James M. Walker and T. D. F. Guerrant, who were not originally made defendants, but were brought in subsequently, without formal amendment, plead their discharge in bankruptcy in bar to any liability that may be sought to be fixed on them, and pray to be dismissed. Many of the defendants do not answer, but quite a number demur and answer. Some deny that the lots owned by them are within the boundary of the land sought to be recovered in cause No. 2. Some content themselves

with a denial of complainants' claim, and insist that they are bona fide purchasers for value and without notice, while others make full and specific answer to the various allegations of the bills, and set out fully their several grounds of defense. They admit the death of James C. Moorman; that his heirs and next of kin are correctly named; the intermarriage of his widow with Dougherty; the birth of a child by that marriage; its death in infancy, and the subsequent death of the mother; that W. W. Keen qualified as the administrator of the estate of James C. Moorman, deceased, and gave bond as alleged; but they deny assets to the amount claimed, and from information say that the assets of the estate which came to the hands of the administrator were converted into Confederate money, and perished with the downfall of that government. They deny all knowledge of conversations between Keen and his partner, James M. Walker, or that the former ever contemplated investing money of the estate in real estate. They deny that at the date of the alleged purchase by Keen of the 262½ acres of land from Decatur Jones he had in his hands \$30,000, or any amount, belonging to his intestate's estate. They admit that E. F. Keen sold W. W. Keen and James M. Walker, partners as W. W. Keen & Co., the property embraced in the deed from the former to the latter, dated January 22, 1864, (Exhibits E, F, K,) but their knowledge is derived solely from the recordation of that deed. They deny all knowledge of the alleged sale to T. D. F. Guerrant, or of the alleged exchange, and deny that any of said transactions were had with W. W. Keen as administrator of Moorman. They insist that the Jones tract (so far as any money is proved to have been paid) was paid for with the funds of W. W. Keen & Co. That the property now sought to be recovered was bought and paid for by W. W. Keen & Co. That title was taken by them, and the property was so held until the dissolution of the firm and a division of its property. That the firm existed from 1861 till late in 1865, and during its existence became possessed of several parcels of land in Danville and Pittsylvania county. That in the fall of 1865 the real estate was divided between the partners. Two parcels were released in severalty to Walker by Keen and wife, and about the same time Walker and wife released to Keen their interest in the remaining two parcels of land owned by the firm, and Keen and wife also released to Walker and W. W. Clarkson their interest in a parcel of land owned by the firm composed of Keen, Walker & Clarkson; and they insist that the land so set apart and conveyed to W. W. Keen was as his individual property, and was so held, used, and occupied by him until he surrendered it in bankruptcy. They deny that Keen paid for either the Jones tract or the Tunstall tract with the money

of Moorman's estate, and insist that if he ever had intention of conveying or holding it for the benefit of that estate, he neglected it until the rights of others had attached, and he had no power to do so. They admit the bankruptcy of Keen; that he listed the property in controversy, and that he made the declaration in regard to it on Schedule B 1, given above, but they deny the truth of the facts stated therein. They admit the execution of the deed by Keen to Banks and Powell, his trustees in bankruptcy, but deny that they refer to the schedules in bankruptcy for a description of the property, or that it was necessary for them so to do. The bankrupt's property devolved upon his trustees by operation of law, and the deed did not confer upon them any other or greater rights, but merely designated the persons to carry into effect the purposes of the bankrupt act. They admit that neither complainants nor Mrs. Dougherty were technically made parties to the bankruptcy proceedings otherwise than by the aforesaid declaration of the bankrupt, and say they know of no other way in which they could have been made parties, unless some one had filed a petition for them. That all necessary steps were taken in said matter to ascertain the rights of all lienors and other parties, and to secure a free and unincumbered sale of the lands of the bankrupt. But that neither in said proceeding nor elsewhere were any steps taken to establish the pretended claim of complainants, or to maintain as true the ex parte declaration of their grandfather and trustee, W. W. Keen, on Schedule B 1, until these suits were instituted, long after his death. Later on, when it became necessary to estimate the contingent right of dower of the bankrupt's wife, he treated said land as his own, and included it in the deed in which his wife relinquished her right of dower in his lands. The claim for commutation was brought about by Keen, and the land in question formed the chief portion of the estate taken into said estimate, and he succeeded in having settled upon his wife one of the most valuable houses and lots in Danville; and he knew that, if his declaration in Schedule B 1 was true, his wife had no color of claim to dower in said land. The declaration was made when it seemed probable that it might have the effect of securing to his grandchildren a part of the property which would otherwise go to his creditors. But when the truth of the statement would have deprived his wife of property, which was settled to her use, and afterwards jointly enjoyed by her and her husband, it was not brought in any manner to the attention of the court, or of any of the parties to the proceedings. That Keen was present at the sale of the property, but did not then, or at any other time, intimate that complainants or any one else had any claim to the property whatever. That there were judgments

against E. F. Keen, which attached to said property while owned by him, and passed to W. W. Keen & Co., who had notice, with said liens upon it, and that the judgments against W. W. Keen also attached, and were liens thereon. That subsequently to the conveyance of said land in severalty to Keen by Walker, Keen became a bankrupt, and the lands, subject to the liens, aforesaid passed, by operation of law, to his assignees or trustees. That the judgments against him were more than sufficient to consume all the lands surrendered by him in bankruptcy. That the lien creditors instituted a suit in the circuit court of Pittsylvania county to subject said land to the payment of their debts, but upon the application of the trustees in bankruptcy, and some of the creditors proceeding in said suit, were stopped, and the district court assumed jurisdiction, and convened said creditors before it. Afterwards an account of liens on the real estate of said bankrupt was duly taken, and said lands regularly and duly decreed to be sold for the satisfaction of the liens upon the same. That W. G. Banks, and J. D. Coles were duly and regularly appointed by a decree of said court to make sale of said lands, and in pursuance of said decree, did advertise and sell the same. That the creditors of E. F. Keen, as well as W. W. Keen, were duly convened before said court, and made parties, and said sales were duly reported and confirmed, and deeds directed to be made to the purchasers on the payment of the purchase money. That the purchase money was afterwards fully paid, and conveyances made to the respective purchasers. That there was no other property from which the liens to satisfy which the land was sold, against which said judgments could have been enforced, and said judgments were the first liens on said lands. That they had no notice or knowledge, in any manner whatsoever, of any claim of complainants, or of Mrs. Dougherty, or of the estate of James C. Moorman, deceased, to said land, or any part thereof, or of the declaration made by the bankrupt on Schedule B 1. That they are bona fide purchasers claiming under a decree of a court of competent jurisdiction of the subject-matter of the suit, and that their title is free and clear of the alleged secret trust asserted by complainants. That the purchasers at the bankrupt sale acquired not only the title of the bankrupt, but also the title of E. F. Keen, and that they, and those claiming under them, are entitled to hold said lands by the same right that the judgment creditors who were parties to said matter in bankruptcy, or convened before the court, might have asserted against the said lands, and received the title which might, in any event, have been lawfully subjected to said judgments, and are not responsible for the application of the purchase money by the court. That the declaration of the bankrupt on Schedule B 1 was merely

an ex parte statement, not regularly or formally a part thereof, and not such an assertion of the claim of complainants as would bind purchasers of the land without actual notice of the same. That the declaration does not contain such a description of the lands claimed to have been purchased on behalf of complainants as is sufficient to have warned purchasers who had no notice of the occupancy of the land by Guerrant that it was the same land derived by W. W. Keen from E. F. Keen, or to have put them on inquiry as to the truth of the facts therein stated, unless said purchasers had had notice that said land had been occupied or owned by Guerrant; that the interests of complainants, if any they had, were represented by W. W. Keen, their trustee, and, he being a party to the bankrupt proceedings, they are barred thereby, although not technically parties themselves. That the matter is res adjudicata, and the action of the bankrupt court cannot be collaterally attacked. That complainants' claim, if any they had, is adverse to the trustees in bankruptcy, and, not having been prosecuted within two years, is barred by the limitation prescribed by the bankrupt act. That said claim is barred by the fifteen years' limitation. That the alleged claim of complainants, if any they have, is not a claim to the land, but to the funds which they allege were invested in land, and that the claim accrued to Moorman's administrator, and not to complainants. That the estate was insolvent, and complainants at the time had no real interest in the land. That the funds of the estate belonged to the administrator for the benefit of the creditors, as well as the heirs and next of kin; and, though it may not have been known at the time, it has been subsequently shown that the estate was wholly insolvent, and the claim is barred by the statute of limitations, because the administrator failed to institute suit for the recovery of the same within five years. That the lapse of time and laches of complainants, if not barred otherwise, should preclude them from setting up the claim they now make. To sustain their contention that there were no assets of the estate of Moorman to invest in land, to show that the estate was insolvent, and the declaration of Keen in Schedule B 1, was untrue, they refer to the record in the creditors' suit of Soyars and others v. Moorman's Administrator and others, brought in Pittsylvania circuit court in 1872, in which the administrator, Keen, was examined as to what became of the property of his intestate, and stated that it was lost by the results of the war; that the real estate of Moorman was sold, and the proceeds applied to the payment of his debts, leaving large amounts still due and unpaid. They also refer to the suit of complainants against R. W. Lawson to show that the contention of complainants there is inconsistent with the claim asserted by them

here. The last-named case is reported in 85 Va. 880, 9 S. E. 150, but the admissibility of the record referred to is excepted to by complainants, and, from the view I take of these causes, need not be noticed further. From the foregoing summary of the contents of complainants' bills it will be observed that their contention is that the 262½ acres of land, known as the 'Jones tract,' was purchased by W. W. Keen as administrator of their father's estate, and with its assets, and for its benefit, as an investment. That this tract was afterwards exchanged by said administrator with T. D. F. Guerrant for the Tunstall Hill property, also for the benefit of said estate; and that, while the legal title to said property was taken in the name of W. W. Keen individually, a resulting trust nevertheless arose for the benefit of the estate. That the property was afterwards listed by Keen in his schedules in bankruptcy, but with the declaration of the trust aforesaid written thereon, which affected the purchasers of the property under the proceedings in bankruptcy, and all claiming title through or under them with notice. It will also be observed that the answers deny the existence of the trust, or, if it existed, that the defendants had either actual or constructive notice of it.

"Before considering these questions, upon which, in my judgment, the causes hinge, it will be proper to notice some of the other points which have been raised and discussed. It is argued that if the claim of complainants be true,—that the trust existed, that the bankrupt court never acquired jurisdiction either of the property or parties, and that the sales under its decrees were nullities,—complainants had a full and complete remedy at law, and should have proceeded by action of ejectment, and that this court has no jurisdiction of this. It is sufficient to say that the title of complainants, if any they have, is equitable, not legal, and that they seek to set up and enforce a trust of which a court of equity alone has jurisdiction.

"Again, the question, 'For whose benefit did the trust result?' has elicited much discussion, the contention of the defendants being that it resulted, if at all, to W. W. Keen, as administrator of J. C. Moorman, deceased, or to the creditors of his estate. It would seem clear that neither position is tenable. The administrator, by converting the personality into real estate, put it beyond his reach, and the creditors can in no sense be said to have title either to the personal assets or their product. Theirs was a mere right to subject it to the payment of their debts; nothing more. They might, by proper process, have reached the personality in the hands of the administrator before conversion, and had it applied in discharge of their debts; or, after conversion, they might have proceeded against the administrator and his bondsmen, and held him and them respon-

sible for his devastavit; or they might have followed and subjected the property into which the personality was converted, through the medium of a court of equity, to the payment of their debts. But under no conceivable circumstances would the title either to the personality or realty, by operation of law, devolve upon them. If the personality had not been converted, subject to liability for payment of debts, it would have passed to the widow and children of decedent in the proportion of one-third to the former and the residue to the latter. And surely it cannot be maintained that the relations and rights of these parties, quoad the property in which the personality was invested, were changed or altered by the conversion.

"It is earnestly insisted that the questions upon which this court is asked to pass have been adjudicated by the district court of the United States for the district of Virginia in *Re W. W. Keen, bankrupt*; that the decrees and orders of that court, whether right or wrong, are final and conclusive, and constitute an absolute bar to the claim which complainants are now prosecuting and seeking to enforce here. Whilst this has been the 'bloody ground,' as I may say, of the case, and counsel have shown much learning and research in its discussion, it seems to me to lie within narrow compass, to depend upon principles the justness of which must be allowed, and is of easy solution. I take it to be a fundamental principle of law, requiring no citation of authorities to sustain it, that, in order for the decrees of a court of either special or general jurisdiction to be binding, (unless in pure proceedings in rem,) two things are necessary: it must have jurisdiction of the person and of the subject-matter. The rule is founded upon principles of reason and justice, and the instances in which it has been violated have met with the unqualified disapproval and condemnation of the courts. In *Underwood v. McVeigh*, 23 Grat. 418, Christian, J., in delivering the opinion of the court, said: 'The sentence of condemnation and sale was a nullity, void in toto. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact and upon the matter of law; and no sentence of any court is entitled to the least respect in any other court or elsewhere when it has been pronounced ex parte, and without opportunity of defense. An examination of both sides of the question, and deliberation between the claims and allegations of the contending parties, have been deemed essentially necessary

to the proper administration of justice by all nations, and in every stage of social existence.' See, also, 7 Rob. Pr. p. 52, and *Ray v. Norseworthy*, 23 Wall. 136. Now, while it may be difficult in every case to answer the query of one of the learned counsel for the defendants, arguendo, as to 'who are parties to a proceeding in bankruptcy,' it is very clear that complainants were not in the *Matter of W. W. Keen, bankrupt*. There is no evidence, or even pretense, that they ever appeared, either in person or by counsel, or that any process or notice from the bankrupt court ever emanated against them, by publication or otherwise. This is virtually conceded; but the contention is that they were represented by W. W. Keen, either as administrator of their father's estate or as their trustee. He cannot be said to have been a party in either capacity. He was a party for the purpose of obtaining a discharge from his debts, and for none other, and was discharged June 4, 1869, as administrator. As has been stated, his power over the subject-matter ceased when he converted the personal assets of his intestate into real estate. Both as administrator and trustee, his interest was adverse to that of complainants. It would have been a case of committing the lamb to the care of the wolf. He would have had to play the double role of plaintiff and defendant at the same time. But I do not understand that the doctrine of representation applies in Virginia between trustee and cestui que trust so as to hold the latter concluded by decrees in cases in which the trustee is a party, but the cestui que trust is not. *Sand. Eq.* p. 197; *Richardson v. Davis*, 21 Grat. 706. The extent to which the bankrupt court acquired jurisdiction over the subject-matter of this suit, and the effect of its decrees in relation thereto upon complainants, will be considered later on, and in a different connection; but the fact that said court had no jurisdiction of complainants deprives said decrees of the effect claimed for them by the defendants of having adjudicated the rights sought to be litigated here, and of per se constituting a bar to complainants' claim.

"The defendants further claim that complainants' suits are barred by the act of limitations prescribed by section 5057 of the Revised Statutes of the United States, which declares that 'no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.' It will be observed that this section in terms applies only to suits by or against an assignee. The assignee in bankruptcy of W. W. Keen is not a party to these suits, (nor am I prepared to

may he is a necessary party,) and the limitation, therefore, does not apply.

"Nor does the fifteen-years limitation prescribed by the Virginia statute operate as a bar to the suits. W. A. Moorman, the eldest son of J. C. Moorman, deceased, became of age October 15, 1877, and cause No. 2 was brought April 25, 1887, within less than ten years after he attained his majority.

"It is also insisted that complainants have been guilty of such laches and delay in asserting their claim as should preclude them from recovery in a court of equity. They were informed of the facts upon which they base their right to recover, by their counsel, in April, 1886, and, as has been seen, the second suit was brought about one year thereafter, while the first was brought within seven months, and it is not shown that the defendants have been put to any disadvantage by loss of evidence or otherwise in the interval of time that elapsed between the reception of the information and the institution of the suits. 'It is well settled that laches cannot be predicated of those who are ignorant of their rights. Such a defense is, in equity, only permitted to defeat an acknowledged right on the ground of it affording evidence that the right has been abandoned. Acquiescence cannot be imputed in the absence of all knowledge of the facts of which it is predicated.' *Rowe v. Bentley*, 29 Grat. 763; *Lamar's Ex'r v. Hale*, 79 Va. 164. 'Estoppel from acquiescence,' said the court of appeals in *Green's Adm'r v. Thompson*, 84 Va. 411, 5 S. E. 507, 'must rest upon actual knowledge of the wrongful act, its injurious effects, and unreasonable delay.' See, also, *Tunstall's Adm'r v. Withers*, 86 Va. 892, 11 S. E. 565, and 2 Pom. Eq. Jur. § 817. The case affords no ground for the application of the equitable bar arising from laches, acquiescence, and lapse of time; but what has been said on this subject applies only to the alleged claim of complainants as heirs and distributees of James C. Moorman, deceased, and not as claimants through their mother. The case stands on a wholly different footing as to Mrs. Moorman's interest. She was fully apprised of all her rights from the first, when she was discovered, in the lifetime, and before the bankruptcy, of W. W. Keen; and no valid excuse is offered for her failure to prosecute her alleged rights. If the contention of complainants be true, all that was needful was a request that her father and trustee, W. W. Keen, execute the trust in him for the benefit of herself and children; and, had he refused, she was armed not only with such evidence as has been adduced here, but with her own and her father's, the chief actor in the drama, to sustain her. 'She was silent when she ought to have spoken, and she will not be heard to speak when she ought to be silent.' The converse of the doctrine laid down in the cases of *Rowe v. Bentley*, 29 Grat. 763, etc., cited above, applies with full

force to the claimants of the alleged interest of Mrs. Moorman, and, if no other defense save that of laches was interposed, it would defeat a recovery.

"Having noticed briefly the several special defenses relied on by the defendants, we come now to consider the two main questions in the case: (1) Is the resulting trust, as set forth in the bills, established? and (2) are the defendants bona fide purchasers for valuable consideration and without notice? We will consider these in the order stated. It is contended that W. W. Keen first declared the trust sought to be enforced in 1863, and the evidence chiefly relied on to prove his declarations is that of James M. Walker and T. D. F. Guerrant. As an objection is raised to the competency of these witnesses, that question must first be determined. It is contended that they are parties to this suit, were parties to the original transactions, and participated in, and by their co-operation enabled Keen, the administrator of Moorman, to commit the devastavit, and would be liable over to the defendants in the event of a recovery by complainants; and, further, that Walker is responsible in his warranty of title in his conveyance to Keen. It will be remembered that Walker and Guerrant were not originally made parties to these suits, but upon the filing of the demurrer of Bethell it was suggested that they were necessary parties, and at the June term, 1889, they were made parties without objection. The court at that time was unacquainted with the record, and, acting upon the statements at bar, admitted them as parties without any consideration as to the necessity for so doing. At the January term, 1891, they filed disclaimers, and set up their discharges in bankruptcy in bar of any liability that might attach to them, and moved that the bills be dismissed as to them. The court, still not having examined the records, and not being sufficiently acquainted with their contents to pass intelligently upon the question, had the motion noted, but postponed action upon it. No relief is sought in these suits against either of said defendants, but, on the contrary, the complainants are thoroughly committed to the pursuit alone of the property into which they allege the assets of their father's estate were converted. Nor is it clear that the bills could have been so framed as to have attempted the pursuit of the property involved, and of Walker and Guerrant, by reason of their alleged participation in the devastavit of Keen, without being open to the objection of multifariousness. I can conceive of no other reason for making them parties save to exclude their testimony already taken in cause No. 1, and to prevent their examination in cause No. 2. It is by no means plain that their connection with the transaction was of such a character as to render them responsible to complainants originally, or to the defendants by

way of subrogation in the event complainants should prevail. But they rely upon their discharges in bankruptcy, as above stated. See, on this subject, *Neal v. Clark*, 95 U. S. 704, and, as to their competency, authorities cited in Mr. Christian's note. Their liability, if any, is too contingent and remote to render them incompetent as witnesses. The exception to their competency should be overruled, and their motion that both bills be dismissed as to them should be sustained.

"It is properly conceded that a resulting trust may be established by parol evidence. The authorities are all to that effect. It is also true that if a trust be impressed upon one piece of property, which is afterwards exchanged for other property, the trust follows, and the latter is affected with the same trust. *Cook v. Tullis*, 18 Wall. 341, 342; *Overseers of Poor v. Bank of Virginia*, 2 Grat. 551; *Tabb v. Cabell*, 17 Grat. 160; *Oliver v. Platt*, 3 How. 405. But it is equally as well settled that the evidence to establish the trust must be clear, cogent, and explicit. *Dyer v. Dyer*, 1 White & T. Lead. Cas. 335, 338; *Miller v. Blöse's Ex'r*, 30 Grat. 747; *Jennings v. Shacklett*, Id. 765; 1 *Perry, Trusts*, § 127; *Sugd. Vend.* 708; *Phelps v. Seely*, 22 Grat. 589. And the trust must be proved as alleged. *Dyer v. Dyer*, supra, citing *Andrews v. Farnham*, 10 N. J. Eq. 91. It will be observed that, to establish the trust, complainants rely wholly upon the declarations of W. W. Keen as made to Mrs. Jones, T. D. F. Guerrant, and James M. Walker, and the circumstances. (I allude now to the declarations alleged to have been made in the fall of 1863, and not to that written on Schedule B 1, which will be noticed later on.) It will be remembered that the bill in cause No. 1 charges that the Jones tract was exchanged by Keen with Guerrant for all the property embraced in the deed of January 22, 1864, from E. F. Keen and wife to W. W. Keen & Co., embracing not only the Tunstall Hill property, but also the lower ferry over Dan river, with the land attached, amounting in all to 92½ acres; while all the evidence shows that W. W. Keen & Co. only sold Guerrant a part of this property, witnesses varying in their opinions as to how much, though the weight of evidence would seem to show sixty-odd acres. In cause No. 2, in the light of evidence taken in cause No. 1, the charge is that the Jones tract was exchanged with Guerrant for the 60 acres, but that W. W. Keen, finding himself largely indebted to the Moorman estate as its administrator, elected to hold the residue of the 92½ acres, having bought out the interest of his partner, Walker, therein in trust for that estate. It may be remarked in passing that there is not a particle of evidence to sustain this allegation, and attempt to reconcile the discrepancy in the bills, and to sustain

the declaration of Keen in Schedule B 1. The witnesses Mrs. Jones, Guerrant, and Walker testify as to the declarations alleged to have been made nearly a quarter of a century before, when the war was flagrant, and men's minds so disturbed by passing events and the condition of the country that they ceased to apply customary business methods to transactions of vital importance,—e. g. Guerrant purchased the Tunstall Hill property, for which he paid —, investing his all—slaves and tobacco—therein, and took no conveyance. He afterwards, in 1864, exchanged this property for the Jones tract, and obtained no title until February 6, 1867. Mrs. Jones was surrounded by a family of eleven helpless children, which absorbed her attention, while Walker, a man of large affairs, was engaged in manufacturing tobacco, banking, farming, trading in lands, negroes, etc., and operating in a territory extending from Virginia to Georgia. It is proper to look to the surroundings of these witnesses with a view of arriving at the weight to be attached to their recollection of a transaction which did not particularly concern them, and to which they speak twenty-odd years after the fact. It is therefore not surprising that we find their statements as to what Keen's declarations were variant and irreconcilable. Mrs. Decatur Jones, the sister of Keen, and great-aunt of complainants, was examined in both cases,—the first time, December 21, 1886; the second, September 30, 1887,—and yet, upon the second examination, she remembered nothing, and would swear to nothing. In her first deposition she proves the sale of the Jones tract to Keen, but at what time she cannot say 'to save her life.' She says the consideration was \$25,000 or \$30,000 in Confederate money; that she received the last payment—\$5,000—herself, (the charge is that it was a cash sale;) that it was paid to her in bank notes at the residence of Mrs. Holcombe, in Danville, by Jim Walker. She says her brother, W. W. Keen, afterwards asked why she got after Walker about this money; that it was the last payment, and he had intended to make them wait for it. Walker, on the contrary, says: 'My recollection is, in the spring of 1864, or early in the year 1864, W. W. Keen requested me to pay Mrs. Decatur Jones \$5,000, and I gave her the check of W. W. Keen & Co. for that amount. About the time this check was given W. W. Keen informed me that he owed \$5,000, balance on the purchase of the Decatur Jones land, and requested me to give the check, and I charged it to his individual account on the books of W. W. Keen & Co.' In his second deposition he says, prior to the payment of the \$5,000, W. W. Keen asked him to make it, and that he gave Mrs. Jones the firm check in the office of their tobacco factory on Bridge

street. Now, it will be observed that about this transaction, every whit as likely to have fastened itself upon their memories as the declarations of Keen, these two witnesses contradict each other throughout. Mrs. Jones says the payment was in bank notes at Mrs. Holcombe's and that Keen chided her for 'getting after' Walker about it. Walker says the payment was by the check of W. W. Keen & Co., made in the office of their factory, and at the request of Keen. They not only contradict each other, but both contradict the charges of the bills and the written statement of Keen that he bought the Jones tract 'for the sum of \$30,000 in Confederate money, which he paid in cash and with money arising from the sales of tobacco belonging to said estate.' All that Mrs. Jones can be induced to say looking to the establishment of a trust in the Jones tract, though hard pressed by counsel, is: 'I do not like to say, because I cannot recollect well enough to take an oath. I always understood that he [W. W. Keen] bought it [the Jones tract] for Nannie Moorman,' and they made the deed to Guerrant, because she understood that Keen had swapped the Jones tract to him for the Tunstall Hill property; but she was not present. In answer to the direct and suggestive question, 'Did Mr. Keen ever state to you that he bought this property for James C. Moorman's estate?' she answers, 'It has been so long I would not like to swear to that effect.' She proves no declaration of trust by Keen. Dr. Guerrant is also examined in both cases. He proves his purchase of the Tunstall Hill property from Keen & Walker in the fall of 1863, and thinks he held it until the fall of 1864, when he exchanged it with W. W. Keen for the Jones tract. Keen gave him as a reason for the swap that he wanted it for his daughter, Mrs. Moorman; that she was a widow, and he did not want her exposed on that farm in the country so far from him, because it was located and surrounded in a community which was largely negroes, large negro quarters, and, during war times, she would have no protection. 'That commenced the trade,—was the opening preparing our minds for the trade. * * * And in the same conversation he stated he had purchased the Jones tract for his daughter, Mrs. Moorman.' This conversation was in 1864. He was first examined February 2, 1887, and his second examination—September 30th of the same year—is substantially the same. In point of fact, Mrs. Moorman never lived either on the Jones tract or the Tunstall Hill property; but her husband owned a residence in Danville, which was sold years after the war in the suit of Soyars, etc., v. Moorman's Heirs, etc., on February 24, 1887. James M. Walker was first examined, and says: 'To the best of my recollection, in 1863, W. W. Keen had frequent

conversations with me in regard to the investment of some money that he held belonging to the estate of James M. Moorman, deceased; and my recollection is that some time after the frequent conversations he informed me that he had purchased a tract of land from Decatur Jones for the estate of James C. Moorman, deceased. My recollection is this information was given me in 1863. I can't say what time I advised him, but it was prior to the purchase of the property from Decatur Jones. I don't think he held it [the Jones tract] very long. W. W. Keen informed me that he had traded the Decatur Jones property with Dr. T. D. F. Guerrant for the Tunstall property. I think this transaction was in the latter part of 1863. I know the trade was made, and Keen took possession of the Tunstall property after that.' In answer to question 12: 'Do you know whether W. W. Keen, prior to the summer of 1864, received any moneys as administrator of James C. Moorman, deceased?' he says: 'My recollection is that I was one of the appraisers of James C. Moorman's estate; that he had a considerable quantity of manufactured tobacco, leaf tobacco, and other personal property, and that W. W. Keen realized money for the sale of that tobacco; and I think that this was prior to the summer of 1864.' 'I think the date of the purchase of the Jones farm was early in the fall of the year 1863.' In answer to the question if he knew to what end or purpose Keen held the Tunstall Hill property, he answers: 'I do know, and derived my information from W. W. Keen. My recollection is that in the latter part of the year 1863, or early in the fall of 1863, W. W. Keen informed me that he had exchanged the Decatur Jones tract of land with Dr. T. D. F. Guerrant for the estate of James C. Moorman, deceased.' He was again examined September 30, 1887, and says: 'As stated before, W. W. Keen consulted me as to how he should invest this money belonging to the estate of J. C. Moorman, deceased, and did inform me that he had made the purchase of the Jones tract of land for the estate of J. C. Moorman, deceased. I don't recollect that he had any special reference to any special money,—that he purchased it with Moorman's estate, or any other money.'

"The foregoing are extracts from the depositions bearing directly upon the point under discussion. Can it be fairly predicated of them that they clearly and explicitly establish the charges of either bill? They show that only a part of the 92½-acre tract, claimed to have been exchanged by Dr. Guerrant with Keen for the Jones tract, ever belonged to him. Again, Mrs. Jones 'always understood' (from whom it does not appear) that her brother, W. W. Keen, bought the Jones tract for his daughter, Mrs. Moorman. And Dr. Guerrant distinctly testifies that Keen told him he purchased it for his daughter, Mrs. Nannie Moorman; not for complainants,

not for the Moorman estate, or with its assets, but for his daughter. Walker, with equal pertinacity of statement, says Keen told him he was going to buy it for the Moorman estate, and afterwards that he had done so. Now, which of these statements is to be adopted? If the former, the trust resulted in favor of Mrs. Moorman, who knew of her rights, and, failing to assert them until the rights of others intervened, those claiming under her are estopped from doing so now. It may have been laudable in her to remain silent, and permit her father to hold, use, and enjoy her property, and finally to surrender it in bankruptcy, rather than to assert her rights, and be disowned by him; but she cannot visit the consequences of such a course upon the defendants. But is it incumbent upon a court to undertake to reconcile the serious conflict in the testimony, and to adopt that of Walker, rather than that of Mrs. Jones and Dr. Guerrant, and, too, against that justly favored class in equity, purchasers for value and without notice? Or, if it be insisted that Keen made both statements, do his inconsistent statements furnish a safe guide to the mind in search of truth? Aside from these declarations, the circumstances would seem to repel the presumption that the assets of the Moormans' estate paid for the Jones tract. The witnesses all agree that the purchase was in 1863, and the claim is for cash. It is undisputed that Moorman died November 8, 1863, and that Keen qualified as administrator at the county court of Pittsylvania following (November 16th.) There is no evidence that he left any ready money. To the contrary, Walker, one of the appraisers, testifies as to what the estate consisted of, and no money is mentioned; and, as has been seen, Keen, in his statement in Schedule B 1, says he had in his hands 'large sums of Confederate money arising from the sales of tobacco belonging to the estate.' The inference is a reasonable one, from the amount of the penalty of the administrator's bond, \$300,000, that the personal estate was estimated at half that amount. But it would be unreasonable and against experience that a personal representative, qualifying after the middle of November upon the estate of a decedent who left no ready money, could have sold property and collected money sufficient to have made a cash purchase of land that year for \$25,000 or \$30,000 for the estate. The sale of tobacco, too, must have been after the inventory was taken, otherwise the money would have been inventoried in place of the tobacco. And yet we must conclude either that Keen did make sales and collections as supposed, to sustain the theory that the Jones tract was bought and paid for with the money of Moorman's estate, for all the witnesses una voce locate the date of sale in the fall of 1863, and Walker early in the fall, which would make it antedate not only Keen's qualification, but Moorman's death. The first moneys of the estate traced to

Keen's hands were the \$12,000 paid him by Harvey, James & Williams, commission merchants, in May, 1864, months after the land was purchased and paid for, if the charge in the bills and the declaration of Keen on his schedules are true. But the last payment, as has been shown, was made by the \$5,000 check of W. W. Keen & Co. And, finally, after the close of the war, to wit, on November 15, 1865, W. W. Keen, when the matter was fresher in his mind than when he went into bankruptcy, several years later, took a conveyance of the Tunstall Hill property to himself individually. Thus it would seem that the circumstances are not only helpful in reconciling the conflict in the alleged declarations of Keen, but tend strongly to discredit the truth of any and all of them. 'A mere parol declaration by one that he is buying land for another is not sufficient to establish a resulting trust; there must be some proof of an actual or constructive payment by the person claiming such trust.' 1 Perry, Trusts, § 134. 'Proof of mere admissions of one that he purchased for another, without proof of some previous arrangement or advance of money by such other, is insufficient to create a resulting trust.' Id. § 137. 'A resulting trust may be set up by parol evidence against the letter of a deed,' etc., 'but the testimony to produce this result must in each case be clear and unquestionable. Vague and indefinite declarations and admissions long after the fact have always been regarded, with good reason, as unsatisfactory and insufficient.' Phelps v. Seely, 22 Grat. 573. 'The witness swears to no fact or circumstance capable of being investigated or contradicted, but merely to a naked declaration of the purchaser, admitting that the purchase was made with trust money. That is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it; besides, the slightest mistake or failure of recollection may alter the effect of the declaration.' Opinion of Sir William Grant in Lench v. Lench, 10 Ves. 511-518, quoted with approbation by Bouldin, J., in Phelps v. Seely, supra. And in Botsford v. Burr, 2 Johns. Ch. 405, 411, Chancellor Kent, in commenting on the value of such testimony, says: 'This is a remarkable instance of uncertainty and fallacy of parol testimony, and shows the great danger of giving much latitude to these implied trusts, founded on naked declarations in opposition to the solemnity and certainty of written documents.' See, also, McKeown v. McKeown, 33 N. J. Eq. 384, and other cases cited by counsel for defendants to the same effect. 'A resulting trust must arise at the time of the execution of the conveyance. Payment of the purchase money at the time of the purchase is indispensable. A subsequent payment will not, by relation, attach a trust to the original purchase.' Beecher v. Wilson, 84 Va. 513, 6 S. E. 209. Now, it can hardly be said that the

evidence in these causes measures up to requirement. But suppose it be conceded that the trust is established. It is not pretended that the defendants had notice of it, and to give it efficacy it must be coupled on to a declaration of which they did have notice; for, says Christian, J., in delivering the opinion of the court in *Carter v. Allan*, 'It is sufficient to say that it has been the uniform course of decision in this state, as well as the other states of the Union, to hold that the bona fide purchaser of a legal title is not affected by any latent equity founded on a trust, fraud, or incumbrance, or otherwise, of which he had not notice, actual or constructive.' 21 Grat. 249, and cases cited.

"The contention, however, is that this link is supplied by what is styled the 'declaration of trust' on Schedule B 1 of Keen's bankruptcy proceedings, which it is claimed confirmed and corroborated the previous declarations, confirmed the purchase of the Jones tract for the Moorman estate, and the payment of the purchase price with its assets, and confirmed the exchange of it with Guarant for the Tunstall Hill property. I have considered the declarations of Keen alleged to have been made in 1863, without advert- ing to the objection made to their admissibility. They were made, if at all, while he was in possession of the property, were contemporaneous with the transactions, were made when he was solvent, and were against his interest. Declarations made under such circumstances are clearly admissible. *Doo- ley v. Baynes*, 86 Va. 644, 10 S. E. 974. It is insisted that with the declarations of 1863 eliminated complainants are still en- titled to recover upon the declaration found on Schedule B 1. I prefer to discuss the ef- fect of this in its various bearings under the head: (2) Are the defendants bona fide pur- chasers for valuable consideration, and with- out notice? It is proved that they did not have actual notice of what was written on Schedule B 1. Did they have constructive notice? Reason and justice demand that we look at this question not in the light of after developments, but from the standpoint occupied by the defendants when they pur- chased, paid the purchase price, and took conveyance to the land in controversy, and what would the records have disclosed to a prudent, careful, and diligent examiner of the title? He would have found that the 92½ acres of land, including the ferry, composed of several parcels, was conveyed by L. M. Shumaker and wife to E. F. Keen by deed dated December 17, 1862; that E. F. Keen and wife conveyed it to W. W. Keen & Co., a firm composed of W. W. Keen and James M. Walker, by deed dated January 23, 1865; that W. W. Keen conveyed to James M. Walker his interest in three pieces of prop- erty owned by W. W. Keen & Co. for the consideration of \$9,000, by deed dated Novem- ber 15, 1865; and that Walker conveyed to Keen his interest in two parcels of land

owned by said firm for the aggregate con- sideration of \$10,000, Walker's half interest in the whole of the property in controversy being conveyed by deed bearing date Novem- ber 15, 1865, reciting a consideration of \$5,000, and that its purpose was to vest in Keen the entire title to that property, which had before been jointly owned by him and Walker. There were five deeds from Walker to Keen, and each expressed on its face that the intention was to vest in Keen, as his in- dividual property, the land which had been previously held by Keen and Walker as part- ners. In other words, they were nothing more or less than deeds of partition of the lands of W. W. Keen & Co. between the members of the firm. In this connection it may be observed that this is not only a fair inference from the deeds themselves, but is proved by Wm. Walker, and virtually admit- ted by James M. Walker on cross-examina- tion. He would also have seen that these lands were heavily incumbered in the hands of E. F. Keen, W. W. Keen & Co., and W. W. Keen by judgments against E. F. Keen and W. W. Keen. He would have dis- covered the deed of March 13, 1868, from W. W. Keen to William G. Banks and Charles L. Powell, his trustees in bankruptcy, and that the land had been ordered to be sold by the bankrupt court to discharge the liens up- on it. The record title was in all respects regular and perfect. The property appeared to be Keen's individually and in fee, and properly surrendered by him in bankruptcy, and regularly sold to pay incumbrances. Could he reasonably have been required to investigate further? The deed to the trust- ees is general in its terms, conveying 'all his estate and effects,' giving no particular de- scription of the property embraced, and re- ferring to no other paper for a description. But the contention is that the deed from Keen and wife to the trustees of June 1, 1869, did refer to the lands 'which were list- ed and surrendered by the said Keen in his schedules in bankruptcy, where a more particular description thereof will be found,' and that the defendants were by this deed directed where to go for information about Keen's property. But the whole title, by op- eration of law and the first deed, had passed out of Keen, and, had the second deed under- taken to carry title, it would have been inop- erative. *Evans v. Spurgin*, 6 Grat. 118. But the second paper was in no proper sense a deed conveying Keen's property. He mere- ly joined to make effectual his wife's relin- quishment of her contingent right of dower; and, besides, there is nothing in the language employed, had the deed fallen under the eye of the examiner, to have led him to suspect that the schedules would make any disclo- sure as to title other than what the records, of which we suppose him to have been ap- prised, showed, but merely a 'more particular description' of the property would have been found. So far from exciting suspicion, had

any existed, the deed would have tended to allay it, for it was fair to presume it had reference to property belonging to Keen, and of which his wife would be dowable in the event of her surviving him, and not to trust property, in which neither was interested. If the declaration of Keen in Schedule B 1 is true, the land ought not to have been surrendered by him in bankruptcy. The assignees or trustees had no more right to it than if it had been an express trust, declared in the most formal manner by deed or other written instrument; and it would have been no act of bankruptcy for Keen to have conveyed the legal title to the owners of the equitable estate. Section 5053, Rev. St. U. S., provides: 'No property held by the bankrupt in trust shall pass by the assignment;' and Id. § 5016, provides what does pass, and what the inventory or schedules shall contain: 'The said inventory must contain an accurate statement of all the petitioners' estate, both real and personal, assignable under this title, describing the same and stating where it is situated, and whether there are any, and if so, what incumbrances thereon.' Surely, then, this was no place for one to look to find, not only what was not required to be there, but what ought not to have been there. The records had shown the purchaser that the property was Keen's, and how unreasonable and dangerous would be a rule that required an examiner to search for latent, hidden equities not in his line of title, and not in the proper receptacle for them, but when the law had solemnly declared they should not be to falsify and nullify the record title. A purchaser cannot be deemed negligent for omitting to look for that which he cannot reasonably expect to find. *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. 121, 205; *Mott v. Clark*, 9 Pa. St. 400; *Siter v. McClanachan*, 2 Grat. 312, 313. and cases cited by defendant's counsel. While it is true, as has been stated, the decrees and orders of the bankrupt court did not per se constitute a bar to complainants' claim, as they were not parties, it is equally true that said court did have jurisdiction sub modo of the subject-matter of these suits. The legal title to it was in the bankrupt, and he embraced it in his inventory. If it was trust property, and had been legally made so to appear, the court would have had no jurisdiction, but the mere unsupported claim that it was trust property surely could not have had the effect of ousting the court of jurisdiction. Suppose the lien creditors of a party indebted to insolvency were to file a bill to subject his real estate to the payment of their liens, and he were to set up affirmatively in his answer that while it was true he had contracted the debts upon which the judgments were based on the faith of the land, to which he had the legal title, and had possessed, used, and enjoyed it under said title as his own, nevertheless there was a secret, resulting trust in him for the benefit of his

wife and children, or grandchildren, if you please, and later on in the same proceedings he and the attorney who prepared the answer were to admit that the statement was untrue, or did some act so totally inconsistent with its truth as to be tantamount to an admission that it was false, can it be believed that a court of equity would stay proceedings till the wife and children or grandchildren could be brought in by amendment, and afforded an opportunity to prove a resulting trust in the land? And if the court were to proceed and sell the land to purchasers without notice of the unproved and subsequently falsified affirmative allegation of the answer, and confirmed the sale, collected the money, applied it in discharge of liens upon the land, and had title conveyed to the purchasers, would it be contended, under the facts supposed, that the court would be ousted of jurisdiction, and its decrees be nullities? Surely the position could not be maintained, and yet the case put is the case under judgment stated differently. Let us suppose a case suggested by one of defendants' counsel,—that the bankrupt had declared that all the property surrendered by him was bought with funds belonging to his wife; could it be seriously contended that the mere assertion of such a fact, wholly unsupported, would have divested the court of jurisdiction? It would seem plain that the court was not wholly without jurisdiction, as is contended, nor do I believe there was any obligation upon it to have stayed its hand by reason of the declaration made on Schedule B 1; more particularly when it is borne in mind that Keen himself repudiated the statement, and made the property the basis of a claim for the settlement of valuable property upon his wife, in consideration of her relinquishment of her contingent right of dower, and when counsel who dictated the so-called 'declaration of trust' signed a consent decree for the sale of the land embraced in it to pay liens upon it. With what propriety could a court be asked or expected to give credence to a declaration thus discredited by client and counsel? As I understand the rule, declarations, to be admissible, must have been made when the party had no interest to make them. And surely this cannot be predicated of Keen's declaration, made in favor of his grandchildren against his creditors, when he was not only insolvent, but in bankruptcy. *Ross v. Bank*, 1 Aiken, 43; 1 Cow. & H. and Edw. Notes, 644, 645; *Padgett v. Lawrence*, 10 Paige, 170; *Carpenter v. Hollister*, 13 Vt. 552. It would be carrying the doctrine of the admissibility of declarations against title to a dangerous length to hold that of Keen admissible under the circumstances of this case. To do so, and maintain that it is sufficient to establish the truth of it, and impress a trust upon property, would be to hold that every insolvent, unscrupulous debtor could shield his property from creditors simply by declaring a trust in favor of his family. It

is believed that no respectable authority can be found to support a rule so unreasonable, and so fraught with mischief. All that can be said of the proceedings and decrees of the district court is that, while not per se binding on complainants, because not parties, the court did acquire jurisdiction of the subject-matter of controversy, and passed the title to it to bona fide purchasers for value and without notice, actual or constructive, before their claim, if any they had, was properly and legally made to appear.

"This opinion has been extended far beyond the limits of what was either intended or desired, but an apology will be found in the voluminousness of the record and the variety of questions involved. I am gratified that the law and evidence in the case are, in my judgment, in consonance with justice and equity. A decree will be prepared dismissing both bills, with costs to the defendants."

John W. Riely, Berkley & Harrison, and Christian & Christian, for appellants. Green & Miller, Peatross & Harris, and Geo. C. Cabell, for appellees.

FAUNTLEROY, J. These causes, pending in the circuit court of the city of Danville, involving the same subject of controversy and the same questions of law, were heard together, and they are here by appeal from a decree of the said court pronounced May 26, 1891, by which the bills of complainants in both of said causes were ordered to be dismissed. In an elaborate and exhaustive opinion in writing, filed in the cause and made part of the said decree, the judge of the said court reviews all the law and the evidence in the records so fully, so ably, and conclusively, upon every point of law and fact involved in the causes at issue, that it is the judgment of this court, after mature consideration of the whole of the records brought under review by these appeals, to adopt the said opinion of the said judge of the circuit court of the city of Danville as the opinion of this court, and to affirm the decree appealed from for the reasons therein set forth. Affirmed.

BROWN v. PUTNEY et al.¹

(Supreme Court of Appeals of Virginia. Jan. 25, 1894.)

EXCHANGE OF INFANTS' PROPERTY — VALIDITY — CURATIVE ACT — ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. In 1884 a bill was filed, asking permission to exchange infants' property for property belonging to their father, which permission was granted, and a commissioner was appointed to execute proper deeds. These proceedings were

irregular, since, if the court could authorize the exchange of infants' land, the trustee for said infants was not served with process, the bill was not brought by one having authority to do so, and the depositions were not taken in the presence of a guardian ad litem of said infants, as provided by Code 1873, pp. 931, 932. *Held*, that Acts 1887-88, p. 504, "providing that any exchange of land heretofore decreed or ordered by a court shall be as valid as if such exchange had been decreed or ordered after the passage of this act," did not validate such exchange.

2. Where a debtor conveys his property to a trustee for the benefit of his creditors, he may convey property nominally held by him in trust for others, which is in reality his own, and withhold other property standing in his own name, which equitably belongs to others.

Appeal from circuit court, Amherst county; John D. Horsley, Judge.

Prior to July 25, 1884, one Benjamin Brown owned a residence and 10-acre lot in the village of Amherst Courthouse, and one Taylor Berry, as trustee for said Brown's wife and children, owned a business lot in the same place. Brown filed a bill against Berry, trustee, and said wife and children, to exchange said lots, and the court entered a decree approving the exchange, and appointing a commissioner to make the necessary deeds, which was accordingly done. The proceedings in said suit were faulty, in that prior to 1888 there was questionable jurisdiction in the chancery court to exchange an infant's real estate; that the bill was filed by Brown personally, while the statute required the same to be filed by a guardian, trustee, or some one interested in the trust estate; the trustee was named as, but never really made, a party to the suit; the depositions in the case were not taken in the presence of a guardian ad litem as provided by statute, (Code 1873, p. 932.) Subsequently, Brown, becoming embarrassed, executed a deed for the benefit of his creditors, in which he recited said exchange, and his belief that it was invalid, and conveyed the residence which he held as trustee for his wife and children to his creditors, while the business property, which was in his own name, he declared as a trust for his wife and children. His creditors attacked this conveyance as fraudulent, and sought to set it aside, claiming that said exchange was valid, and that the lack of jurisdiction in the circuit court had been remedied by Acts 1887-88, p. 504, which provided: "Any exchange of lands heretofore decreed or ordered by a court shall be as valid as if such exchange had been decreed or ordered after the passage of this act." The lower court declared said deed of trust to secure creditors void, in so far as it attempted to alter the previous exchange of property, and confirmed the decree under which said exchange was effected. From this decree the wife and children of said Brown appealed. Reversed.

J. Thompson Brown and Caskie & Coleman, for appellants. John H. Lewis, John L. Lee, and John B. Robertson, for appellees.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

LACY, J. This is an appeal from a decree of the circuit court of Amherst county, rendered on the 15th day of October, 1890. The bill in this case was filed by the appellees Stephen Putney & Co., William Neely & Co., and Fleishman & Morris on the 2d day of February, 1888, to set aside and annul a trust deed executed by B. Brown and wife to J. Thompson Brown, trustee, on the 19th of January, 1888, to secure certain creditors their several debts set forth in the said deed,—among them, the debts of the plaintiffs in the bill, which, however, were deferred and postponed to other creditors, who were preferred, the debts due the plaintiffs being arranged in the ninth class,—and to secure in the said class all other debts due and owing by the grantor B. Brown, but omitted and not mentioned in the said deed. The trustee was directed to take immediate possession of the property conveyed by the deed, sell the same, and deduct expenses, and distribute the net result among the several creditors according to their respective rights under the deed. The deed conveys a large quantity of real estate, as to which the wife released her contingent right of dower, for which she was to be paid \$400, which \$400 to the wife was first secured. Subsequently, the appellees Armstrong, Carter & Co., and others, creditors secured, but postponed to the remote ninth class, filed their petitions attacking the said deed in like manner. The gravamen of the attack upon the deed in the bill grows out of the following clause of the deed of January 19, 1888: "The dwelling house, and ten acres of land attached thereto, lying in the edge of the village of Amherst C. H., in the angle of Lynch's road and the Mount Moriah road, being the same now occupied as the residence of the said Benjamin Brown and family, and being so much of the same tract that was conveyed, as 30 acres 3 roods 15 poles, to the said Benjamin Brown by Edward S. Brown, as special commissioner of the circuit court of Amherst county, in the case of Davidson v. Smith, etc., by deed dated the 19th day of May, 1884, and recorded in the clerk's office of Amherst county court on the 27th day of May, 1884, to which deed reference is here now made. This house, and ten acres of land attached thereto, is identically the same which was attempted to be conveyed to the said Benj. Brown, as trustee for his said wife and children, by a deed from Taylor Berry, as commissioner of the circuit court of Amherst county, under and by virtue of a decree of said court in a chancery cause styled Benjamin Brown v. Taylor Berry, trustee, and others, which deed is dated the 19th day of July, 1884, and was recorded in the clerk's office of the county court of Amherst county on the 4th day of August, 1884, to which, and to the said proceedings in said circuit court of Amherst county, which undertook to authorize it, reference is here and now made. But the said Benj. Brown

is advised that the deed last referred to is void, and has always been void; and the said Benj. therefore disregards the said conveyance to himself, as trustee for his said wife and their children, treating it as though no such conveyance had ever been attempted to be made to him as such trustee, and has by his conveyance of the said property by this deed, as just set forth, treated the said dwelling house, and ten acres of land attached thereto, as his own, as in fact and in law it is, under and by virtue of the deed from Edward S. Brown, commissioner of the circuit court of Amherst county, in the case of Davidson v. Smith, etc., hereinbefore recited and referred to. And so, likewise, the deed from Taylor Berry, as commissioner of the circuit court of Amherst, in the cause of Benj. Brown v. Taylor Berry, trustee, and others, made under and by virtue of the same decree as in the said cause aforesaid, by which deed, dated the — day of —, 1884, and recorded the 5th of August, 1884, the fee-simple title to the property therein named and set forth was attempted to be conveyed to the said Benj. Brown, is also void, and has always been void, and therefore need not be released now by the said Benj. Brown and wife. But in order to more effectually remove all cloud from the title to said property as held by Taylor Berry, trustee for S. P. Brown, wife of said Benj. Brown, and their children, under the deed from said Benj. Brown and S. P. Brown, his wife, to the said Berry, trustee, bearing date the 12th day of November, 1879, and recorded that day in the clerk's office of the county court of Amherst, in Deed Book LL, p. 492, they, the said Benj. Brown and S. P. Brown, his wife, do hereby quitclaim, renounce, and release all right, title, interest, and benefit that was attempted to be conveyed to the said Benj. Brown by the deed from said Berry, as commissioner of the circuit court of Amherst, under said decree in the said cause of Benj. Brown v. Taylor Berry, trustee, and others, as hereinbefore mentioned. And so the effect of the failure to make the exchange of the properties as attempted to be made by the aforesaid proceedings in the circuit court of Amherst was and is to leave the ownership of and title to the said properties, respectively, exactly where it was before such attempt was made to exchange them; that is to say, to leave the fee-simple title to the dwelling house and the ten acres of land attached thereto, hereinbefore mentioned as being now conveyed by this deed, in the said Benj. Brown under the deed to him from Edward S. Brown, special commissioner of the circuit court of Amherst county, in the case of Davidson v. Smith, etc., hereinbefore referred to, and the title to the storehouse and lot in the village of Amherst C. H., in Taylor Berry, as trustee for Mrs. S. P. Brown, wife of said Benj. Brown, and their children, under the deed from said Brown and wife to said Berry, trustee, dated and re-

corded on the 12th day of November, 1879, and hereinbefore referred to."

The exchange of properties set forth in the said deed as above was claimed to be a valid exchange, and that the business properties in the village were liable to the debts of creditors, in lieu of the residence property above described. That the said B. Brown had been enabled to obtain his credit from the plaintiffs and others by holding himself out as the owner of the business properties. That the settlement in the said deed attacked, by B. Brown on his wife, of \$400, in consideration of her uniting in the deed, and relinquishing her contingent right of dower in the land conveyed, was in excess of the true value of the wife's right. That the said deed might be set aside and annulled, and the property conveyed in the said deed be subjected to the payment of the debts of the plaintiffs, etc. Whereupon, the defendants demurred and answered, and the court decreed that the first-named cause, of Putney, etc., v. Brown, etc., be referred to a master for accounts: (1) Of all the real estate of B. Brown, and the annual and fee-simple value thereof. (2) An account of all the personal property purporting to be passed by the said trust deed. (3) An account of all the debts of B. Brown, and their priorities. (4) The value per cent. of the contingent right of dower of Mrs. Brown. (5) An account of the transactions of J. Thompson Brown, trustee. (6) An account of the transactions of J. Thompson Brown as receiver. (7) An account of the personal property mentioned in the trust deed of 19th January, 1888, to J. Thompson Brown, trustee for Mrs. Brown, and the considerations thereof. (8) Any accounts deemed pertinent by himself, etc.

B. Brown demurred and answered, as we have said. In his answer he denied any act to hinder, delay, and defraud creditors. Mrs. Brown, in her answer, denied all fraud, and insisted on her legal rights. The trustees, J. Thompson Brown and Taylor Berry, answered separately, and in accordance with their view of the legal rights of their cestuis que trustent. S. P. Brown, wife of Benjamin Brown, by J. Thompson Brown, her next friend, filed her bill against B. Brown, asserting her rights under the said deeds, etc., to which B. Brown made formal answer, admitting the charges in the bill to be true. Taylor Berry, trustee, answered for his cestuis que trustent, and submitted their rights to the court.

The commissioner of the court reported as to the several matters stated above. The evidence was taken in the form of depositions, and on the 15th day of October, 1890, the court rendered the decree appealed from here. Therein, the demurrers of the defendants were overruled; sustained exception of Stephen Putney to the allowance of any dower to the wife of B. Brown in the 10-acre residence and store, except as to the surplus after satisfying the deed of September 26, 1884,

to Gilliam & Co., and refused the first exception of the same parties to a commission; sustained the exchange of properties made in the suit of B. Brown v. Taylor Berry, trustee, declaring the said exchange valid and binding, and decreed that the above-described business properties be subjected to the payment of the plaintiffs' debts, and, without deciding any other questions, ordered certain accounts; set aside and annulled the deed of B. Brown to J. Thompson Brown, trustee, of the 19th day of January, 1888, conveying certain personal property for the benefit of his wife, as voluntary and void as to the plaintiffs, and ordered the sheriff to sell the same; and appointed John L. Lee as special commissioner to rent out the above-described property and insure uninsured buildings, give bond, and report to the court. And this decree being interlocutory, but settling the principles in the cause, the appellants applied for an appeal to this court, which was allowed by one of the judges.

The first error assigned here is the action of the circuit court in overruling the demurrer of the defendants to the plaintiffs' bills, and overruling their motion to dismiss the said bills of the plaintiffs. The second error assigned is as to the action of the court in holding that the exchange above referred to, made in 1884, was valid. The third assignment of error is as to the action of the court in setting aside the deed of the 19th January, 1888, as to the bona fide creditors secured therein, who are neither proved nor alleged to have been participants in the supposed fraud, whatever the court might hold as to the grantors therein.

Section 2460 of the Code of Virginia allows a bill to be filed by a creditor to set aside a conveyance, etc., declared void by sections 2458 and 2459, before obtaining judgment or decree, (this is upon the ground that the above sections refer to fraudulent acts that are void,) and expressly contains, in section 2458, a reservation in favor of a purchaser for valuable consideration without notice of the fraud. And section 2459 refers to voluntary conveyances not upon valuable consideration. The bill bases its ground of procedure upon the ground that the exchange cited above, in 1884, was effectual, and that the deed assailed conveyed, therefore, property as to which the debtor had no property rights, and failed to convey property which was liable for his debts. If the debtor made a release to his wife's trustee of the business property in the village in lieu of the residence and 10 acres outside of the village, it cannot be said to be voluntary and without consideration, and it cannot be said to be fraudulent, but it was made, however mistakenly, under the honest belief that he was entitled to the residence and adjoining lands which he conveyed to secure bona fide creditors. But how can this exchange of the infants' land in 1884 be upheld as valid? The statute (Code 1873, p. 931, c. 124, § 2)

provides how infants' lands may be sold, (if this attempted exchange could be treated as a sale.) It is prescribed that this suit shall be brought by the guardian, or, if held in trust, by the trustee, guardian, committee, or any person interested therein, who thinks the interests of the infants, etc., will be promoted by a sale may file a bill for the purpose, stating plainly all the estate, real or personal, to which the infant may be entitled, verified by the oath of the plaintiff, and the infants, insane person, beneficiaries, and the trustee, (when not plaintiff,) and all other persons interested, shall be made defendants, and also, where there is an infant or insane defendant. All those who would be his heirs or distributees if he were dead. This statute must be strictly followed. The bill was filed by B. Brown, who was neither guardian, trustee, nor person interested in the estate. The subsequent act of 1888, (Acts 1887-88, p. 504,) which provides for exchanges, could not be held to validate such as were made without authority of law. The trustee was not a party. The depositions were taken without a guardian ad litem for the infant defendants, and were not, therefore, taken in his presence, nor upon interrogations agreed on by him, and were in fact taken before the bill was filed. And the infants had already brought their suit to rehear the decree, rendered thus illegally against them.

The claim that improvements had been placed upon these properties by B. Brown, which could belong or be subjected by his creditors, is immaterial to the plaintiffs, because, whatever that claim was, it had been conveyed by the deed for the benefit of other bona fide creditors of the grantor. And the same may be said of any excess of \$400 over the present value of the wife's contingent right of dower. So that it appears, in whatever aspect the case may be viewed, the bill of the plaintiffs could not be maintained, and should have been dismissed. The debts secured were and are admitted to be valid debts. It is nowhere otherwise alleged. The conveyance was neither fraudulent nor voluntary. It preferred certain creditors, but conveyed all the property of the grantor to secure all his creditors according to the schedule provided by the deed. The circuit court having decided otherwise, the decree of the said court must be reversed and annulled, and such decree will be rendered here as the said circuit court ought to have rendered.

DAVIS et al. v. DAYS.

(Supreme Court of South Carolina. Dec. 13, 1893.)

APPEAL—DISMISSAL—ABSENCE OF REPRESENTATIVE.

Appellant's counsel not being in attendance, and no one being present to represent appellant on the call of the case for trial, the appeal will be dismissed.

Appeal from common pleas circuit court of Clarendon county.

Action by W. E. Davis and J. S. Davis against Harry Days. Judgment for plaintiffs. Defendant appeals. Appeal dismissed.

Rhame & Davis, for appellant.

McIVER, C. J. It appearing to the court that the appellant's counsel is not in attendance upon this court, and upon the call of this case for trial no one appears to represent the appellant herein, it is ordered that the said appeal be, and the same hereby is, dismissed.

WITTE BROS v. WEINBERG.

(Supreme Court of South Carolina. Dec. 6, 1893.)

APPEAL—REHEARING.

No material fact or principle of law having been overlooked, a rehearing will not be granted.

On rehearing. For former report, see 17 S. E. 681.

PER CURIAM. After a careful examination of this petition, we are unable to discover that the court has either overlooked or disregarded any material fact or principle of law, and there is, therefore, no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

STATE v. BENNETT et al.

(Supreme Court of South Carolina. Jan. 30, 1894.)

CRIMINAL LAW—INSTRUCTIONS—IMPEACHMENT OF VERDICT—RECOMMENDATION TO MERCY.

1. The court, after the usual charge on the credibility of witnesses, observed that the confessions were made to a detective working up the case, whose pay depended on the result of the trial; that his testimony should be received like another's, and weighed by all the circumstances. *Held*, that it was proper to refuse to charge that his testimony was to be received with great caution and distrust, his motives to secure a conviction being different from those of a good citizen acting unselfishly.

2. The trial court's denial of a new trial for insufficiency of evidence to sustain the verdict cannot be reviewed.

3. A recommendation to mercy is no impeachment of the verdict.

4. The affidavit of a juror that he was not satisfied of the prisoner's guilt, and only consented to the verdict in the belief that the recommendation to mercy would secure a pardon or commutation of sentence, cannot be considered to impeach the verdict.

Appeal from general sessions circuit court of Berkeley county; James F. Izlar, Judge.

Grant Bennett and Peter Burno, alias Dick Burno, were convicted of murder, and appeal. Affirmed.

B. Pressley Barron, for appellants. Mr. Jersey, for the State.

McGOWAN, J. The defendants were charged with the crime of murder, in wrecking a passenger train on the South Carolina Railroad at Lincolnton, in the county of Berkeley, of the state of South Carolina, on the night of November 28, 1891, and thereby causing the death of one Mason Parker on the said passenger train. The cause came on to be heard before his honor, Judge Izlar, and a jury. There was much testimony, which is all printed in the record, including that of an employed detective. Under the charge of the judge, the jury found both the defendants guilty, with a recommendation to mercy. The trial judge refused a motion for a new trial, and thereupon the defendants appeal to this court to reverse the judgment below upon the following grounds: "First. Because his honor erred in refusing to charge as requested, to wit: 'That the testimony of the detective is to be received with great caution and distrust, by reason of the motives and inducements to secure a conviction being different from those of the good citizen under unselfish influences.' Second. Because his honor erred in refusing the motion for a new trial on the ground that the verdict is not sustained by the evidence, there being no sufficient testimony to corroborate the incredible testimony of the detective, the witness Bob. Lee, who was evidently the tool of the other detective, Weinbush. Third. Because, had the defendant Bennett made the confession, as testified to by the detective Weinbush, it was incompetent evidence to affect the defendant Burno; and, eliminating this testimony, there was no evidence to support the verdict. Fourth. Because his honor erred in refusing the motion for a new trial, predicated on the verdict of the jury recommending the parties convicted to the mercy of the court, and the following affidavit: 'The State of South Carolina, Berkeley County. Personally appeared Phillip H. Hutchinson, who, being duly sworn, says that he was a member of the jury on the trial of the above-stated case at the present term of the court; that he was not satisfied of the guilt of the prisoners, and only consented to the verdict because he believed that the recommendation to mercy would secure the pardon of the prisoners or a commutation of the sentence which should be passed. [Signed] P. H. Hutchinson. Sworn to before T. G. Venning, N. P.'"

As to the first exception, the judge did charge that the credibility of all witnesses is for the jury; "and in passing upon the credibility of witnesses, and the weight which you will attach to their testimony, you must consider all the circumstances,—their opportunity for knowing what they testify to, their conduct and demeanor upon the witness stand, the influences under which they testify, the inducements held out to them, and everything which is calculated to bias and influence their views and judgment,—and then say what weight you will give to their evidence. In this case you will consider the

fact that the confessions in this case were made to a detective who was working up the case, and whose compensation depends upon the result of the trial. The testimony of the detectives should be received like that of other witnesses, and weighed in the light of all the surrounding circumstances," etc. This was not in the precise terms of the request to charge, but it answered the same principle in other language. We know of no law which subjects the evidence of a detective to other rules than those applied to other witnesses. No error here.

The second exception relates to an alleged insufficiency of testimony to sustain the verdict. That is a pure question of fact, of which, as often ruled, this court, in a law case, cannot take cognizance. "This court has no power to consider alleged error of the circuit judge in refusing to set aside a verdict in a law case upon the ground of an alleged insufficiency of the testimony." *State v. Robinson*, 35 S. C. 340, 14 S. E. 768.

The third exception is also based upon alleged error as to matter of fact. It was admitted, at the hearing in this court, "that the circuit judge instructed the jury that the testimony as to the confessions of one of the defendants was not to be considered against the other." Whether there was other testimony to authorize and sustain the verdict was a matter exclusively for the jury. No error as alleged here.

The fourth exception alleges error on the part of the circuit judge for the double reason that one member of the jury which heard the case made an affidavit "that he was not satisfied of the guilt of the prisoners, and only consented to the verdict because he believed that the recommendation to mercy would secure the pardon of the prisoners or a commutation of the sentence which would be passed," etc.; and also for the reason that the verdict contained a recommendation to mercy. (1) As to the recommendation to mercy. It seems that the practice of making such recommendations by the jury is as old as the trial by jury itself, and possibly made, for the most part, in the hope that they may have some weight with the judge or other officer having, within certain limits, the right to graduate the punishment or exercise executive clemency. But, be that as it may, in a court having jurisdiction only for the correction of errors of law, such recommendations can have no effect whatever upon the verdict regularly and solemnly rendered. See *State v. Gill*, 14 S. C. 414. (2) As to the affidavit of Mr. Hutchinson, (one of the jury which tried the case,) expressing his dissatisfaction with the verdict, we can only repeat what this court said in the case of *State v. Senn*, 32 S. C. 408, 11 S. E. 292: "This court cannot lend a ready ear to disclosures coming from the jury room. * * * The affidavits undertake to state the manner in which the verdict was reached, and especially that 'the recommendation to mercy' was to induce

a commutation of the death penalty. It is very clear that it can have no such effect. The court is bound to take the verdict as rendered, and refuse to listen to any affidavits of jurors tending to impeach it. There are reasons of public policy why jurors should not be heard to impeach their verdict, whether by showing their mistakes or their misconduct. Neither can they be properly permitted to declare, with a view to affect their verdict, an intent different from that actually expressed by their verdict as regularly rendered in open court. See *Smith v. Culbertson*, 9 Rich. Law, 111; *State v. Tindall*, 10 Rich. Law, 213; 3 *Grah. & W. New Trials*, p. 1928, and cases cited. In the Case of Culbertson, Judge Wardlaw, in delivering the judgment of the court of appeals, said: "The mischiefs, the delays, the arts, the scandal likely to ensue, come naturally to our thoughts when we imagine encouragement given to the pursuit of jurors by disappointed suitors for the purpose of obtaining affidavits to invalidate verdicts regularly rendered. * * * Whether they have been misled by sophistry or mistake, or have adopted the determination of a majority or of a chance, they have upon their oaths unanimously rendered a verdict in solemn form, and high considerations of justice and policy place that verdict beyond their future influence," etc."

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed upon the defendants.

McIVER, C. J., and POPE, J., concur.

BOWERS v. WATTS et al.

(Supreme Court of South Carolina. Dec. 14, 1893.)

APPEAL—NOTICE—SERVICE OF CASE.

An appellant who serves notice of his intention to appeal without waiting for notice of the filing of the judgment of the lower court, thereby waives such notice, and the 30 days in which to serve the case proposed for appeal, with exceptions, begins to run from the date of such waiver.

Appeal from common pleas circuit court of Lexington county.

Action by George W. Bowers against James R. Watts, Rhoda Watts, Jacob F. Witt, and Cornelia J. Witt. From a judgment for plaintiff, defendant Jacob F. Witt appeals. Dismissed.

C. M. Eford, for appellant. Thos. S. Moor-man, for respondent.

McIVER, C. J. This is a motion of respondent to dismiss the appeal herein on three grounds, viz.: (1) The case proposed for appeal, with exceptions, was not served upon respondent's attorney within the time

required by law; (2) the return herein was not filed in this court within the time required by law; (3) neither the return nor case for appeal contains the testimony in the action essential to the determination of both the issue of fact and the issue of law raised by the grounds of appeal.

As to the first ground, it appears that the case proposed for appeal, with exceptions, was not served until after 30 days had elapsed from the service of notice of intention to appeal. Counsel for appellant argued that the time in an appeal from an order or decree filed in vacation should be computed from the time of service of written notice of the filing of the said judgment of the circuit court; and that he was not bound to serve his notice of intention to appeal until he had been served with such written notice. Such, no doubt, is the law; but such notice may be waived, and we think it was waived in this case. The appellant gave notice of his intention to appeal without waiting for notice of the filing of the judgment of the circuit court, and thereby waived such notice. The case is analogous to the nonservice of a summons and the filing of an answer by the defendant. The defendant, thereby waives such service, and the court has jurisdiction. The notice of the judgment comes from the respondent, and not from the appellant. The notice of the judgment served by the appellant in this case was mere surplusage. The object of the notice by respondent is to cut off the time for appeal after a certain time, to apprise the appellant that the respondent intends to insist on an appeal, if taken, within the time fixed by law. See *Lake v. Moore*, 12 S. C. 563; *McElwee v. McElwee*, 14 S. C. 623; *Wallace v. Carter*, 30 S. C. 610, 9 S. E. 659. As no excuse has been given by appellant for his default, we are compelled to dismiss his appeal, however reluctant the court is to do so. The court has before taken occasion frequently to call the attention of the bar to the fact that the court has certain rules which are intended for the orderly dispatch of the business of the court, and that whenever their protection is invoked we are compelled, however disagreeable and unpleasant it may be, to enforce their provisions. It is always unpleasant to the court, as in this case, to dismiss an appeal, and thus seemingly cut off appellant's rights; but when he has not complied with the rules, and their protection is invoked by respondent, we are compelled to accord to him his legal rights. Motion granted.

The court granted the following order: "The State of South Carolina. In the Supreme Court, November Term, 1893. George W. Bowers, Plaintiff, Respondent, vs. James R. Watts & others, Defendants, Appellants. This was a motion to dismiss the appeal upon the ground that the appellants had failed to serve the case and exceptions within the

time prescribed by law. After hearing the motion with the affidavits, together with the argument of counsel, it is ordered that the motion be granted, and that the appeal be dismissed, for the reasons given orally at the hearing of the motion."

HOLMES v. BOSTON & P. R. LUMBER CO.
(Supreme Court of South Carolina. Dec. 5, 1893.)

APPEAL—DISMISSAL.

Appellee may have an appeal dismissed when appellant fails to appear on the call of the cause.

Appeal from common pleas circuit court of Hampton county.

Action by W. O. Holmes against the Boston & Port Royal Lumber Company. From a judgment for plaintiff, defendant appeals. Dismissed.

W. S. Tillinghast, for the motion.

McIVER, O. J. The appellant failing to appear on the call of this cause, on motion of Mr. W. S. Tillinghast, respondent's attorney, ordered that the appeal herein be dismissed.

MANN et al. v. POOLE et al.
(Supreme Court of South Carolina. Dec. 6, 1893.)

APPEAL—REHEARING.

A rehearing will not be granted on the ground that, under the terms of the former judgment and opinion, certain results may follow, where the point was not raised either in the trial court or on appeal, and therefore could not have been decided on the former hearing.

On rehearing. For prior report see 18 S. E. 145.

PER CURIAM. The rehearing is asked for upon two grounds: (1) Because, as it is alleged, the judgment of this court heretofore rendered, as it now reads, will, or at least may, estop the minors from establishing their claim for the money for which Poole undertook to give them a mortgage, under the call for creditors of said Poole to come in and establish their demands within a time limited by the circuit decree. (2) Because, by the terms of the former opinion, the minors will, or at least may, be prevented "from following the proceeds of sale as stamped with a trust for their benefit to the amount of their estate used in payment of the said goods." After a careful consideration of the whole record, we do not find that either of these points were raised either on circuit or in this court, and hence there is nothing in the former opinion which touches either of these points. Indeed, we are unable to see how either of these points could have been raised or considered here. In the first place, we do not see that the minors ap-

pealed, and no one of the exceptions filed by those of the parties who did appeal present either of the points now, for the first time, brought to our attention. It follows, therefore, that this court not only did not, but could not, have considered or decided such points. We do not think that there is any ground for a rehearing, and the petition is therefore dismissed, and the stay of the ~~re-~~altitut heretofore granted is revoked.

NEWMAN v. CLYBURN et al.
(Supreme Court of South Carolina. Dec. 14, 1893.)

APPEAL—AGREED CASE—TIME OF FILING.

Sup. Ct. Rule 1 gives appellant the whole of 20 days after agreement to file the agreed "case" with the clerk of such court, and the fact that such "case" and return were not delivered at the clerk's office till after he had left it, on the twentieth day, and so were not marked "Filed" by him till next day, did not make them too late.

Appeal from common pleas circuit court of Chesterfield county.

Action by John C. Newman against James Clyburn and others. On motion to reinstate defendants' appeal. Motion granted.

Boyd & Brown and R. T. Caston, for appellants. W. F. Stevenson, for respondent.

PER CURIAM. This is a motion to reinstate the appeal dismissed by the clerk under rule 1. The facts are as follows:

"John O. Newman, Plaintiff, Respondent, against Margaret Clyburn and others, Defendants, and the Following ex parte Petitioners, Elizabeth A. Fields and others, Appellants. Personally appeared before the subscribing officer, Albert M. Boozer, who on oath says that he is clerk of the supreme court, and that he received the case and return in the above cause through the post office at Columbia, S. C., and that the envelope containing same shows from the postmarks thereon that it was received at the post office at Columbia at 1:30 P. M. on September 19th, 1893; that same was probably put in his delivery box that afternoon, after his office was closed for the day, as the afternoon delivery is generally made after his office hours; that he did not come to his office that evening, but received same out of his delivery box the next day, (September 20th,) and upon this day marked same 'Filed' in his office; and upon the affidavit of W. F. Stevenson, one of respondent's attorneys, that the same had not been filed within the required time, he dismissed the appeal. Albert M. Boozer, Clerk Supreme Court. Sworn to before me this 19th October, 1893. J. A. Sawyer, [Seal] Not. Pub. for S. C."

"John C. Newman, Plaintiff, Respondent, against Margaret Clyburn, and others, Defendants, and the Following Named ex parte Petitioners, Elizabeth A. Fields and others, Appellants. Personally appeared before the

subscribing officer, R. T. Caston, one of the attorneys for the appellants in the above case, who on oath says: That he had charge of the preparation of this appeal, and that soon after the notice of appeal was served he entered into an agreement with the attorneys for respondent under which the appellants were given until August 20th, 1893, to prepare case for appeal, and respondent was given until August 31st, 1893, to serve exceptions thereto. That on August 30th, 1893, the case was made up under said agreement, and consent indorsed thereon that same should constitute the case and return for the hearing in the supreme court. Soon thereafter (on September 9th, as deponent is informed by the clerk of court) the original was filed in the office of clerk of court for Chesterfield county, and during the week following copies were furnished him, with the request that he would verify same, and, after attaching his certificate thereto, forward same to the clerk of the supreme court. As deponent lived at a distance from the courthouse, and as the clerk was very busy,—it being about the close of a long session of court, and the clerk wished to examine copy before certifying same,—deponent left same with him with the request to forward same to clerk of the supreme court. He is informed by the clerk that within a day or two thereafter he forwarded the certified copy to the clerk of the supreme court, and he is informed by the clerk of the supreme court that he received and marked same 'Filed' in his office in Columbia, S. C., on September 20th, 1893, but that the envelope containing same showed from the postmark thereon that it was received at the Columbia post office at 1:30 P. M. on the day before, (September 19th,) and was probably delivered in the delivery box of the clerk of the supreme court on that day, but, as his office was not open at the time, the same was not received by him until the next day, (September 20th.) Thus the case and return was filed one day late. Deponent is informed and believes that daily mail from Chesterfield and Cheraw to Columbia reaches Columbia about 11 o'clock A. M., and that if promptly delivered would reach the clerk of the supreme court during his office hours on that day, and deponent and the clerk of court had good reason to believe that papers sent to clerk of the supreme court by the mail of September 19th would reach him in ample time to be by him filed in his office on that day. R. T. Caston. Sworn to before me this October 20th, 1893. F. A. Waddill, [Seal] Notary Public."

"The State of South Carolina. In the Supreme Court, November Term, 1893. Fourth Judicial Circuit, Chesterfield County. John C. Newman, Plaintiff, Respondent, against Margaret Clyburn and others, Defendants, and the Following ex parte Petitioners, Elizabeth A. Fields and others, Appellants. Personally appeared before the subscribing

officer, G. Julian Redfearn, who on oath says: That he is clerk of the court of common pleas and general sessions for the county of Chesterfield, in the state aforesaid. Deponent further says that the original 'case' and return in the above-stated case was filed in his office on the 9th of September, 1893, and that the agreement subscribed thereto was dated the 30th of August, 1893. That a certified copy thereof was prepared and delivered to him by R. T. Caston, one of appellants' attorneys, between the 11th and 15th of September, 1893, and that, after examination thereof, he signed and sealed same, and at the request of said attorney mailed same, a day or two thereafter, to A. M. Boozer, Esq., clerk of the supreme court, at Columbia, S. C. Deponent further says that at the time the copy above referred to was delivered to him for his certificate he was very busy, it being the closing days of a long session of court, and he retained same to verify it as soon as he had the time, for the purpose and with the understanding with the attorney for appellants that he (deponent) would forward same to the clerk of the supreme court as soon thereafter as he could do so, and that he did so forward it as above stated. G. J. Redfearn, C. C. C. P. & G. S. Sworn to before me this October 19th, 1893. Alfred W. Davis, [Seal] Not. Pub."

The respondent's attorney submitted the following affidavit: "The State of South Carolina. In the Supreme Court. Fourth Circuit, Chesterfield county. J. C. Newman, Plaintiff, Respondent, v. Margaret Clyburn and others, Defendants, and Elizabeth A. Fields and others, ex parte Petitioners, Appellants. Personally comes W. F. Stevenson, who on oath says: That he is one of respondent's attorneys and is now sole surviving attorney for respondent. That, subsequent to the dismissal of this cause for failure to file return in due time, Mr. G. Julian Redfearn, clerk of court, stated to deponent that when Mr. Caston delivered the 'case' to him, and he certified the copy of the same, he asked Mr. Caston if there was any special hurry to have the return sent on, and Mr. Caston replied that there was not; and, inasmuch as he was busy at that time, he delayed a day or two before sending, but if he had known the time expired on the 19th of September he would have mailed it on the night the conversation occurred, although he still thought he sent it in ample time. Deponent further says that the case as filed on September 9th was printed, and that there was no difference in the printed copies. That the term of court referred to by the affidavits of appellants adjourned on the 15th of September, and by appellants' own showing he could have had the return filed by the 19th. W. F. Stevenson. Sworn to before me Dec. 13, 1893. Edward McIver, [L. S.] Notary Public."

Upon these facts the court decided that the question of "excusable neglect" does not en-

ter into this case at all. It appears that the return was actually sent and lodged in the office of the clerk of the supreme court within the 20 days required by rule 1. It was the duty of appellants to file the return, as agreed upon, in the office of the clerk of the circuit court, which was done in due time; and then it was his duty to file a certified copy of the same in the office of the clerk of the supreme court within the time prescribed. That he transmitted the return the latter part of the time in which he was required to do so makes no difference. The appellants were entitled to full 20 days, and, the return having reached the office of the clerk of the supreme court on the evening of the twentieth day, that was sufficient, though the paper was not marked "Filed" on that day. Motion granted. Order made accordingly.

TRUSTEES OF WADSWORTHVILLE POOR SCHOOL v. JENNINGS.

(Supreme Court of South Carolina. Jan. 20, 1894.)

On rehearing. Dismissed.

For prior report, see 18 S. E. 257.

PER CURIAM. After a careful examination of this petition, we are unable to discover that any material question of fact or principle of law has either been overlooked or disregarded, and therefore there is no ground for a rehearing. For the purpose, however, of preventing any misconception as to the real ground upon which the decision rests, we deem it best to say that it is a mistake to suppose that the remarks made in the leading opinion, implying, possibly, that the recording of the fee-simple deeds might operate as constructive notice, constituted a ground for the result reached. These remarks were thrown out by the justice who prepared the opinion as an additional reason for the view taken, which, however, as shown by the remarks of the other two justices in concurring in the result, should not be regarded as one of the points decided in the case. Petition dismissed.

STATE v. BENNETT et al.

(Supreme Court of South Carolina. Jan. 23, 1894.)

CRIMINAL LAW—APPEAL—JURISDICTION—AGREED RETURN.

Counsel in a criminal case may, on appeal, agree on and sign the brief, and file it as the return, though incomplete and imperfect, and thereby give the supreme court jurisdiction of the case.

Appeal from general sessions circuit court of Berkeley county.

Grant Bennett and Peter Burno, alias Dick Burno, appealed from a judgment convicting them of a crime, and the state moved to

docket the case in the supreme court. Motion granted.

B. Pressley Barron, for appellants. Mr. Jervy, for the State.

PER CURIAM. In this case the solicitor moved to take up the appeal for argument on the call of the first circuit docket. The chief justice stated that the same was not on the docket, and that the clerk had informed him that the return had not been filed; consequently, the court had no jurisdiction of the case. The solicitor stated that he waived any technicality, and would consent to the docketing of the case, as he was desirous of disposing of the appeal. The chief justice stated that consent did not give jurisdiction; that it was necessary to file the return to give the court jurisdiction, and constitute a record for the court to act upon; that counsel could agree on the brief, and file that, under the statute, for the return. This the counsel did; and the brief was agreed to, so signed, and filed as the return, though incomplete and imperfect, the statute allowing such agreed statement to be filed as the return.

BANK OF MARION v. EVERETT et al.

(Supreme Court of South Carolina. Dec. 14, 1893.)

APPEAL—DISMISSAL.

When appellant fails to appear on call of the case, or to file argument, as required by rule of court, the appeal will, on respondent's motion, be dismissed.

Appeal from common pleas circuit court of Marion county.

Action by the Bank of Marion against Everett Bros., Gibson & Co., and others. Judgment for plaintiff. Defendants appeal. Dismissed.

Woods & Macfarlan, for respondent.

McIVER, O. J. The appellants in above-entitled case having failed to appear when the appeal therein was called, and having failed to file their argument, as required by rule of this court, on motion of Woods & Macfarlan, counsel for respondent, ordered that said appeal be dismissed.

STATE v. ROBINSON et al.

(Supreme Court of South Carolina. Jan. 26, 1894.)

GAMBLING—BETTING ON DICE—VARIANCE.

1. On a prosecution under Gen. St. §§ 1715, 1716, for betting on a game of dice in a public place, a charge that it is no crime for persons to play at dice for amusement, but to allow money to be staked on the game is gambling, is proper.

2. On a prosecution for a misdemeanor, a variance between the indictment and proof cannot be first objected to on appeal.

3. One convicted of a misdemeanor cannot complain of the judge's omission to give charges which were not asked for.

Appeal from general sessions circuit court of Charleston county; James F. Izlar, Judge.

John Robinson, Francis Alston, N. K. Alston, Fred Froddy, Richard Steele, and Hynn Hynes were convicted of gambling, and appeal. Affirmed.

John C. Millar and Charles E. Prioleau, for appellants. Mr. Jervy, for the State.

POPE, J. The defendants were all tried and convicted of the offense of gambling at the June term, 1893, of the court of general sessions for Charleston county, in this state. Notwithstanding, after their arrest and bail, it was made their duty to appear and answer to this bill of indictment, and notwithstanding they had counsel, yet when the case was called for trial neither the defendants nor their counsel appeared in court. The offense charged being a misdemeanor, the trial, in their absence, was legal. After conviction and sentence, they have appealed to this court, and move for a reversal of the judgment of the circuit court, and for a new trial. As grounds of appeal they substantially allege: (1) That the circuit judge erred in his charge to the jury that it was no crime for persons to play at dice for amusement, but to allow money to be staked on the game was gambling. (2) That the circuit judge erred in his charge to the jury when he stated that if the testimony should satisfy them beyond a reasonable doubt that the defendants were there betting their money on a game of chance, or playing at dice when money was bet, it would be their duty to convict. (3) That the circuit judge erred in not charging that the offense of gambling could only be committed at a place prohibited by the act under which the indictment was drawn. (4) That the circuit judge erred in not charging the jury that whereas the indictment charged the defendants as gaming at cards, and the proof related to gaming with dice only, the variance was fatal, thereby acquitting the defendants. (5) That the circuit judge erred in not charging that no offense was charged in the indictment as to these defendants, because it was alleged that the gaming was done at a public place, which is not within the terms of the statute. (6) That the circuit judge erred in not charging that a "bar room," not being named in the statute as one of the places where betting was inhibited, and such being established by the proof offered at the hearing, a conviction could not be had.

The first ground of appeal is not well taken. The acts of our general assembly on this subject, now incorporated in the General Statutes of this state as sections 1715, 1716, do certainly denounce betting on the throwing of dice as an offense. In general terms, the circuit judge was here seeking to enable the jury to see what was and what

was not gambling. He was seeking, in other words, to impress upon their minds that the mere handling and throwing dice, where money was not bet, was not an offense under our laws.

So, too, in the second ground of appeal, he refers to playing at dice, when money was bet, in the public place, as indicated in the indictment and proof adduced at the hearing. But the appellants insist that there was a fatal variance between the indictment, which charged betting on cards, and the proof offered, which alone referred to betting on throwing of dice. Undeniably, if the defendants had raised this question in the circuit court, and the circuit judge had failed to sustain it, it would have been reversible error by this court. But no such question was passed upon by the circuit judge. No such question was raised there. It is raised in this court for the first time, and, not being jurisdictional, if we pass upon it, would not this court be undertaking to do more than the language of the constitution gives it power to do when it says, "The supreme court shall have appellate jurisdiction only in cases of chancery, and shall constitute a court for the correction of errors of law," etc.? Const. art. 4, § 4. It is alleged there is a variance here. Has that question been submitted to the circuit judge? Has he passed upon the question of variance complained of, here raised for the first time? If not, where is there any error committed by the circuit judge which may and should be reviewed by this court? We fail to see it. This question is not a novel one, however. This court has held that a variance, such as here complained of, pointed out in this court for the first time, and not having been raised in the court below, will not be considered here, being too late, and involving a question of fact. *State v. Senn*, 32 S. C. 392, 11 S. E. 292.

The remaining grounds of appeal all relate to alleged omissions of the circuit judge in his charge. No requests were made in the court below for such charges. That being so, these grounds are without vitality. *Massey v. Wallace*, 31 S. C. 153, 10 S. E. 937. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

STATE v. MEYERS.

(Supreme Court of South Carolina. Jan. 23, 1894.)

CRIMINAL LAW—NONAPPEARANCE OF ACCUSED—VARIANCE.

1. Accused having failed to appear at his trial for a misdemeanor, in person or by counsel, cannot complain of the court's failure to give a charge for his benefit.

2. On a prosecution for a misdemeanor a variance between the indictment and proof cannot be first objected to on appeal.

Appeal from general sessions circuit court of Charleston county; James F. Izlar, Judge.

Henry E. Meyers was convicted of keeping a gaming table, and appeals. Affirmed.

John C. Miller and Charles E. Prioleau, for appellant. Mr. Jersey, for the State.

POPE, J. The defendant (appellant) was tried, in his absence, and in the absence of his counsel, at the June term, 1893, of the court of general sessions for Charleston county, for the offense of keeping a gaming table. After his conviction and sentence, he appealed therefrom. The grounds raise substantially these questions: First, that the circuit judge erred in failing to charge the jury that an indictment which charged the defendant with keeping a gaming table was not sustained by proof only that the defendant kept a public place for gaming, and that such variance was fatal; second, that, in the absence of proof of the charge set up in the indictment, the circuit judge erred in not directing an acquittal; third, that the circuit judge erred in charging the jury "that the testimony tends to show that the defendant keeps a public house where liquors are sold," whereas the proof was that defendant kept a saloon."

It may be well to remark at the outset that by the laws of this commonwealth, when an offense cognizable by the court of general sessions is committed, the court of general sessions acquires jurisdiction of the person of the offender by his arrest. After his arrest, except in capital cases, he is entitled to bail, as of right; and one of the conditions of his recognizance is that he will appear at the next term of the court of general sessions of the county where the offense was committed, to answer such indictment as may be preferred against him. By our constitution such offender is allowed to appear in his defense by counsel or in person or both. This appellant, after his arrest and bail, neglected to appear at his trial, either in person or by counsel, though he had counsel. The charge being a misdemeanor, his trial was legal in his absence. After his conviction and sentence under these circumstances, he now appeals to the supreme court, and for the first time alleges error in his trial in the circuit court. As will be observed, in the first ground of appeal the appellant alleges that the circuit judge erred in failing to make a charge that appellant now thinks would have inured to his benefit. By numerous decisions of this court it has been held to be the law in this state that no such allegation of error will be considered in this court unless a request for such charge has been made to the circuit judge on the trial before him.

The second ground of appeal is not tenable. Not only did the appellant fail to make any request of the circuit judge to this effect while the offense was undergoing in-

vestigation in the court below, but in the "case" for appeal some proof of the charge does appear. This court being confined, by the provisions of our constitution, to the correction of errors of law in cases of law, is powerless to interfere here.

The last allegation of error involves the question of variance between the offense set up in the indictment and the proof adduced at the hearing. It is too late to raise that question for the first time, in a case on the law side of the court, in this court. See the judgment just filed in the case of *State v. Robinson*, 18 S. E. 891. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

TOMPKINS et al. v. AUGUSTA & K. R. CO.
(Supreme Court of South Carolina. Dec. 19, 1893.)

APPEAL—DISMISSAL—REINSTATEMENT.

An appeal, dismissed by the clerk of the supreme court because the return was not filed within the time required by court rules 1 and 2, will not be reinstated where it appears that appellant himself undertook to manage his appeal, and that the default was his own, and not his attorney's, and that he probably delayed because of his unwillingness to incur the expense of appeal until the determination of another action pending in the supreme court, involving a similar question.

Appeal from common pleas circuit court of Edgefield county.

Action by S. S. Tompkins and others against the Augusta & Knoxville Railroad Company. From a judgment for defendant, plaintiffs appeal. The appeal was dismissed by the clerk, and plaintiffs now move to reinstate the same. Denied.

The other facts fully appear in the following statement by McIVER, C. J.:

This is a motion to reinstate the appeal dismissed by the clerk under rule 1. The appellants submitted the following affidavits:

"State of South Carolina, Edgefield County. In re S. S. Tompkins et al. versus A. & K. and P. R. & A. R. R. Co. Personally appeared before me S. S. Tompkins, one of the plaintiffs in the above-stated cause, who, being first duly sworn, deposes and says that he undertook to have the printing done of the case as agreed upon between counsel on the sixth of July, 1893; that he immediately returned to Columbia, and the next day placed the papers in the hands of the printer, with the understanding that they were to be finished by the 20th July, but the printer, finding it to be so much larger than he had supposed, could not and did not deliver them to deponent until one o'clock on the 24th of July; that immediately upon receiving them, fearing the delay of the mail, he carried them to the express office, to be forwarded to N. G. Evans, appellants' attorney at Edge-

field, to be filed and served on respondent's attorneys. Three or four days thereafter deponent received a copy of the brief, with the acceptance of respondent's attorneys thereon, and believing that the clerk of the supreme court would not file them without a certificate of the clerk of the court below that they had been filed in his office, wrote back to his attorney, N. G. Evans, and requested him to forward a copy of the brief with the certificate of the clerk that it had been filed in his office. In response to this he received a reply from Mr. Evans that the clerk of the court could not certify without the original agreement as to what should constitute the case was on file in his office, and requesting deponent to forward the agreement. By return mail he sent the agreement to Mr. Evans, and in due course of mail received a certificate on a detached piece of paper. Deponent believed he had no authority to attach this certificate to the brief, returned it to Mr. Evans, to be attached by the clerk to the brief on file in his office. On the fifth of August, the brief, with the proper certificates, was mailed at Edgefield to deponent, but did not reach Columbia until 7:30 A. M. on the 7th of August. Immediately upon receipt thereof he filed the same with the clerk of the supreme court. Deponent cannot imagine how he could have been more expeditious in the matter but by coming personally to Edgefield on the receipt of the brief from the printer, and seeing that it was filed and served, and taking it back with him, which he would have done but for the want of the necessary funds, and from the fact that he would have had to neglect the business of his employers, although then under the impression that he had twenty days more. S. S. Tompkins. Sworn to before me this, the 9th, day of August, 1893. John B. Hill, [L. S.] C. C. C. P."

"State of South Carolina, Edgefield County. In re S. S. Tompkins et al. versus A. & K. and P. R. & A. R. R. Cos. Personally appeared before me, —, a notary public, W. H. Macfeat, stenographer of the fifth judicial circuit, who took the testimony in the case of S. S. Tompkins et al. versus The Augusta & Knoxville Railroad Company, tried at the March, 1893, term of court for Edgefield county, and makes affidavit that a transcript of the testimony was furnished to the plaintiff, S. S. Tompkins, for appeal purposes, on the 3rd July, 1893. This was the earliest possible moment that same could be written out on account of other orders for transcripts which took precedent because of priority, and because of engagements in court. Deponent also says that no blame should be attached to the plaintiff, S. S. Tompkins, for any failure to receive the testimony earlier than the date above mentioned, because he filed his order for same in sufficient time, and was urgent to obtain it, but, for the reasons above stated, an earlier transcript of same was a physical impossi-

bility. W. H. Macfeat. Sworn to before me this 9th August, 1893. John B. Hill, [L. S.] C. C. C. P."

"State of South Carolina, Edgefield County. In re S. S. Tompkins et al. versus A. & K. and P. R. R. Co. Personally appears N. G. Evans, who upon oath says: That he is one of the attorneys for the appellant in the above-stated cause. That on the sixth of July a statement for the hearing of this case was agreed upon by the attorneys for the appellant and respondent. That the attorneys for respondent were duly served with a copy of the papers constituting the case. That the case was then agreed upon, and Major S. S. Tompkins took the papers to Columbia, to have same printed. That on the 26th July deponent received the printed brief agreed upon for the hearing of this case in the supreme court, and duly served Messrs. Sheppard Brothers, attorneys for respondent, with three copies of same, and filed a copy in the office of the clerk of the court of common pleas for Edgefield county, and by the mail of the 26th July forwarded the original brief, with the acceptance of service thereon by the attorneys, to Major S. S. Tompkins, to have same filed in the office of the clerk of the supreme court. That Major S. S. Tompkins, thinking that a certificate from the clerk of the court of common pleas was necessary before the filing of the brief in the office of the clerk of the supreme court, wrote by return mail to the deponent, asking that the clerk make out said certificate. That the clerk gave deponent such a certificate on a detached paper, which was duly forwarded by the same mail to Major S. S. Tompkins, to be attached to the original brief; and he, thinking he had no right to attach said certificate to the original brief, wrote to deponent that he thought it was necessary for the clerk to make the certificate upon the brief, and send that for filing in the office of the clerk of the supreme court. Deponent at that time did not think it was necessary to have the certificate from the clerk of court of common pleas upon the brief. That the agreement between counsel was sufficient to have the case docketed in the supreme court. That the clerk of the court of common pleas did not have the agreement of counsel as to what should constitute the brief for the hearing of the case in the supreme court, and this deponent wrote to Major S. S. Tompkins, at Columbia, to send said agreement, as it was in his possession. Immediately upon receipt of same, the clerk of the court made his certificate in conformity thereto, which is upon the back of the brief as filed in his office, dated 26th July, 1893. N. G. Evans. Sworn to before me this 9th day of August, 1893. John B. Hill, [L. S.] C. C. C. P."

The respondent submitted the following affidavit: "State of South Carolina, Edgefield County. In the Supreme Court. In re S. S. Tompkins et al. vs. The A. & K. R. R. and

The P. R. R. Co. Personally came before me J. C. Sheppard, who, being duly sworn, says: That on or about the 6th day of July last, when deponent and N. G. Evans, Esq., were agreeing upon the papers which should constitute the brief for the appeal in the above-stated cause, deponent inquired of Maj. S. S. Tompkins why he had not perfected the appeal in said cause, deponent stating to Maj. Tompkins that there had been plenty of time allowed, to which Maj. Tompkins replied, in the presence of Mr. Evans, 'I have been waiting for the decision in the other case.' The 'other case' to which Maj. Tompkins referred was the case of Tompkins et al. vs. Tompkins et al., in which the title of W. R. Parks to the tract of land involved in the above-stated cause was in question, and in which the decision of this court was not filed until some time in October. Deponent mentions this matter to show that neither 'inadvertence' nor mistake caused the failure to perfect the appeal within the time allowed, but that said failure was attributable to the unwillingness of Maj. Tompkins to incur the expense incident to such appeal in advance of the action of this court upon another cause then pending. J. C. Sheppard. Sworn to before me this the 15th December, 1893. Albert M. Boozer, [L. S.] Notary Public of S. C."

N. G. Evans, for appellants. J. C. Sheppard and Joseph Ganahl, for respondent.

McIVER, C. J., (after stating the facts.) After hearing argument pro and con, the court refused the motion to reinstate the appeal. The court stated that it appeared that the neglect to file the return in the time required was not due to the default of the appellant's attorneys, but his own. The appellant himself undertook to manage his appeal, and it was his neglect which resulted in the dismissal.

The court made the following order: "The State of South Carolina. In the Supreme Court, November Term, 1893. S. S. Tompkins and others, Plaintiffs, Appellants, vs. The Augusta & Knoxville Railroad Company, Defendant, Respondent. This is a motion to reinstate the appeal dismissed by the clerk under rules 1 and 2. The showing made before the clerk was amply sufficient to justify that officer in dismissing the appeal, and there was, therefore, no error on the part of the clerk in dismissing the appeal. The only question, therefore, now before this court is whether the showing now made is sufficient to justify this court in reinstating the appeal. Under the proviso to rule 1, as amended on the 22d of December, 1892, an appeal dismissed by the clerk may be reinstated, provided it be made to appear to the satisfaction of this court that the default in complying with the requirements of the rule has arisen from some excusable neglect. Without going

into any discussion of the facts stated in the affidavits, it is sufficient for us to say that the showing made is insufficient. It is therefore ordered that the motion to reinstate the appeal be dismissed."

HALL'S SAFE & LOCK CO. v. SCITES et al.

(Supreme Court of Appeals of West Virginia.
Jan. 20, 1894.)

MECHANICS' LIENS — AGAINST COUNTY PROPERTY.

1. The public buildings of a county are wholly exempt from the operations of the mechanic's lien law, and cannot be sold under execution or other process.

2. The county court of a county cannot be compelled by a bill in chancery to issue an order against the county funds for any debt or claim, just or unjust, against the county. The statutory law furnishes the remedy in all such cases, and it must be strictly pursued.

(Syllabus by the Court.)

Appeal from circuit court, Wayne county.

Action by the Hall's Safe & Lock Company against Scites & Wiley and others to enforce a mechanic's lien. There was judgment for defendants dismissing the action, and plaintiff appeals. Affirmed.

Simms & Enslow, for appellant.

DENT, J. At September rules, 1892, the appellant in this case, Hall's Safe & Lock Company, filed its bill in chancery in the clerk's office of the circuit court of Wayne county against the county court of said county and J. D. Scites and C. L. Wiley, partners doing business under the firm name and style of Scites & Wiley, claiming the right to enforce a mechanic's lien against the courthouse and grounds of said county for material furnished by them to said Scites & Wiley, contractors, for the construction of said courthouse, and which material so furnished was used in said building, and never paid for, being of the value of \$1,750. The county court demurred to said bill, for the reason that a mechanic's lien could not attach to a public building, and therefore the bill was without equity. On the 30th day of May, 1893, the circuit court sustained the demurrer, and dismissed the bill. Thereupon the plaintiff appealed to this court, and assigns the following grounds of error: "It was error to dismiss said bill upon said demurrer, because, under the law, the plaintiff was in equity entitled to recover from the defendants Scites & Wiley the amount due the plaintiff, and, having complied with the requirements of the statute giving him a lien for materials furnished, and the county court of Wayne county being indebted to said Scites & Wiley, its contractors, the court should have entered a decree adjudicating the claim, and the order requiring the county court of Wayne county to pay the same by the issuing of a proper county order, as prayed for in said bill." The only question raised

by this assignment is whether the public buildings of a county may be subjected to a mechanic's lien, as there is no other matter of equity alleged in the bill. There has been no decision by this court in relation to the question presented, but in many of the states the matter has been judicially determined, and invariably against the right to such lien; and in *Phillips on Mechanics' Liens*, (section 179,) the rule, as settled by these various decisions, is as follows, to wit: "Property which is exempt from seizure and sale under an execution upon grounds of public necessity must for the same reason be equally exempt from the operation of the mechanic's lien law, unless it appears by the law itself that property of this description was meant to be included; and to warrant this inference something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property enforceable as judgments rendered in other civil actions." *Board v. O'Conner*, 86 Ind. 536; *Williams v. Controllers*, 18 Pa. St. 275; *Poillon v. Mayor*, etc., 47 N. Y. 666; *Secrist v. Delaware Co.*, 100 Ind. 59; *Whiting v. Story Co.*, 54 Iowa, 81, 6 N. W. 137; *Panola Co. v. Gillen*, 59 Miss. 198; *Bouton v. McDonough Co.*, 84 Ill. 384, 15 Amer. & Eng. Enc. Law, 29. There is nothing in the statutory law of this state that would indicate in any way that it was the intention of the legislature that public buildings should be subject to mechanics' liens, as other buildings; on the contrary, there is every inference against such intention. The county court is not the owner of the county buildings. They belong to the citizens of the county, and are to be held and used in trust for public purposes alone. Section 43, c. 39, of the Code provides that "the lands, buildings, furniture and books belonging to a county and used for county purposes, shall not be subject to execution or other process," thereby clearly exempting such property from sale in any manner or for any purpose, and hence no mechanic's lien could in any manner attach thereto. Public policy and necessity both sustain this law. If such things were permitted, counties would be in continual litigation about their properties, either from just or unjust demands, and the public business would be greatly interfered with and hindered, to the great detriment of the innocent taxpayers. The assertion that, while the plaintiffs would not have the right to sell the property, yet they would have the right to have their alleged mechanic's lien enforced to the extent of requiring the county court to issue an order for the amount claimed by them out of funds due from the county to *Scites & Wiley*, is untenable. The bill contains no allegation that the county is in any manner or to any extent indebted to *Scites & Wiley*, nor can it be regarded either as a garnishee process or as a petition for a mandamus to compel the county court to issue an order for the sum demanded. A me-

chanic's lien cannot attach to property the sale of which the law forbids, and, this being the only ground of equity set up in the bill, the circuit court committed no error in sustaining the demurrer, and dismissing the same. Therefore the decree complained of is affirmed, with damages and costs, as the law directs.

TOUDY v. NORFOLK & W. R. CO.
(Supreme Court of Appeals of West Virginia.
Feb. 3, 1894.)

RAILROAD COMPANIES—KILLING ANIMALS ON
TRACK—SIGNALS.

1. If a horse is killed by a train at a public road crossing, and the evidence shows that the train was running at the rate of 12 miles an hour, and the horse walked onto the track 25 or 30 yards in front of the approaching train, and the engineer at once gave two sharp whistles, and the evidence further shows that it was impossible to stop the train, considering its speed, after the horse got on the track, the killing of the horse must be regarded, under the circumstances, as an inevitable accident, and the railroad company is not responsible therefor.

2. The statutory requirement of blowing the whistle or ringing the bell 60 rods before reaching a crossing is intended to warn persons who are about to use the crossing in passing over the public road, and not for the purpose of preventing dumb animals from going upon the crossing.

(Syllabus by the Court.)

Error to circuit court, Wayne county.

Action by H. J. Toudy against the Norfolk & Western Railroad Company. There was judgment for plaintiff, and defendant brings error. Reversed.

Campbell & Holt, for plaintiff in error.

ENGLISH, J. This was an action brought by H. J. Toudy against the Norfolk & Western Railroad Company on the 26th day of September, 1892, before a justice of the peace of Wayne county, for the recovery of \$200 damages for a wrong done. It appears that the damages claimed were occasioned by reason of the defendant running its engine and cars over the plaintiff's horse in February, 1892, in Wayne county, and that the damages sustained amounted to \$150. The defendant made answer, and pleaded not guilty. The case was heard by the justice, who found for the plaintiff the sum of \$150, and gave judgment against the defendant for that amount in favor of the plaintiff, and for costs, amounting to \$3.25. From this judgment the defendant appealed to the circuit court, and on the 3d day of February, 1893, the case was submitted to a jury, which found for the plaintiff, and assessed his damages at \$150, subject to the defendant's demurrer to the plaintiff's evidence, which demurrer was overruled by the court. The defendant excepted, and judgment was rendered upon said verdict, and the question we are to consider is whether the evidence set out in the demurrer to the evidence is such as entitled the plaintiff to recover. The facts

shown by the plaintiff are as follows: On the 12th day of February, 1892, the plaintiff's horse was killed at a county road crossing by an east-bound freight train, composed of an engine and tender and 15 loaded gravel cars, running at a speed of 10 or 12 miles an hour. The view of the railroad track is unobstructed from the point where it is crossed by the county road for a distance of 225 feet in the direction of the approaching train, but the horse did not come upon the track, according to the testimony of one of the plaintiff's witnesses, until the engine was within 25 or 30 yards of the crossing, and, according to the testimony of another, "just ahead of the train;" and the undisputed testimony was that the train could not have been stopped short of 300 feet. In addition to this, the evidence of the plaintiff was to the effect that no whistle was heard sounding or bell ringing for the crossing, but, upon the other hand, a witness for defendant stated positively that he heard the whistle blown for the crossing, and it is admitted that two sharp blasts of the whistle were given before the horse was struck. Was the killing of the plaintiff's horse in this instance the result of negligence on the part of the defendant, or was it, under the circumstances of the case, the result of inevitable accident? Patterson, in his work on *Railway Accident Law*, at page 35, says: "Railways are not to be held liable for injuries resulting from inevitable accident,—that is, accident not due in any way to negligence on the part of the railway, and such as no human foresight could avert." Did the defendant use ordinary care in the management of its train when approaching this crossing? Now, while it is true, as shown by the evidence set forth above, that the officers in charge of the train were in a position to have an unobstructed view of the crossing where the horse was killed for a distance of 225 feet before said crossing was reached, the evidence shows that the track and the crossing were clear and free from obstruction of any character, and the horse did not appear on the crossing until the train was within 25 or 30 yards of the crossing,—that is, 75 or 90 feet in front of the train; and according to the evidence it would have required a distance of 300 feet in which to stop the train, which was running at a speed of 10 or 12 miles per hour. It is obvious, then, that, although the view was unobstructed for a distance of 225 feet from said crossing in the direction in which the train was approaching, that fact would be of little service to those in charge of the train if two-thirds of that distance had been traversed by the train before the plaintiff's horse appeared upon the crossing. Mr. Bocock, a witness for the plaintiff, stated that he was standing at the time of the accident inside of plaintiff's palings, just 40 feet from the railroad track, and about 50 feet west of the road crossing. The horse stepped upon the crossing, and was

struck by the engine. That he did not hear any whistle blown or bell rung. He also stated on cross-examination that said horse was coming along the county road, and stepped upon the railroad track just ahead of the train. That the horse came on the track so close ahead of the train that from where he was standing, as soon as the horse reached it, the engine shut him off from his view; and he did not think that it would have been possible to stop the train, considering its speed, after the horse got on the track. 3 Wood, Ry. Law, (Minor's Ed.) p. 1849, says: "And negligence cannot be inferred from the mere fact of killing. It is not necessary that the killing should be shown to have been wantonly or willfully done, but it must appear that it was negligently done, which may be established by showing that the engine driver did not use proper precautions to avoid accident. Thus, when animals are standing on the track of a railway, and can be seen by the persons running the train by the use of ordinary care, it is their duty to make use of the engine whistle to drive them off, and to slacken speed or stop the train if necessary to avoid injuring them. * * * But it is not always necessary that the engine driver should stop the train or slacken its speed on discovering stock on the track. Ordinary prudence requires him promptly to endeavor to drive them off by sounding the whistle, but does not require him to stop or slacken the speed of the train when he may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger." In a note on page 1851 it is said: "Speed and punctuality in the running of trains, as well as the safety of passengers, are paramount considerations, to which private interests must yield; and to compel a railroad company to slacken the speed of its trains or stop them, whenever an animal is seen upon the track, would impose a burden upon them which would destroy all calculations as to the arrival of trains, etc., and compel them often to choose between pecuniary loss and injuries to their passengers which would be unwise and unjust," citing *Maynard v. Railroad Co.*, 115 Mass. 458; *Railroad Co. v. Ballard*, 2 Metc. (Ky.) 177; *Needham v. Railroad Co.*, 37 Cal. 409.

Under our statute, (Code, c. 54, § 61,) "a bell or steam whistle is required to be placed upon each engine which shall be rung or whistled by the engineer or fireman at the distance of at least sixty rods from the place where the railroad crosses any public street or highway, and to be kept ringing or whistling for a time sufficient to give due notice of the approach of such train," etc. Was this statutory signal given? The witness Bocock says that he did not hear any whistle blown or bell rung, and the plaintiff says no whistle was blown or bell rung on approaching this road crossing, except that when within about 50 feet of the crossing it blew

two sharp blasts of the whistle. Now, suppose it be true that the statutory requirement was not complied with in this case, did that fact in any manner conduce to the killing of the horse? The statutory requirement that the whistle shall be blown 60 rods from the crossing which the train is approaching is not intended for the purpose of giving notice to horses and cattle running at large in the public road, but to give warning to travelers upon the highway, to persons who have the faculty of reasoning and understanding the object of the signal. This is illustrated in the case of *Improvement Co. v. Stead*, 95 U. S. 161, in which Justice Bradley, speaking for the court, says: "From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop, and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and the right of way. But it is bound to give due warning of its approach, so that the wagon may stop, and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way," etc. The warning required is obviously intended for the driver, and not for the horses attached to the wagon; and in this connection we may ask with propriety, what possible effect could the failure to give the signal required by statute have had in causing the death of the horse complained of in this case? If the whistle had been blown 320 yards away from the crossing, can we say it would have prevented the horse from walking onto the crossing at the very moment he did? He undoubtedly was approaching the crossing at the moment the warning should have been sounded, but if he had heard it he could not have reasoned that the train was approaching, and he must keep off the track, so that his death was not occasioned by the failure to whistle, if the engineer failed to give such signal.

In the case of *Fisher v. Railroad Co.*, 126 Pa. St. 293, 17 Atl. 607, it was held that, "where the plaintiffs' mule escaped from him, and, straying upon a railroad company's track at a public crossing, was struck by a locomotive and killed, the failure of the engineer to ring the bell and sound the whistle as the engine approached the crossing was not negligence on the part of the company, and, the mule being a trespasser, the plaintiff could not recover." The opinion of the court in that case is short, and reads as follows: "The defendant company was sued to recover damages for the loss of plaintiff's mule. The mule was killed upon the track by one of defendant's locomotives. It was loose, and for the purposes of this case must be regarded as straying upon the track. The alleged negligence of the company consisted in not ringing the bell or sounding the whistle as the engine approached the crossing near which the mule was killed. If it was

the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule to 'stop, look, and listen.' To apply rules to dumb animals which were intended only for reasonable beings is dangerously near the realm of absurdity."

This court, in the case of *Hawker v. Railroad Co.*, 15 W. Va. 628, states the law upon the question involved in this case as follows, in point 3 of the syllabus: "If the killing of the cattle on the railroad track were, under the circumstances, an inevitable accident, the railroad company is not responsible therefor, though the engineer used no precaution, such as blowing the whistle, or doing anything else. If no precaution could possibly, under the circumstances, have avoided the accident, the failure to use any precautions will not render the railroad company liable."

In the case of *Flattes v. Railroad Co.*, 35 Iowa, 191, it was held that "where, in an action against a railroad company to recover the value of stock killed on its station grounds, the evidence fails to show negligence of the company or those in charge of the train, a verdict of the jury against it will be set aside. (2) That the rate of speed was not slackened nor the whistle sounded is no evidence of negligence when it appears that such efforts would have been, under the circumstances, unavailing to prevent the injury." Now, from the evidence in the case under consideration as to sounding the whistle before reaching the crossing as required by statute, the plaintiff on cross-examination states that he would not swear positively that no whistle was sounded or bell rung by the train upon approaching the road crossing, but that he heard no bell rung or whistle sounded except two shrill blasts of the whistle, indicating "Down brakes!" when the train had nearly reached the crossing. The witness Bocock also states that he did not hear any whistle blown or bell rung. The plaintiff, however, did hear the two sharp blasts when the train was near the crossing, which demonstrated that one may hear when the other does not; and Mr. Wyant, a witness for the defendant, who does not contradict the plaintiff's witness, says: "This train gave two shrill whistles just before striking the horse, and I heard this train beside whistle for the road crossing where the horse was killed." Starkie, Ev. (4th Ed.) p. 867, illustrates the distinction between positive and negative evidence as follows: "If one witness were positively to swear that he saw or heard a fact, and another were merely to swear that he was present, but did not see or hear it, and the witnesses were equally trustworthy, the general principle would, in ordinary cases, create a preponderance in favor of the affirmative; for it would usually happen that a witness who swore positively, minutely, and circumstantially to a fact which was untrue would be guilty of perjury, but it would by no means follow that

a witness who swore negatively would be perjured, although the affirmative were true. The falsity of the testimony might arise from inattention, mistake, or defect of memory. And the author illustrates it by two persons in the same room for the same period, and one of them should swear that he heard the clock strike during that time, and the other should swear that he did not hear it; it is possible that the fact might be true, and yet each might swear truly. There seems, however, to be no controversy about the fact that two sharp whistles were given about 50 feet from the crossing. This is stated by the plaintiff himself, and the evidence shows that the horse stepped onto the track 25 or 30 yards ahead of the engine,—say that was about 80 feet. Then the train was running at the rate of 12 miles an hour,—that is, a mile in five minutes, and about 18 feet in a second,—so that in less than two seconds after the horse appeared on the crossing the two sharp whistles were sounded according to the plaintiff's own statement, so that, under the circumstances, the train was too close upon the horse to be stopped. It struck the horse in three seconds from the time the whistle sounded at the rate of speed it was running, and the accident was inevitable. The men on the train did all that was required of them, and the evidence discloses no negligence on their part. I am therefore of opinion that the circuit court erred in overruling the defendant's demurrer to the plaintiff's evidence, and in entering judgment for the plaintiff. Said judgment is therefore reversed, and this court, proceeding to render such judgment as the court below should have rendered, doth give judgment for the defendant, with costs, and the costs of this writ of error.

CRAIG v. WILLIAMS et al.¹

(Supreme Court of Appeals of Virginia. Feb. 1, 1894.)

JURISDICTION ON APPEAL—CONSOLIDATED SUITS—ATTACHMENT IN EQUITY—RETURN TO RULES—CHATTEL MORTGAGE—EXECUTION IN SISTER STATE—VALIDITY.

1. Where the interests are separate on appellants' part, the decree may be reversed as to one, and dismissed as to another, because the subject, as to him, is less than the jurisdictional amount.

2. Where the amount in controversy equals \$500 as to one of appellants, the question is properly before the court as to him; and when the questions as to all the appellants are identical, and the claims have been consolidated and heard together, the decree will be valid or invalid as to all, and the decision on appeal will conclude the rights of all in like condition, though some of the claims may be less than \$500.

3. Code 1887, § 2965, providing, in regard to an attachment, that, "if issued in a pending suit, it shall be returnable to a term of the court in which the same is pending," does not authorize the return of an attachment in equity

to rules, in the case either of a regular writ of attachment, or when the order indorsed on the summons by the clerk directs the officer to whom it is delivered for service to attach the property mentioned.

4. A chattel mortgage which is valid and duly recorded where it was executed, both as between the immediate parties thereto and against third persons, will be upheld by courts of a sister state to which the property may be afterwards removed.

5. A statute relating to the record of chattel mortgages has no application to a mortgage executed outside the state, unless it expressly so provides.

Appeal from circuit court, Franklin county.

Suits by Williams, White & Co. and others against Ormond & Goforth, John Craig, and others. Plaintiffs attached certain property belonging to Ormond & Goforth, which the latter had mortgaged to said Craig before it was removed to Virginia. The mortgage was regularly executed and recorded in South Carolina, but not in accordance with the laws of Virginia. From a decree giving said attachments precedence over his mortgage, defendant Craig appeals. Reversed.

Anderson & Hairston and Staples & Munford, for appellant. Dillard & Lee and Kean & Lile, for appellees.

LACY J. This is an appeal from a decree of the circuit court of Franklin county, rendered on the 26th day of September, 1892, in the consolidated causes entitled "Williams, White & Co. and others v. Ormond & Goforth and others," in which there were 13 cases consolidated and heard together. The appellees Williams, White & Co. brought their suit in equity in the circuit court of Franklin county, and for an attachment on certain personal property situated in said county, against the appellant, John H. Craig, and Ormond & Goforth, nonresidents of the state of Virginia, to have satisfaction of certain debts due by the said Ormond & Goforth to the said complainants. Ormond & Goforth are railroad contractors and constructionists doing work in the said county of Franklin, in the state of Virginia, where the said property is situated. The said John H. Craig is a nonresident of Virginia, resident in the state of South Carolina, and the mortgagee in a mortgage executed by the said Ormond & Goforth in the said state of South Carolina, on the 2d day of November, 1890, upon the property attached, now in this state, and other property then in the state of South Carolina, which was admitted to record, upon insufficient authentication by the law of this state, on the 26th day of November, 1891, by the evidence of one witness, one J. S. Brice. Upon the bringing of this suit, numerous other suits were brought for different debts of various amounts, varying in amount from \$1,300 to \$50, but otherwise identical in character; and, in proceedings had in them, they were consolidated and heard with the first-named suit, and the same decree rendered for all. None of these

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

debts appear to be disputed or denied, but the point of contest between the several plaintiffs and the defendant Craig is as to the priority of the home attachments, issued and levied in the county of Franklin, and the lien of the mortgage, executed in the state of South Carolina, and duly recorded according to the laws of that state. The circuit court held the foreign mortgage ineffectual for want of proper recordation in the state of Virginia, and sustained the lien of the attachments, and decreed accordingly for their several debts in favor of the attaching creditors; whereupon John H. Craig applied for, and obtained, an appeal to this court.

The first question which arises here on the appeal is by certain attaching creditors,—Oglesby, Tutwiler & Co.,—and others who, like them, have debts of less amount than \$500, it being conceded that the debts of Williams, White & Co. and Sims & Woell exceed the said sum of \$500, which is necessary to give this court jurisdiction of such an appeal, which is merely pecuniary; and they, the said Oglesby, Tutwiler & Co., and others in like situation, insist that the appeal should be dismissed as to them, for the stated reason that the amount involved is less than the amount required to sustain the jurisdiction of this court. This court has no jurisdiction to hear an appeal which is merely pecuniary, and is less in amount than \$500. In order that the defendant may enjoy the right of appeal when it depends on the amount, the judgment or decree must be for at least \$500, principal and interest, exclusive of cost, and that the plaintiff may enjoy it, his claim must be not less than \$500, principal and interest; and, if several creditors are seeking, by creditors' bill, to subject property to their debts, no one of which amounts to as much as \$500, although, in the aggregate, the sum is much greater, there can be no appeal on the creditors' part, because their claims are independent one of another; but the owner of the property, when the total of debts is as much as \$500, although severally the claims be less, may appeal. 4 Minor, Inst. 857; Umbarger v. Watts, 25 Grat. 167; Railroad Co. v. Colfelt, 27 Grat. 779, 780; Devries v. Johnston, Id. 808; Gage v. Crockett, Id. 735. And, where the interests are distinct and separate on the part of the appellants, the decree may be reversed as to one, and dismissed as to another, as having been improperly awarded, because the subject of controversy, as to him, is less than \$500, (Cocke v. Minor, 25 Grat. 260;) but, where the amount in controversy involved in the appeal is above the jurisdictional amount as to one of the appellants, the question is properly before this court as to that one; and when the questions as to all others are identical, and the claims have been consolidated and heard together, the validity or invalidity of the decree will affect them all, and involve the validity of the de-

cree as to all, and in all respects. The interests in such case are such that they cannot be severed in any court where they are considered, and the decision here as to the rights of one will conclude the rights of all in like condition. Witz v. Osburn, 83 Va. 227, 2 S. E. 33. We must therefore overrule the motion stated above,—dismiss the appeal as to some of the appellees for want of jurisdiction.

There are two causes of error assigned by the appellant. The first is that the attachments sued out by the appellees were invalid because they are made returnable to rules, and, being attachments in equity, they are authorized to be made returnable to a term of the court, being issued in a pending suit. The second is that priority was given to the attachments because they were issued and levied before the foreign mortgage was recorded, according to the laws of this state.

Upon the first question,—as to the validity of the attachments when they are, as here, returned to rules instead of to a term of the court,—we will remark that the statute of this state requires (section 2965) that "if issued in a pending suit it shall be returnable to a term of the court in which the same is pending." The former law of this state added, after the foregoing, the words, "Or to some rule day thereof." There is, therefore, no longer any lawful authority to return such an attachment to rules. It is argued that this is a mistake—an accidental omission—on the part of the lawgivers, because it would render the law nugatory in many cases like this, where attachments were issued after suit was brought, because, a summons having been issued, served, and returned, the requirement in the law that the clerk should indorse on a subpoena an order, to the officer to whom it is addressed, to attach the property, would be an ineffectual direction when the attachment was subsequent, and could refer only to writs of attachment, and not to such as this. But (1) the act expressly declares that any attachment issued under that chapter (chapter 141, Code) shall be, if in a pending suit, returnable to a term of the court in which the same is pending; and (2) the supposed difficulty lying in the way of indorsing it on the subpoena in the case is answered by the provision of section 2904. The provision is: "Upon such affidavit the plaintiff may require the clerk to indorse on a summons an order to the officer to whom it is directed to attach," etc. Nor is there any difficulty in the way in the subsequent provision that "any attachment under this section shall be executed in the same manner and shall have the same effect as at law, but the proceedings therein shall be the same as in other suits in equity." The contention that this proceeding is required only as to, and refers only to, technical writs of attachments, such as are issued at law independent of the summons, and not to proceedings in equity, where it

is insisted that the summons and order for attachment are inseparable, is set at rest by the law, in the plainest terms. Reliance is placed on the provision: "Any attachment under this section shall be executed in the same manner as at law and have the same effect as at law. But the proceedings therein shall be the same as in other suits in chancery;" and it is claimed that the manner of return is a part of the proceedings. If there can be said to be any proceedings in a suit until the original process is returned executed, it is obvious that the above general reference to the proceedings must refer only to such proceedings as are not specially provided for in the statute. We think the circuit court erred in upholding the return of the attachments as valid.

But the learned counsel for the appellees insist that although the attachment should be invalid, and the lien thereof ineffectual, nevertheless, the suit remains, and that they are entitled to relief under their bill, independent of the attachment law. We will briefly consider the question raised as to the ineffectual registry of the foreign mortgage. The appellant insists that the law of the place of the contract, where this is also the place in which the mortgaged property is situated at the time of the mortgage, governs as to the validity, construction, and effect of the mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirements of the law of the latter state. On the other hand, the appellees insist that the laws of other governments have no force beyond their territorial limits, and, if permitted to operate in other states, it is upon the principle of comity, and only where neither the state nor its citizens would suffer any inconvenience from the operation of the foreign law. It is said in 3 Amer. & Eng. Enc. Law, p. 190: "The general rule is that a chattel mortgage which is valid under the laws of the state where it was executed, both as between the immediate parties thereto and as against third persons, will be so held by the courts of a sister state, to which the property may be removed. And if a mortgage is valid where it is made, and if it is executed and recorded according to the laws of the state or country of its execution, it will be enforced in the courts of another state or country as a matter of comity, although it is not executed according to the requirements of the law of the latter state; and this is because of the general principle that the law of the place of contract governs as to the nature, validity, construction, and effect of the contract,"—citing numerous authorities. In *Jones on Chattel Mortgages* (page 299, § 299) the same doctrine is laid down. "By the comity of nations, as a general rule, a contract valid where it is made is valid everywhere, and the law of the place of the contract controls as to the construction of it. Without this rule there could not

safely be commercial or business intercourse between citizens of different nations. But the laws of a nation or a state have not, *ex proprii vigori*, any binding force beyond the limits of its territory. Any effect they have is *ex comitate*." It is further there said, (section 303:) A statute relating to the recording of mortgages has no application to a mortgage made outside the state, unless specially made so, though the property be afterwards brought within the state; and it does not matter that such mortgage was made by a citizen of the state while temporarily absent in another state with such property. If the mortgage be duly recorded in the state where it was executed, and the mortgagor afterwards takes the property with him into another state, no registration of the mortgage is necessary, unless made so by positive statute of that state. *Beale v. Williamson*, 14 Ala. 55; *Offutt v. Flagg*, 10 N. H. 46; *Peterson v. Kaigler*, (Ga.) 3 S. E. 655; *Hubbard v. Andrews*, 76 Ga. 177; *Kanaga v. Taylor*, 7 Ohio St. 134; *Jones, Chat. Mortg. § 200*; *Hornthall v. Burwell*, (N. C.) 13 S. E. 721; *Bank v. Lee*, 13 Pet. 107. There are decisions to the contrary, to which we have been referred, and which we have considered, but the general rule is as we have stated in the foregoing authorities. We have no express statute in Virginia requiring foreign mortgages to be recorded, and the weight of authority is that in such case our recording acts do not apply to them. The circuit court of Franklin county decided otherwise on both these propositions, and we think the decision of that court was erroneous; and the decree appealed from must be reversed and annulled; and such decree rendered here as the said circuit court ought to have rendered.

RICHMOND & M. R. CO. v. HUMPHREYS.¹
(Supreme Court of Appeals of Virginia. Jan. 18, 1894.)

CONTINUANCE—WANT OF DILIGENCE—EMINENT DOMAIN—EVIDENCE.

1. Upon a motion for a continuance on the second trial of a case, it appeared that, on May 28th, process was issued for a witness distant over 100 miles, and was served on May 31st, to appear June 2d; that the witness was not present; that he had done certain work, the value of which was in dispute, but that none of the attorneys had conversed with him, or knew what his evidence would be; that six months had elapsed since the court on appeal ordered the case to be tried, almost all of which time was allowed to elapse without effort to ascertain what his testimony would be. *Held* no error to deny the motion.

2. Upon a question as to the value of the property taken in condemnation proceedings by a railroad company, and the privilege of using certain earth and stone work, it is not error to refuse to allow a witness to testify that he had donated similar property to the company.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

3. It is not error to refuse to interrupt counsel in the midst of an argument to the jury, in order to give instructions upon a question under discussion.

4. A railroad company, without lawful proceedings, entered upon certain property, and constructed expensive earth and stone work. This company became insolvent, and its franchise and property were bought out by another company. *Held*, that the purchaser was liable to the landowner for the land taken, without considering the benefit arising by the construction of the road, and for the damage to the residue of the tract, which was its difference in market value before and after taking, and that the amount to be awarded for the land taken, including the earth and stone work, is the fair cash market value of the land and said improvement at the time of the taking, in view of the uses to which they had been put. Lacy, J., dissenting.

5. A verdict will not be disturbed where the evidence would have warranted a larger amount of damages than that given.

Appeal from circuit court, Mecklenburg county.

T. F. Humphreys owned a tract of land upon which a railroad company had illegally entered and constructed expensive earth and stone work. The company became insolvent, and its entire property was purchased by the Richmond & Mecklenburg Railroad Company, which was compelled, by a former order of this court, to condemn and pay for the right of way over the tract in question. Upon a trial of the issues as ordered by this court, Humphreys obtained a verdict for \$7,079, with interest from January 1, 1882, and, from a decree approving said verdict, the company appealed. Affirmed.

B. B. Munford and Th. N. Williams, for appellant. Finch & Atkins and W. W. Henry, for appellee.

RICHARDSON, J. This is an appeal from a decree of the circuit court of Mecklenburg county, rendered on the 6th day of June, 1892, in a suit in equity therein then pending, wherein T. F. Humphreys was plaintiff, and the Richmond & Mecklenburg Railroad Company was defendant. This is the second time this case has been before this court, and for a full statement of the circumstances under which the controversy arose, and the merits of the controversy, reference is made to the opinion of this court when the case was formerly here. See *Humphreys v. Railroad Co.*, 88 Va. 431, 13 S. E. 985. For the purposes of this opinion it is sufficient to say that the appellee, Humphreys, was a subscriber to the capital stock of the Richmond & Mecklenburg Railroad Company in the sum of \$1,000, which had been reduced, by payments, to \$700. Humphreys was at this time the owner, by purchase, of a tract of land on Roanoke river, near Clarksville, over which, prior to the purchase of Humphreys, the old Roanoke Valley Railroad Company had erected costly stone piers in the Roanoke river, a stone abutment at the bank of said river, and an extensive earthwork or embankment from said abutment to the high

ground south thereof, as and for a part of its roadway. This work was constructed without authority of law, the Roanoke Valley Railroad Company never having in any way acquired the right of way over this tract of land, though it had acquired the right of way through and over most of the other lands along its proposed railway. Before completing its road, the Roanoke Valley Railroad Company became insolvent, and, by purchase, the Richmond & Mecklenburg Railroad Company became its successor, and the owner of all the rights of way which had been lawfully acquired by it, but did not thereby become the owner of the right of way, nor of the stone and earth work aforesaid, on and over the tract of land owned by the appellee, Humphreys, which, as before stated, had never been acquired by said Roanoke Valley Railroad Company. Humphreys having subscribed, as aforesaid, to the capital stock of the Richmond & Mecklenburg Railroad Company, when that company was about proceeding to construct its road, its agents were directed to solicit the donations of the right of way by the landowners, respectively, along the proposed road, to the company. The president of the company, J. B. McPhail, after frequent and urgent importunities, representations, and promises, finally induced the appellee, Humphreys, to execute the paper known in the original record as "Exhibit A," which upon its face was an unconditional obligation on his part to convey to the Richmond & Mecklenburg Railroad Company, when thereto requested by the president of said company, the right of way through and over his said tract of land, and said paper was delivered to said McPhail, but upon the agreement and understanding between him and Humphreys that said paper should not be delivered to said company except upon just compensation by it to Humphreys for the stone and earth work aforesaid, including the land proposed to be taken, and for damages to the residue of the tract of land, unless the withholding of the paper would endanger the construction of the road. McPhail, though he had undertaken and promised to do so, and had thereby induced Humphreys to execute said paper "A," never presented to the directory of his said company the claim of Humphreys to compensation, nor did he ever take any step to secure the same, but, on the contrary, long after the building and equipment of his company's road was fully assured, and when the company had ample means with which to make just compensation to Humphreys for his property, turned said paper "A" over to his said company, and thenceforth the company claimed that, by that paper, Humphreys had made an absolute and unconditional donation of the right of way over his said land, including the valuable stone and earth work aforesaid, and that he was bound to convey the same to the company, as provided on the face of said paper. This con-

tention was denied by Humphreys, who insisted that said paper was executed by him, and delivered to McPhail as his agent, upon and subject to the conditions above named, neither of which conditions had been performed, and that, instead of delivering said paper to the company, he should, under the circumstances, have delivered the same up to Humphreys. In the mean time, and prior to the institution of this suit, the Richmond & Mecklenburg Railroad Company instituted an action at law in the circuit court of Mecklenburg county against said T. F. Humphreys, to recover from the latter the balance due on his said subscription of \$1,000 to the capital stock of said company.

At the October term, 1885, of said court, with the leave of court, Humphreys filed his bill against the Richmond & Mecklenburg Railroad Company, setting forth substantially, but more in detail, the circumstances and facts above referred to, and praying for an injunction to restrain said railroad company from proceeding in said action at law until the further order of the court; that said paper "A," executed on the 3d of October, 1881, be declared null and void; that the damages to the plaintiff's land be set off against his said subscription, etc.,—and for general relief. A temporary injunction was accordingly awarded the plaintiff, Humphreys, but on condition of his confessing judgment in said action at law for the balance due on his said subscription, and judgment was accordingly confessed. The Richmond & Mecklenburg Railroad Company answered the bill, admitting, in effect, that it had not in any way acquired the right of way over the plaintiff's land other than by said paper "A," and insisting that, by said paper, Humphreys made an unconditional donation of said right of way, including said stone and earth work, and that he was estopped thereby from raising any question as to the company's right to said property, and that it was entitled to have a conveyance of same from Humphreys, according to the terms of said paper. Being thus at issue, both parties took depositions, and the cause, having been matured, came on and was heard by said circuit court on the 15th day of April, 1889, when a decree was therein rendered, dissolving the injunction theretofore awarded in the cause, and dismissing the plaintiff's bill. From that decree, the plaintiff, Humphreys, obtained an appeal to this court. Upon the hearing of that appeal, this court held that said paper "A," executed and delivered by said Humphreys to said McPhail on the 3d of October, 1881, was so executed and delivered upon certain conditions, neither of which had been performed, and that the same was null and void; and this court, so holding, entered a decree here, reversing and annulling the decree of the circuit court of Mecklenburg county appealed from, to wit, the decree of April 15, 1889, and remanding the cause to the said circuit

court, with instructions to restore the case to its place on the docket, to be proceeded in to a final decree, and with a further instruction that, when the case should be matured for hearing, the said circuit court should direct an issue quantum damnificatus, to be tried at the bar of said court on the law side thereof, to ascertain the damages aforesaid, and that when the same should be so ascertained, and duly certified to the chancery side of said circuit court, they should be set off against said judgment at law confessed by the applicant in favor of the Richmond & Mecklenburg Railroad Company, and that the excess, if any, over and above said judgment, be decreed against said railroad company in favor of the appellant, Humphreys. When the case went back to the circuit court, that court, at the January term thereof, 1892, made an order in the cause, directing the issue required by the decree of this court, and at the May term thereof, 1892, the case was tried, and the jury rendered the following verdict: "We, the jury, upon the issue joined, find in favor of the plaintiff, T. F. Humphreys, and ascertain his damages to be \$7,079.00, with interest from January 1, 1882,"—and judgment was accordingly entered on the law side of said court; and the same being duly certified to the chancery side of said court, the following decree was entered in the cause: "And this court, approving said verdict, in accordance therewith, and with the decree of the supreme court of appeals pronounced on the 14th December, 1891, doth adjudge, order, and decree that the plaintiff do recover of the defendant the said sum of \$7,079.00, with legal interest thereon from the 1st day of January, 1882, till paid, and the legal costs of this suit, including the cost of said issue, and the cost awarded by the supreme court of appeals, to be credited by the judgment confessed by the plaintiff in favor of the defendant on the 9th of October, 1885, for \$695.00, with legal interest thereon from the 10th January, 1885, and \$9.56, cost of said judgment. And the court doth further adjudge, order, and decree that whenever the defendant shall pay the above decree, interest, and cost, that then the plaintiff and his wife do execute and deliver to the defendant a proper deed, acknowledged and ready for record, conveying to the defendant the 3.83 acres of his land taken by it in its right of way through his land, with all the earthworks and masonry thereon or thereto belonging, and all claims for damages done to the residue of his tract by reason of the construction or completion of its line of road through it." From this decree the defendant obtained an appeal to this court.

The questions to be decided by this court are presented in the five several bills of exception taken by the defendant to certain rulings of the trial court.

1. The defendant's first bill of exceptions is to the action of the court in refusing its

motion for a continuance of the cause on the ground that a witness for the defendant, one W. S. Gooch, a resident of Louisa county, Va., more than 100 miles distant from Boydton, Mecklenburg county, Va., the place of trial, and who, it appeared, had been duly served with process on the 31st day of May, which process was issued on the 28th of May, 1892, to appear on the 2d of June, 1892, the time fixed for the trial, was not present. This bill of exceptions sets forth that when the case was called for trial, on the 2d day of June, 1892, and before the jury had been sworn to try the issue, the following statement was made to the court by counsel for the defendant, to wit: "That the defendant was not prepared for trial, and asked for a continuance or postponement, for the reasons then stated by counsel as follows: That some time before the trial, to wit, about the middle of May, an arrangement was entered into between Thomas N. Williams, resident counsel for the defendant company, and Beverly B. Munford, of Richmond division, counsel of the defendant company, on the one hand, and Messrs. Finch & Atkins, attorneys for Thomas F. Humphreys, on the other, by which it was agreed that the trial of this case should be commenced on Wednesday, the 8th of June, 1892; that, relying upon this agreement, Beverly B. Munford, of counsel for the company, had made arrangements which were imperative, and which could not be changed,—one in Baltimore, for the 2d of June, and one at another point on the 3d of June,—and could not, therefore, be present." The court so certifies, and it is doubtless true, that these statements were made by the counsel for the defendant who was present at the time; but it is also true that no exception was taken to any action of the court refusing to continue the case on the ground of absence of counsel. Such statements of counsel are therefore out of the case, and the only question properly raised by this, the defendant's first bill of exceptions, is as to the refusal of the court to continue the case on account of the absence of the witness Gooch. It is true that the court certifies that counsel for the defendant stated to the court that said Gooch was the contractor who did the work for the defendant company over the lands, abutments, etc., in controversy, and was a witness material for the company's defense, and that it could not go to trial in his absence; but it is equally true, as certified by the court, that neither of the counsel for the defendant company had ever talked with said Gooch about the matter in controversy in this case. And it is further certified in this bill of exceptions that on the 28th of May, it appearing to the court that the arrangement fixing the 8th of June as the time for the trial of the case was made, as was stated by counsel for plaintiff, and not denied by counsel for defendant, subject

the approval of the court, and the court, being satisfied that the business of the court would be completed several days before the 8th day of June, stated to counsel that, when the cases on the docket had all been disposed of, it would adjourn, and would not be willing to wait several days longer to try this case; that thereupon counsel for the plaintiff stated that they were very desirous of trying the case at that term of the court, and that, if there was any doubt as to the court's remaining in session until after the 8th of June, they desired to fix some earlier day for the trial of the case; that thereupon, it being conceded that all the cases upon the issue docket would be disposed of by Wednesday, the 1st day of June, the court fixed upon Thursday, the 2d day of June, for the trial of the case, and informed counsel that on that day the case would be called, and either tried or continued, if proper grounds were shown for a continuance; and that, on the 2d day of June, Mr. Munford being still absent when the case was called, the court refused the motion of counsel for defendant to further postpone or to continue the case, or to delay the trial until the 8th day of June, on account of the absence of the witness W. S. Gooch. The question is, did the defendant company bring itself within the rule applicable to continuances of causes? We think it clearly did not. About six months had elapsed since the order was made, directing the issue in this case, all of which period, except a very few days just preceding the trial, was permitted to pass without any effort to ascertain, either by talking to the witness or by corresponding with him, what would be the character of his testimony, or whether it would be material or not; and notwithstanding the agreement between counsel, made about the middle of May, subject to the approval of the court, that the case should be tried on the 8th day of June, the summons for this witness was not issued until the 28th day of May,—the day on which the court fixed upon the 2d day of June for the trial of the case, and only three or four days prior to the trial. This, so far from evincing that degree of diligence required by the rule, shows gross negligence and indifference on the part of the defendant. Moreover, the witness residing more than 100 miles distant from the place of trial, the defendant could, under the statute, (section 3365, Code 1887,) have taken his deposition. The cases of *Railroad Co. v. Peake*, 87 Va. 130, 12 S. E. 348, and *Myers v. Trice*, 86 Va. 835, 11 S. E. 428, relied on by counsel for the appellant, were decided upon grounds entirely different from those insisted upon in the present case, and have no application to this case. It is perfectly clear that the trial court did not err in overruling the defendant's motion for a continuance.

2. The defendant's second bill of exceptions sets forth that, after all the plaintiff's

evidence had been introduced, the defendant company, to sustain the issue on its part, introduced one J. J. Love, and, through its counsel, stated to the court that it desired to prove by said witness that he (said Love) was the owner of a property on the opposite side of the river from the property owned by the plaintiff, on which had been erected an embankment, piers, and an abutment similar to those on the plaintiff's land, and that he (Love) had given the right of way, including said piers, abutment, and embankment, to said railroad company, in order that the jury, from these circumstances, might form some estimate of the value of the plaintiff's property at the time of the construction of said railroad; but the court refused to allow the witness to be introduced for such purpose, or to allow counsel for defendant to ask any such questions. It goes without saying that the court did not err in this ruling, and it would be a useless waste of time to further consider the question.

3. The defendant's third bill of exceptions sets forth that, upon the trial of the cause, counsel for the plaintiff, in his closing speech, stated to the jury that the plaintiff was entitled to recover the value of said piers, abutments, and embankments for railroad purposes, and that counsel for the defendant then asked the court to inform the jury that such statement did not embody the law, and that the plaintiff could only recover the market value of the property as of the time it was taken, which the court refused to do, stating that it would not at that time, and in the midst of the argument, give any instruction. It is clear that the court did not err in this respect. The request of counsel that the court should arrest, and thereby disarrange, the argument of counsel, in order to then instruct the jury upon the law of the case, was premature, and opposed to the well-settled rules of practice. Moreover, the instruction asked for did not correctly propound the law of the case.

4. The defendant's fourth bill of exceptions is as to the refusal of the court to give to the jury two instructions asked for by counsel for defendant, and in giving, in lieu thereof, three instructions of its own. In this exception the court certifies all the evidence in the cause. By the first instruction asked for by counsel for the defendant, the court was asked, in effect, to say to the jury that in ascertaining the damages to the plaintiff's land taken, and the damages to the residue of the tract, they should award an amount equal to the difference between the market value of the property at the time it was taken and the market value after the same had been taken. The second instruction asked for by counsel for the defendant company lays down an entirely different rule for ascertaining the value of the property taken, namely, the fair cash value of the land, right of way, embankment, abutments, and piers so taken, at the time of taking the

same, and concludes by asking the court to say to the jury that in ascertaining the plaintiff's damages they should not consider the value of the property to the defendant company for railroad purposes. The two instructions thus asked for by the counsel for the defendant were properly refused by the court—First, because they are inconsistent with each other, and calculated to mislead and confuse the jury, and to leave them to grope their way in darkness and ignorance as to which of the two conflicting instructions should be their guide in arriving at their verdict; and, second, because neither of said instructions correctly propound the law applicable to the case. On the other hand, the instructions given by the court of its own motion, in lieu of the instructions asked for by counsel for the defendant, do correctly state the law of the case. (1) The first of these instructions follow the statute, (section 1078, Code 1887,) and says to the jury that they shall ascertain and determine from the evidence what would be a just compensation to the plaintiff for the land taken by the defendant, the Richmond & Mecklenburg Railroad Company, and for damages to the residue of the tract beyond the peculiar benefits derived by him, in respect to such residue, by the completion of said railroad. (2) The second of said instruction says to the jury that in ascertaining the damages to the residue of said tract they shall award the plaintiff, Humphreys, an amount equal to the difference in the market value of the residue at the time of the taking and its market value after the same had been so taken; and in ascertaining said damages they may consider every circumstance, present or future, which affected its then value. (3) "The court further instructs the jury that the amount to be awarded Thomas F. Humphreys for his land taken, including the embankment, abutment, and piers upon said land, or belonging thereto, is the fair cash market value of the said land, embankment, abutment, and piers so taken at the time of the taking, and said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking."

These instructions, and especially the third and last one given by the court in lieu of those asked for on behalf of the defendant, are so logically adapted to the principles applicable to the peculiar circumstances of the case in hand that no argument is needed to enforce them. The question presented has been clearly and definitely settled by the highest court in the land, and the doctrine there held has been recognized and enforced by many other courts of very high authority. In *Boom Co. v. Patterson*, 98 U. S. 403, the supreme court of the United States has so clearly stated the doctrine as to leave no room for doubt. In that case the defendant in error, Patterson, was the owner in fee of

an entire island, and parts of two other islands, in the Mississippi river, above the falls of St. Anthony, in the county of Anoka, in Minnesota, which, it seems, were unproductive and valueless to him, or to any one else, for any other than boom purposes. The land on these islands owned by the said Patterson the boom company sought to condemn for its uses, and, upon its application, commissioners were appointed by the district court to appraise its value, and they awarded to the owner the sum of \$3,000. From this award, both the company and the owner appealed. When the case was brought before the district court, the owner, Patterson, who was a citizen of the state of Illinois, applied for and obtained its removal to the circuit court of the United States, where it was tried. The jury found a general verdict assessing the value of the land at \$9,358.33, but accompanied it with a special verdict assessing its value, aside from any consideration of its value for boom purposes, at \$300, and, in view of its adaptability for such purposes, a further and additional value of \$9,058.33; whereupon the company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to \$5,500. The owner so elected, and thereupon judgment was entered in his favor for the reduced amount. To review this judgment, the company took the case to the supreme court of the United States on a writ of error, and that court affirmed the judgment of the circuit court. The only question applicable to the case here in hand, which was decided by the supreme court, was as to the amount of the compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated. In delivering the unanimous opinion of the court, Mr. Justice Field said: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value, which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we

should say that the compensation to the owner is to be estimated by reference to the uses to which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands in the Mississippi, fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over 20,000,000 feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river, as, by utilizing them in the manner proposed, they would save heavy expenditure of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

The principle thus applied is, beyond all question, a just one, and Mr. Justice Field's argument in support of its application is unanswerable. The same principle applies with even greater force to the case here under consideration, for in that case the property condemned was taken as it came from the hand of nature, while here the valuable earthwork and masonry on the land taken by the appellant company had been erected for railroad purposes, and was adapted to such purposes. Here, another railroad company had erected, without lawful authority, the earthwork and masonry in question for railroad purposes, and the appellee, becoming subsequently the owner of the land, including said earthwork and masonry, was, as respects the latter, as much entitled to the fair market value of same, viewed with reference to the purposes for which they were taken and the uses to which they have been applied, as if he had erected them at the special instance and request of the appellant company, and upon its promise, either express or implied, to make just compensation therefor. The appellant company needed the appellee's property for railroad purposes, and, without lawful authority, took and appropriated it to railroad purposes, and for over 11 years has applied it to railroad purposes. It is with poor grace that the company comes now, after all the wrong and injury inflicted by it upon the appellee, and when common justice and the law call upon it to make restitution, asserting the monstrous claim that the appellee's damages must be estimated with reference to the productive value of the property before it was so taken. We repeat that the instructions given by the court in lieu of those asked for on behalf of the defendant (the appellant here) are eminently correct, and that the trial court did not err, either in refusing said instructions asked for by the defendant, or in giving the instructions which it did give.

5. The defendant's fifth and last bill of

exceptions is to the action of the court in overruling its motion to set aside the verdict of the jury, and grant it a new trial, upon the ground that the verdict was against the law and the evidence. It is only necessary to say that the facts proved fully warrant the verdict. Indeed, in view of the evidence, the jury might well have found a verdict for a much larger amount. This court could not, therefore, without improperly invading the rightful province of the jury, undertake to disturb the verdict. Moreover, the trial judge, both in the conduct of the case and in expounding the law applicable thereto, appears to have presided with conspicuous ability and fairness. There is nothing, therefore, of which the appellant company can justly complain. For these reasons we are of opinion that the decree appealed from is without error, and that the same must be affirmed. Decree affirmed.

LACY, J., (dissenting.) I do not concur in the opinion of the court, and file my own dissenting views. This is an appeal from a decree of the circuit court of Mecklenburg county, rendered on the 6th day of June, 1892. This is a case arising out of proceedings under the decree rendered in this court on the 14th day of December, 1891, in the case of Humphreys v. Railroad Co., which case, at its first hearing in this court, is reported in 88 Va. 431, 13 S. E. 985, which is referred to for the proceedings then had and the conclusions reached. By said decree of this court it was directed that an inquiry of damages should be made and tried at the bar of the circuit court by a jury, to ascertain the damages done to the appellant, Humphreys, by the said railroad company, by entering upon and using his land, earthwork, or embankment, and masonry on his land, or belonging thereto, at the time they were so taken possession of, and the damages to the residue of the appellant's said tract of land resulting from any work of the railroad company on said embankment after the railroad took possession thereof, the same, when ascertained, to be set off against the judgment confessed by said Humphreys in favor of the said railroad company, which judgment was for the amount of his subscription to said company still unpaid. When the case went back, a jury was impaneled, and the amount of damages found by their verdict was \$7,079, with interest from January, 1882. The defendant moved the court to set aside the said verdict, which motion was overruled, and judgment was rendered on the verdict, and the defendant appealed.

The errors assigned here are: First, the refusal of the circuit court to continue the case on account of the absence of a material witness; second, the refusal of the circuit court to continue the case because of the absence of the leading counsel for the defendant; third, the exclusion of the evidence

of the witness Love, by whom it was desired to show the cost, if any, to the company, of the right of way through the land of the witness, which was on the opposite side of the river, and exactly like the land of Humphreys, containing pillars in the river, and an embankment and old railway bed across the low grounds on the river; fourth, because of misdirection by the court as to the law of the case and the proper method of ascertaining and estimating the amount of damages; fifth, the refusal of the circuit court to set aside the verdict, and grant a new trial to the defendant company.

We will pass by, for the present, the first and second assignments of error, as to the action of the court in refusing a continuance to the defendant upon the ground of the absence of a material witness, and the absence of the leading counsel for the defendant, as they will appear to be immaterial, in view of my conclusions herein.

I think there was no error in the third assignment, as the fact that the witness Love had given away for nothing his property, although exactly like the property of Humphreys, could not in any way affect the amount of damages proper when the land had not been given.

The fourth assignment of error is because of the action of the court in giving the following instruction to the jury: "They are further instructed that, in ascertaining the damages to the residue of the tract, they shall award said Humphreys an amount equal to the difference between the market value of the residue of the said tract at the time of its taking and its market value after the same had been so taken; and in ascertaining said damages they may consider every circumstance, present or future, which affected its then value. The court further instructs the jury that the amount to be awarded the said Humphreys for his land taken, including the embankments, abutments, and piers upon said land, or belonging thereto, is the fair cash market value of the said land, embankment, abutment, and piers to be taken, at the time of the taking, and said damages are to be assessed in view of the uses to which said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking,"—having, also, on the motion of the plaintiff, instructed the jury that they should determine from the evidence what would be a just compensation to the plaintiff for the land taken by the defendant, and for damages to the residue of the tract beyond the peculiar benefit derived by the plaintiff in respect to such residue by the completion of said railroad; and in refusing certain other instructions asked for by the defendant railroad company, as follows: "The court instructs the jury that they shall ascertain and determine from the evidence what would be a

just compensation to the plaintiff for the land taken by the defendant, and for the damages to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue. They are further instructed that in ascertaining the damages for the land actually taken, and to the balance of said tract, they shall award said plaintiff an amount equal to the difference between the market value of his property at the time of the taking and its market value after the same had been taken. The court further instructs the jury that the amount to be awarded said plaintiff for the right of way through his land, including the embankment, abutment, and piers on said right of way, *is the fair cash market value of the land, right of way, embankment, abutment, and piers so taken, at the time of the taking, and not what the same may be worth to the railroad company for railway purposes.*"

The dispute as to these instructions arises upon the words italicized above, as follows: The plaintiff claimed, and the court so instructed, "that the said damages are to be assessed in view of the uses to which said land, embankment, abutments, and piers have been put," whereas the defendant claimed, and the court rejected its instruction so directing, that the amount of the damages is "the fair cash market value of the land, right of way, embankment, abutments, and piers so taken, at the time of the taking, and not what the same may be worth to the railway company for railway purposes." In determining the true measure of damages in a case like this, I will remark that the statute prescribes (sections 1077, 1078, Code,) when the condemnation is by commissioners under chapter 46, that the commissioners, after viewing the land, and having such proper evidence as either party may offer, shall ascertain what will be a just compensation for the said land, and for the damages to the residue of the tract beyond the peculiar benefits to be derived, in respect to such residue, from the work to be constructed. In this case, as is fully explained and set forth in the opinion of this court by RICHARDSON, J., on the former appeal to this court, in *Humphreys v. Railroad Co.*, 88 Va. 431, 13 S. E. 985, before cited, the defendant company entered upon this land by virtue of a right of way in writing from Humphreys, which was set aside and annulled for reasons there stated, no condemnation proceedings being had or deemed necessary, and, as has been already shown from the decree of this court, the case was remanded for such inquiry of damages to be made by a jury, and the measure of damages stated in the instructions by the court in accordance with the statute, (section 1078, Code,) thus: "What would be a just compensation to the plaintiff for the land taken by the defendant, and for damages to the residue of the tract beyond the peculiar benefit derived by him in respect to such residue by the completion of

said railroad,"—and this principle is substantially restated in different language in the second instruction. In the third instruction the provision objected to is inserted as is already set forth, thus: "And said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking." The added words, "And said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put," indicate that the character of the proceeding have been obscured or lost sight of. Our law proceeds upon the idea of a just compensation for what private property is taken for public uses, and provides for compensation to the landowner for injury to the residue of the tract by reason of the taking of a part of the land. These damages are for compensation for an injury resulting from a lawful act. Our constitution prohibits the taking of private property for public purposes without just compensation. The compensation is allowed for the actual taking, and, so far as the actual taking is the cause of a resulting deprivation of right, it is a taking in the constitutional sense, and the law requires that it likewise shall be compensated by a just compensation. If the whole, and not the part, only, be taken, just compensation for what was actually taken would be the complete measure of relief. There would be no damages beyond that to be assessed. There would be no damages to be paid in excess of just compensation for the whole, and it would not be contended that the measure of compensation could be otherwise than the full value of the property taken; for it must be borne in mind that the transaction is a lawful one, and bears in it no element of a tort.

Regarding the transaction, then, and all the proceedings thereunder, from the standpoint of compensation, where can we find any place for damages to the plaintiff for the use to which the defendant is to put the property taken, unless we are to compensate the landowner for what is not his? What are his proprietary rights in the railroad of the defendant? Does it affect his rights that this railroad, when completed, is worth \$15,000 per mile, or that it is a public incorporated turnpike with but little, or a county road with no, marketable value, provided it has been lawfully taken for public purposes under the right of eminent domain? If he has received just compensation for what has been taken directly and what has been taken incidentally, all that has been taken from him having been paid for, can he go further, and lay a valid claim to the subsequent use to which it has been put? What is the proper amount of compensation we are not now considering in this case. The question is, what is the true measure of dam-

ages by way of compensation? This is a matter of law, to be decided by the court; and, when this has been correctly decided by the court, the jury must follow the direction of the court, or their verdict cannot stand. What is just compensation for what is taken is one question here. In considering the phrase, "just compensation," a learned author says, (Sedg. Dam. 606:) "The general principle running through the cases seems to be that a just compensation to the owner for taking his property for public use without his consent means the actual value of the property in money, without any deduction for estimated profit or advantages accruing to the owner from the public use of his property. Speculative advantages or disadvantages, independent of the intrinsic value of the property, are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken." Our statutes, as we have seen, however, after providing that one of these shall be set off against the other, directs that the excess of the first (that is, of the injury to the residue, if any) above the second (that is, the peculiar benefits to be derived in respect to such residue from the work to be constructed) shall affect the dry claim for the intrinsic value of the property taken; but there is no provision for an allowance for the value of the property taken in the hands of its new owner. If it is more valuable then, or less so, the question of just compensation for what is taken is not thereby affected. The true interpretation of our statute is the question to be determined in this case. "Just compensation for what is taken is the value of the land taken for the uses to which it is suitable, having regard to the existing business wants of the community, or such as may be reasonably effected in the immediate future. The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses for which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses?" Opinion of Mr. Justice Field in *Boom Co. v. Patterson*, 98 U. S. 410. While disclaiming to lay down a rule to govern in all cases, this we consider the true rule, and the result of the cases which I have considered. It is right that the value of the earth-work, abutment, and piers for valuable uses should be considered as constituting an element of the value of the land; but the use to which it has been put is subsequent, and independent of an ended transaction, and could not have been considered by any assessors of its value when taken, and the instructions complained of are to this extent erroneous; and, as it is impossible to determine to what extent this error may have governed the case in its results, it is error for which I think the judgment must be reversed.

NORFOLK & W. R. CO. v. MCGAVOCK'S ADM'RS.¹

(Supreme Court of Appeals of Virginia. Feb. 1, 1894.)

RAILROAD COMPANIES—INJURY TO STOCK—FAILURE TO FENCE.

1. Under Code 1887, § 1258, requiring a railroad company to fence its right of way along inclosed lands, and section 1261, providing that, in any action against a railroad company for stock killed on its track at a place which was not fenced as required, it should not be necessary to prove negligence on the part of the company, a railroad company cannot show that there was a legal fence at the point in question erected by the landowner, and that, therefore, it was under no obligation to erect a fence there. Lacy, J., dissenting.

2. The erection of a legal fence by a landowner at a point where the railroad company is required by law to fence will not relieve the company from the penalty prescribed by statute for failure to perform said duty.

Error to circuit court, Wythe county.

This was an action by McGavock's administrators against the Norfolk & Western Railroad Company for damages to stock. A verdict was rendered against the company, and from a judgment approving the same the railroad company brings error. Affirmed.

Bolling & Stanley, for plaintiff in error. Blair & Blair, for defendant in error.

FAUNTLEROY, J. This is a writ of error to a judgment of the circuit court of Wythe county rendered at the February, 1893, term of the said court, in a suit at law by J. R. McGavock and J. C. McGavock, administrators of Randall McGavock, deceased, plaintiffs, against the Norfolk & Western Railroad Company, defendant. The suit is an action of trespass on the case for killing and injuring the horses and mule of the plaintiffs' intestate by the defendant in error's cars operated upon the road, and by the agents and servants of the said company, at a point where the defendant's railway passes through the inclosed lands of the plaintiffs' intestate, and where the defendant was required to fence or inclose its roadbed by section 1258 of the Code, and which it had not done. The facts of the killing and injuring of the horses and mule, as charged in the declaration, upon the inclosed land of the plaintiffs' intestate, and the failure of the defendant to fence its roadway through the said lands, and the assessed value of the said horses and mule so killed by the defendant's cars, agents, and servants, were all proved by the evidence; and the jury rendered a verdict for the plaintiffs for \$664.67, whereupon the defendant moved the court to set the verdict aside, as being contrary to the law and the evidence, and to grant it a new trial, and moved in arrest of judgment, which motions the court overruled, and entered judgment upon the verdict for \$664.67, with interest from the date of the verdict, and the costs.

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

The statute (section 1258, Code 1887) requires the defendant company to erect along its line of railroad, through the inclosed land of the plaintiffs' intestate, a lawful fence, on both sides of its roadway, as defined in section 2038, which may be made of timber or wire, or of both, and to keep the same in proper repair, and with which the owners of adjoining lands may connect their fences, as they may deem proper, etc.; and section 1261 provides that, in any action or suit against a railroad company for an injury to any property on any part of its track not inclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employes, agents, or servants.

The first assignment of error is the refusal of the court to permit the defendant company to introduce witnesses to show that the defendant railroad company was not bound to fence its roadway at the point where the said horses and mule of the plaintiffs' intestate were killed by it, because the said intestate himself had erected a fence, which was a lawful fence, at that point, between his land and the roadway of the defendant company passing through his inclosed land, and that, therefore, the defendant company was not liable for injury done by it to the plaintiffs' intestate's stock at that point. The court did not err in excluding this testimony. The failure of the company to erect a lawful fence along the line of its roadway between the inclosed land of the plaintiffs' intestate and its roadway, as expressly required by law, makes it amenable to the penalty of the law for its neglect or violation of the requirement of the law; and the fact that the owner of the land has himself endeavored to protect his stock ranging upon his inclosed land, by building a fence, does not condone or excuse the disobedience to and neglect of the mandate of the law by the railroad (defendant) company; and the owner of stock getting injured by the railroad cars or servants at a point on its line through his inclosed lands is entitled to recover for the injury or killing of his stock, if the defendant company has failed or refused to comply with the law requiring it to erect and keep in order at that point a lawful fence. See Code 1887, c. 52, §§ 1258, 1259, 1261, 1262; *Id.* c. 93, § 2038; 7 *Amer. & Eng. Enc. Law*, pp. 907, 927, and cases cited in note 2; *Id.* p. 934, and note 2.

The court did not err in refusing to instruct the jury "that although they shall believe from the evidence that the horses and stock of the plaintiffs' intestate were killed and injured on the railroad of the defendant company by the cars of the defendant company in charge of the servants, agents, and employes of the defendant company, as charged in the declaration, nevertheless, if they shall believe from the evidence that there was a lawful fence along the roadbed of the de-

fendant company, between its land and that of the said decedent, at the place where the said injury occurred,—erected there by the said decedent or by his administrators,—then the court instructs the jury that under the statute such a fence is sufficient, and, in the absence of gross negligence, they will find for the defendant." And the court did not err in instructing the jury "that if they shall believe from the evidence that the horses and stock of the plaintiffs' intestate were killed and injured on the railroad of the defendant company by the cars of the defendant company in charge of the servants, agents, and employes of the defendant company, as charged in the declaration, and shall further believe from the evidence that the said horses and stock were so killed and injured by the defendant company at a point on said railroad at which the said railroad passes through the lands of the said decedent, Randall McGavock, and shall further believe from the evidence that the defendant company failed to fence its right of way or roadbed through the inclosed lands of the said decedent at the place of said injury, then the court instructs the jury that they shall find for the plaintiffs, and assess their damages at such sum as to the jury shall seem right, based on the evidence as to the value of said stock at the time the same was killed and injured."

The court did not err in overruling the motions to set the verdict aside, and in arrest of judgment; and the judgment of the circuit court of Wythe county is without error, and is therefore affirmed. **Affirmed.**

LACY, J. I do not concur in the opinion of the court, and file my own views:

This is a writ of error to a judgment of the circuit court of Wythe county rendered at its February term, 1893. The case is as follows: The plaintiff in error company ran over, and killed and crippled, stock of the defendants in error, to the value of \$664.67, whereupon the defendants in error instituted this action; and, upon and under the instructions of the court, the jury rendered a verdict for that amount in favor of the plaintiff, whereupon the case is brought to this court by writ of error.

It was proved in the case that the land adjacent to the railroad, where the horses were kept, was inclosed by a lawful fence put up by McGavock, deceased, and that the fence was pulled down in the night, and the horses escaped on the track on a dark night, and were killed or seriously damaged, and that the horses were worth as much as the amount of the verdict. This evidence was all that was offered by the plaintiff. The defendant offered to prove by its witnesses that there was a lawful fence along the right of way of the company at the place where the horses escaped on the track, though not put there by the company; that the bars in this fence were up late on the evening of the day when

the horses were killed at night; and that the bars were pulled down by some unknown person in the night. But the court refused to admit this evidence, holding that by the act of assembly the negligence was established by reason of the fact that the fence was not built by the company, and so instructed the jury; that the failure to fence the right of way of the company established negligence; and that this could not be contradicted or disproved by the company by any evidence whatever,—and refused an instruction per contra offered by the defendant company.

Section 1261 of the Code provides as follows: "In any action or suit against a railroad company for an injury to any property on any part of its track not inclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants." The effect of this statute is to shift the burden of proving negligence from the plaintiff, and place upon the company the burden of proving the negative of this proposition; but it is not intended to deny all defense to the defendant, and confine the case to a simple inquiry of damages, as is held in this case. The law does not require all parts of the railroad right of way to be fenced by the company,—only certain parts, described in chapter 52 of the said Code, (section 1259.) In this particular case there was a lawful fence erected at this spot, but the company was not allowed to prove it. The statute requires the company to cause a fence to be erected along its right of way, and one was already there in this case. I think (without expressing an opinion on any other question) that the circuit court erred in its construction of this statute, in denying all right of defense to the company; and for this cause the judgment should be reversed, and the case be remanded for a new trial to be had therein.

HARDIN v. ALEXANDRIA INS. CO.¹

(Supreme Court of Appeals of Virginia. Jan. 18, 1894.)

INSURANCE—SUBSTITUTION OF NEW POLICY—LIABILITY OF COMPANY—AUTHORITY OF AGENT.

1. An insurance company issued a policy upon which, at various times, a number of indorsements were made, and, when the insured applied to the agent for permission to move his property, he was told as there were so many indorsements that it would be better to cancel the policy, and take out a new one for return premium at pro rata rates. The company, however, issued a new policy at short rates, which was not delivered to the insured, who was absent, but it was left for him at his place of business. The insured property was burned after the new policy expired, but before the end of the period covered by the former policy. Held, that the insured could compel the com-

pany to issue a new policy for the full term, and pay the loss.

2. Where an insurance company furnishes a man with all needful blanks and papers, responds to his acts, approves permits of removal given by him, and pays his rent, it is bound by his acts as its agent.

Appeal from circuit court, Wise county.

Suit by J. M. Hardin against the Alexandria Insurance Company to compel it to issue a policy to him, and pay a loss sustained thereunder. From a decree for defendant, plaintiff appeals. Reversed.

Bullitt & McDowell, for appellant. Geo. A. Mushback and Burns & Fulton, for appellee.

FAUNTLEROY, J. The petition of J. M. Hardin represents that he instituted a suit in chancery in the circuit court of Wise county against the Alexandria Insurance Company to compel the said defendant company to issue to him, the said J. M. Hardin, a policy of insurance on a certain stock of merchandise, pursuant to a contract theretofore made by the said defendant company with him, the said Hardin, and to recover of the said defendant company the sum of \$750, with interest from October 26, 1891. The cause was heard in the court aforesaid at the December term, 1892, and the decree complained of was entered, dismissing the complainant's bill, with costs against him.

The facts which appear by the record are as follows: In November, 1890, one G. W. Lovell, whose occupation was general insurance business at Big Stone Gap, Wise county, Va., went to see W. S. Reese, who told him that he wished an insurance upon his stock of liquors and bar fixtures, and asked the rate, and was told by Lovell that the rate was 3 per centum, whereupon Reese instructed Lovell to write a policy for \$1,000. Lovell went to his office, where he had the blank forms and instructions of the Alexandria Insurance Company, and filled in a policy, as instructed, for \$750 insurance upon the stock of liquors, and for \$250 insurance upon the bar fixtures, furniture, etc., and mailed it to the "Alexandria Ins. Co., Alexandria, Va." Lovell, in a few days, received from that company a policy covering the property with insurance of \$750 on the stock of liquors, and \$250 on the bar fixtures, furniture, etc., in the two-story frame building, metal roof, on Wyandotte avenue, Big Stone Gap, Va., for one year from 12 m., November 25, 1890, to 12 m., November 25, 1891. This policy he delivered to the insured, W. S. Reese, and received from him the premium of \$30 for the Alexandria Insurance Company. On the 2d day of December, 1890, Lovell indorsed on this policy a permit for Reese, the insured, to remove the stock of liquors to a storage house in rear of the original place, and mailed the said policy, thus indorsed, to the company for its approval. The company did approve the permit so indorsed by Lovell upon the said policy, and returned it, with its

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

approval, to Lovell, who delivered it to Reese. On the 7th of May, 1891, Reese assigned this policy to J. M. Hardin, the appellant, by a writing witnessed by Lovell, who sent the said policy, so indorsed, with the said assignment, to the Alexandria Insurance Company, who approved it, and returned it to Lovell, who delivered it to said Hardin. Thus, in May, 1891, the original policy became the property of Hardin, the appellant, with the sanction of the company to the assignment, and to the removal of the stock insured from the two-story frame house to the storage house in its rear. On or about the 27th of July, 1891, Hardin removed the stock of liquors insured from the storage house to the Intermont Hotel, and, through Lovell, obtained from the Alexandria Insurance Company its approval and permit to Hardin of this second removal. About the 31st of August, 1891, Hardin informed Lovell that he had removed the stock of liquors to the Summerfield House or Building, and asked Lovell to give him a permit or approval of the said transfer. Lovell told Hardin that, as there were so many indorsements on the policy, it would be better to cancel it, and take out a new policy for the return premium. Hardin was in a great hurry, and told Lovell to do that. Lovell called Hardin back, and told him to wait until he could fill in the receipt for the return premium, when Hardin said to Lovell: "Show me where to sign. You can fill in the amount." This Lovell did, and filled in five dollars, according to the short-rate table, though he wrote, at the foot of the said receipt for the return premium: "Canceled pro rata, and new policy to be issued." Lovell then sent this original policy, so indorsed, to the Alexandria Insurance Company, who kept or suppressed it, and, instead of issuing a duplicate of the original policy, as Hardin expected, issued a new and different policy, according to the short-rate table, (while the original policy was according to the pro rata,) for \$1,000 on stock, which device and arrangement shortened the life of the policy to the 9th of October, 1891, instead of the 25th of November, 1891, and made it expire on the 9th of October, 1891. This new policy was sent by the Alexandria Insurance Company to Lovell, but it never came to the hands, nor to the sight, of Hardin. Hardin was absent in Norfolk when it came to Lovell, and Lovell left it, he says, at the Summerfield House, which was not Hardin's place of abode, and in which he had no concern except the liquor store there.

Hardin contends and deposes that he had only \$882 in stock, and had not asked for insurance of \$1,000, nor for over \$750. On the 26th day of October, 1891, the Summerfield House was burned down, and in it the stock of liquors was destroyed, of the value of \$882. The Alexandria Insurance Company, on demand, refused to pay the insurance, and denied all liability, on the ground that

the new policy expired on the 9th of October, 1891, and that no policy existed on the 26th of October, 1891.

Had the new policy issued by the insurance company, but never delivered to Hardin, been a duplicate of the original, as Hardin claimed and expected, and at pro rata rates, as the original was, it would not have expired until after the 26th of October, 1891, the date of the fire, and it would have covered the loss. It was wholly different from the policy which Lovell suggested to Hardin to obtain because of the numerous indorsements on the original,—the only reason assigned by Lovell, and urged upon Hardin, for canceling the original policy and taking out a new one. This advice and this reason were the only cause of Hardin's agreeing to Lovell's suggestion, and he reasonably understood and relied upon Lovell's statement that the new policy was to be the same as the one surrendered for convenience, only, because the original was covered all over with indorsements. The question now is, who is responsible for this change of policies? a change certainly not intended or expected by Hardin. The responsibility lies between the Alexandria Insurance Company and Lovell, on whom Hardin relied as the authorized agent or representative of the company. Either Lovell misinformed the company as to the terms of the new policy asked for by Hardin, and did not apprise the company of the reason why Hardin asked for a new policy, and that, too, on Lovell's suggestion, and the reason for the suggestion, or else the company deliberately ignored the understanding between Lovell and Hardin, and arbitrarily issued the new policy to suit itself, at short-table rates instead of according to the memorandum indorsed upon the original policy by Lovell: "Canceled pro rata, and new policy to issue." The new policy, as written, was never contemplated nor asked for by Hardin. It was the device of the company or of Lovell. If it was the work of the company, it is responsible for destroying Hardin's security for \$750 insurance upon the stock insured. If it was Lovell's act, and he misled the company, whose medium he was, it is liable and responsible for his acts in the conduct of its business.

Both Lovell and the company claim that the company had never issued a commission to him as their agent, and that he was acting only as a broker. But this is playing upon words; and the whole testimony, and the transaction itself, show that he was held out to the public as the agent or intermediate of the company, by and through whom all transactions with the company by parties seeking or having insurance must pass, subject to approval. The insurance company furnished him with all needful papers and blanks, responded to his acts, approved permits of removal given by him, and paid his rent, thereby treating and holding him out as agent to the public, who had the right to deal

with the company by and through him as their agent in fact; otherwise, the public would be misled and defrauded by either, or by a combination of both. The Alexandria Insurance Company must be held responsible for the loss occasioned to Hardin by a change of his policy of insurance, which was made by it, and not intended or contemplated by him, and brought about either by the agent, Lovell, or by the act of the company of its own motion, or by a combination of the company and Lovell. The decree appealed from is erroneous, and must be annulled and reversed: and this court, proceeding to render such decree as the circuit court of Wise county should have entered in the cause, will enter a decree for the appellant according to the prayer of the bill, which the circuit court erred in dismissing. **Reversed.**

CHAPMAN v. CHAPMAN et al.¹

(Supreme Court of Appeals of Virginia. Jan. 18, 1894.)

CONSTRUCTION OF WILL—VESTING OF FUTURE ESTATE.

A provision, "I loan to my wife, E., during her natural life," all the residuary estate, "and my wish is that the property I have loaned to her after her death" be sold, and the proceeds "equally divided among my four children," or "their lawful heirs begotten of their bodies," vests the gift to the children immediately, so that an assignment by one during the widow's life is valid.

Appeal from circuit court, Madison county.

Appeal from decree in a suit in equity wherein Thomas A. Chapman was plaintiff and Thomas W. Chapman and others were defendants. The single question involved in the appeal appears from the opinion.

John E. Roller, for appellant. James Hay and T. C. Gordon, for appellees.

LEWIS, P. The testator, Thomas Chapman, after providing in his will for each of his four children, added a sixth clause, as follows, to wit: "It is my wish and desire that all of my estate, both real and personal, which I have not heretofore disposed of, I loan to my wife, Elizabeth Chapman, during her natural life; and my wish is that the property I have loaned to her, after her death, both real and personal, should be sold by my executors, and the money arising from the sale should be equally divided among my four children above named, or their lawful heirs begotten of their bodies." One of the children, James E. Chapman, assigned his interest, and died before the life tenant. The question, therefore, is whether the gift to the children under the sixth clause of the will vested immediately, or was postponed to the death of the life tenant. In support of the latter view, the appellant lays much

stress on the word "loan," as manifesting an intention on the part of the testator to annex the time of the distribution to the substance of the gift. But it is clear that the will was written inops consilii, and that the word, like the word "lend" in *Wade v. Bogley*, 5 Leigh, 442, was used as the equivalent of "give." Nor is there anything in the will to support the appellant's contention. The object of the testator obviously was to provide a life estate for his widow and to defer the distribution for no other purpose than to give precedence to the life estate. Hence, the gift is, in substance, a gift to the children, subject to the life interest of Mrs. Chapman; or, in other words, the title is conferred immediately, though the enjoyment in possession is postponed. *Hansford v. Elliott*, 9 Leigh, 79; *Martin v. Kirby*, 11 Grat. 67; *Brent v. Washington*, 18 Grat. 526; *Gish v. Moomaw*, 89 Va. 345, 15 S. E. 868, and cases cited. Jarman lays it down, and such is the universally recognized doctrine, that, "even though there be no other gift than in the direction to pay or distribute in futuro, yet, if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question;" and by way of illustration he adds: "Thus, where a sum of stock is bequeathed to A. for life, and, after his decease, to trustees upon trust to sell, and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D., as the payment or distribution is evidently deferred until the decease of A. for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator." 2 Jarm. Wills, (5th Amer. Ed.) 458. There is, indeed, nothing better settled in this court than the rule that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will. *Sellers' Ex'r v. Reed*, 88 Va. 377, 13 S. E. 754; *Jameson v. Jameson's Adm'x*, 86 Va. 51, 9 S. E. 480. In the present case, the fact that the gift is to the children, "or their lawful heirs begotten of their bodies," does not make the gift contingent. The money arising from the sale of the property after the death of the life tenant was at all events to be equally divided into four parts, and paid to the testator's four children, "or their lawful heirs," etc., which means that it was to be paid to the children living at the death of the life tenant, or to the representatives of such as might then be dead; the words "or their lawful heirs," etc., being words of limitation, and not the substitution of a new class of beneficiaries, taking as purchasers from the testator, for to effectuate the intent of the will we must read "and" for "or," and give to the word "heirs" its usual and legal signification. *Parkin v. Knight*, 15 Sim. 83; *Patterson v. Hawthorn*, 12 Serg. & R. 112;

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

McGill's Appeal, 61 Pa. St. 46; Linton v. Laycock, 33 Ohio St. 128; Gish v. Moomaw, 89 Va. 345, 15 S. E. 868. In this view of the case, the decree appealed from, upholding the assignment by James E. Chapman as the transfer of a vested interest, is right, and must be affirmed.

**BUFORD et al. v. NORTH ROANOKE
LAND & IMP. CO.¹**

(Supreme Court of Appeals of Virginia. Jan. 18, 1894.)

**EQUITY PRACTICE — TIME FOR FILING ANSWER —
FINAL DECREE—ADVERSE POSSESSION.**

1. Under Code 1887, § 3275, allowing a defendant to file his answer any time before final decree, it is error to refuse leave to defendants to file their answer 10 days after the rendition of a decree against them, but before its entry in the chancery order book, and during the same term of court, the answer tendered by such defendants showing a probable title in them to part of the land in suit.

2. There can be no adversary possession against a cotenant while she is under the disability of coverture.

Appeal from hustings court of Roanoke.

Bill by the North Roanoke Land & Improvement Company against William L. Williamson and wife, and Herbert D. Buford, Nugent Buford, and others. From a decree for complainant, defendants Buford appeal. Reversed.

Hansbrough & Hansbrough, for appellants.
Phlegar & Johnson, for appellee.

FAUNTLEROY, J. This is an appeal from the decree of the hustings court of Roanoke City rendered September 28, 1891, in a chancery cause in said court pending, wherein the North Roanoke Land & Improvement Company is complainant, and William L. Williamson and wife and others, and the appellants, Herbert D. Buford and Nugent Buford, are defendants. From the record in this cause, it appears that by deed of the 8th of September, 1810, one John Campbell and wife conveyed to one Robert Filson 175½ acres of land, composed of three parcels, and that by deed of October, 1810, the said Robert Filson and wife, in consideration of £1,000, conveyed the same three parcels of land, aggregating 175½ acres, to the "lawful heirs" of the said John Campbell and Rebecca, his wife. The said John Campbell and Rebecca, his wife, had at the date of the said deed of October 8, 1880, three children,—Robert, Clack R., and Susan; and after the said date of October 8, 1880, Matilda, a fourth child, was born to them, the said John and Rebecca Campbell. The said Matilda married Daniel Stoner, and from her the appellants, Herbert D. Buford and Nugent Buford, are lineally descended. There is no evidence of any partition having been made

of these 175½ acres of land, and there is no record of any deed of partition vesting the title in severalty to any one in any part of these 175½ acres of land, though it is averred, without proof, that there was a deed of partition, which had been lost, and never recorded. Clack R. Campbell resided from 1843 till his death, in 1881, on a part of this undivided 175½ acres, and held exclusive possession and enjoyment of it, and built upon it. It is said in the depositions that this part was defined by rock fences, though it is not proved that the said fences were put there by Clack R. Campbell, or after he went in it, or as line fences of this particular part. Clack R. Campbell died in 1881, leaving a will by which he devised all of his realty to his wife, Lucy, for her life, with remainder after death to his niece Nannie L. Williamson for life, with remainder over in fee to the children of said Nannie L. Williamson. On the part on which the said Clack R. Campbell resided there is "lot No. 6," the part which is the subject of the controversy in this case. The aforesaid Mrs. Nannie L. Williamson had several children, the remaindermen in fee under the will of Clack R. Campbell; and a suit was instituted in the circuit court of Roanoke for the sale of the realty to which the said children (then infants) were entitled in remainder, and this suit embraced lot No. 6. The record of that suit is not in the record in this cause, and whether the proceedings had were such as are requisite in the sale of infants' land does not appear. The appellants charge that they were not. Be that as it may, it seems that there was a decree for sale, and a sale made to M. P. Preston and his associates, who sold this lot No. 6 to the appellee, the North Roanoke Land & Improvement Company, for \$27,500, who being advised that there was a cloud upon the title, brought this suit in chancery in the hustings court of Roanoke City to clear the title. The Bufords, appellants, were made parties, but they lived in another county, 100 miles away, and the bill was taken pro confesso as to them and all the other parties defendants, the Williamsons only having answered the bill. The hustings court of the city of Roanoke, on the 16th day of September, 1891, rendered a decree final in form, but not in operation, during the then current term of the court, in favor of the appellees, affirming the title made to them by Preston and others, and derived from Clack R. Campbell through the Williamsons. The appellants, the Bufords, on the 26th day of September, 1891, during the same term of the hustings court moved the court for leave to file their demurrer and answer, which motion the court overruled, and refused the leave. From this decree the Bufords appealed, assigning but one error,—the refusal of the court to allow them to file their answer and make defense to the suit against them.

The answer was tendered, and the leave

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

to file it asked for, during the term of the court at which the decree of the 16th of September, 1891, was rendered; and it does not appear that the decree of the 16th of September, 1891, had been actually entered upon the chancery order book by the clerk before the motion for leave to file the answer was made, and refused by the court upon the sole ground that it was "too late." The affidavit of G. W. Hansbrough, who appeared for the Bufords, says that he had been employed by them only the day before,—the 25th. The answer tendered by the defendants the Bufords sets forth such a defense as, if sustained, would have changed the decree rendered on the 16th of September, during the same term, and set up a title to an undivided interest in lot No. 6, sold by the Williamses to Preston, and by Preston, etc., to the appellees. The answer asserts: That by the deed of October 8, 1810, from Filson, a title to an undivided share of the 175½ acres of land inured to Matilda, the daughter of John and Rebecca Campbell born after the date and recordation of that deed, as well as to, and equally with, Robert, Clack R., and Susan, the sons and daughter of John and Rebecca Campbell born before and living at the date of the said deed from Filson. That this undivided share of the said Matilda descended in part to the said Bufords, who are shown and admitted to be her lineal descendants; also, the shares of Robert Campbell and Susan Campbell, (Thrasher,) which they conveyed by deed of August 15, 1853, to Daniel Stoner, and by Stoner to Nefinger, trustee. That no partition of the said 175½ acres was ever made, and no allotment in severalty was ever made, among the joint or common owners. That the entire four—Robert, Susan, Clack R., and Matilda, (their ancestress,)—did hold the said 175½ acres of land jointly, and that no ouster of Matilda was ever made or is charged. That the relation of joint tenants between the said four has never been changed, nor the legal title in severalty has ever vested in any one of the said four to any part of the said 175½ acres. That the statute of limitations is not applicable here, and is no bar to appellants' title.

The transaction of 1810 was an arrangement by John Campbell for the benefit of all the children who were, or who might be, born to him and his then wife, Rebecca. It gave a fee in remainder to one undivided third to Robert, Susan, Clack R., respectively, to be opened for Matilda, when born. That the "lawful heirs of John and Rebecca Campbell, his wife," meant their children, who at their deaths should be ascertained to be their lawful heirs, and that all four—Robert, Susan, Clack R., and Matilda—were deemed to be entitled jointly, is admitted and averred in the bill, where it is alleged that "they—Robert, Susan, and Clack R.—took possession of the [175½ acres] land, and that they, together with said Matilda, continued

so to hold the same, jointly, openly, adversely, notoriously, and exclusively, till 1843." This establishes the fact that the whole four had title and held the land jointly, in fee, until 1843; and there is nothing in the record to show any change in the joint character of their estate, or any vesting in fee, in severalty in any one of the four in any part of the said 175½ acres of land. The entry upon, and exclusive use and occupation of, a part of the land by Clack R. Campbell, one of the tenants in common or joint owners of the undivided whole, (175½ acres,) did not destroy the joint character of the title, nor sever the part on which he so resided from the joint estate of the whole 175½ acres. The case presented in the answer of the defendants Buford showed a state of things which made it even probable that the respondents Buford had title,—a case to which the facts in the record gave strong color,—which had never been argued, and which the court could and should have given them the time and opportunity to argue and to prove. Yet, the court below in the very teeth of Code Va. 1887, § 3275, which commands that a defendant shall be allowed to file his answer at any time before final decree, refused them the privilege of answering and making their defense. See *Bean v. Simmons*, 9 Grat. 391; *Underwood v. McVeigh*, 23 Grat. 419.

This case is not within the rule of *Gerst v. Jones*, 32 Grat. 528, and other cases cited, which decide that where there has been a trial, and errors committed in admitting or in rejecting evidence, or in giving or in refusing instructions, and this court can see from the whole evidence certified that the party appealing could not have sustained prejudice by the ruling of the trial court,—in such a case this court will not set aside a verdict. This is a case in which no trial was had, and no decision pronounced, but the mere denial of a trial, and the refusal of the trial court to receive and consider the answer of defendants, solely on the ground alleged in the decree,—that "the answer was presented too late." The bill itself charges that the four children, including Clack and Matilda, held, jointly, adversary possession of the land until 1843; and she is shown by the record to have been at that time a married woman, under disability of coverture, and to have been alive in 1881, and presumably alive up to a much later period. The denials of the answer, had it been admitted, would have overcome any and all presumptions that there had ever been any partition of the land, and allotment in severalty. The record shows that in 1843, when Clack R. Campbell took possession of the lot in controversy, Matilda Stoner was under coverture, as the wife of Daniel Stoner, and there is no evidence to show when her disability ceased, and Clack R. Campbell could not hold adversary possession against her. No conveyance or partition of land will be pre-

sumed against a feme covert. John Campbell died in 1863, Rebecca, his wife, having predeceased him, and his heirs at that event were his said four children, of whom Matilda, the wife of Daniel Stoner, was one; and she being a married woman, and remaining such, so far as this record shows, till her death, at some period subsequently to 1881. The appellants who were defendants below were illegally and unjustly debarred, by the decree appealed from, from filing their answer and making their defense. The decree of September 26th must be annulled and reversed, the decree of September 16th suspended, and the cause sent back, with leave to the appellants to file their answer, and be allowed time and opportunity to take evidence to support their defense.

RISON et al. v. NEWBERRY.¹

(Supreme Court of Appeals of Virginia. Feb. 1, 1894.)

SPECIFIC PERFORMANCE—WHEN GRANTED—DECREE—RESCISSION OF CONTRACT—FRAUD.

1. Where a vendor of land declines for over a year, without sufficient reason, to carry out his contract, he cannot, at the end of that time, after prices have fallen, ask for specific performance thereof.

2. On a bill for specific performance, the decree, if granting relief to complainant, should provide for the carrying out of the entire contract as made by the parties.

3. A concealment, to justify the rescission of a contract for fraud, must be a willful suppression of such facts in regard to the subject-matter as the party making it is bound to disclose.

Appeal from circuit court, Wythe county.

Suit by Harman Newberry against J. F. Rison and others to specifically enforce a contract for the sale of real estate. From a decree in favor of plaintiff, defendants appeal. Reversed.

Berkeley & Harrison, Green & Miller, and Walker & Caldwell, for appellants. D. S. Pierce, Fulton & Fulton, and R. G. H. Kean, for appellee.

LACY, J. This is an appeal from a decree rendered by the circuit court of Wythe county on the 24th day of February, 1893. This is a suit by Harman Newberry, seeking to have specific performance of a contract in writing, made by said plaintiff with the appellant J. F. Rison, acting on behalf of certain parties purchasers, Ruffin & Hairston, on the 2d day of April, 1890, agreeing to sell to the said parties three-fourths interest in 700 acres of his 706 acres of land in his Kent's Mill farm, in Wythe county. The said contract sets out that the six acres so reserved are those on which the dwelling is located, which was to be laid off compactly with some frontage on the Norfolk &

Western Railroad. The price agreed was \$100 per acre, or \$52,500 for the whole three-fourths interest. Newberry agreed in the said contract to unite with the said purchasers in the formation of a land and improvement company, for the development of the said farm by laying off the said land into town lots and selling the same, and he agreed to take one-fourth—his one-fourth interest reserved—in stock of said company in like manner and kind as shall be issued to the purchasers. The terms of payment were agreed on as follows: \$10,000 cash upon the tender of a proper deed, \$10,000 in three months thereafter, \$7,500 each in six, nine, and twelve months thereafter, and \$10,000, being the remainder, in fifteen months from the date of the first payment; the deferred payments to bear six per centum interest, evidenced by negotiable notes, and secured by trust deed upon the property conveyed. Newberry agreed in the said contract to furnish a plot showing the exact quantities and boundaries of the land sold; and there was a further stipulation that the said land company, when formed, should contribute one-half the cost of a railroad survey from the mouth of Reed creek to some point on New river to or near Stuart, Va., when the other half was contributed by others; the whole not to exceed \$5,000 in cost. By this contract Newberry was to sell, and the others were to buy three-fourths interest in the said land. The other one-fourth interest was to be contributed by Newberry; and they were together to form a company, one-fourth of the stock to belong to Newberry and three-fourths of the stock to all others combined, the company to own and develop the whole land, less the six acres on which the dwelling stood, to be compactly laid off; and Newberry agreed to furnish a plot showing the exact quantities and boundaries of the land sold, which, being done, the six acres not sold would remain compactly laid off or left to itself. On the other hand, the purchasers were to pay \$10,000 on receipt of a proper deed, which Newberry was to furnish to them. The contract was executed on the 2d of April, 1890, as stated. On the next day D. S. Pierce, attorney at law, made out an abstract of title of the said land at the instance of Rison, certifying at the conclusion and as a conclusion that "there are no incumbrances or liens on the land." On the 8th day of the same month the purchasers of the three-fourths interest from Newberry paid, in anticipation of a deed, \$10,000 cash to Newberry. But, Newberry not making a deed as expected, on the 26th of June, 1890, the purchasers, by counsel, forwarded a deed to Newberry conveying the entire property to the Newberry Land Company,—the name adopted for the new company about to be formed,—which was received on the next day. Newberry objected to the stated consideration in the deed of \$210,000 by the land company instead of \$70,000; but it seems that

¹ Reported by F. S. Kirkpatrick, Esq., of the Lynchburg bar.

he agreed to this in order to get the cash payment of \$10,000 in advance. When Newberry received the deed he refused on the next day to execute it, because he said the exact quantity of land had not been ascertained. On the 16th day of August, 1890, Newberry's counsel acknowledged the receipt of the deed, and stated that when he offered the deed to Newberry, and offered it with the metes and bounds furnished by the purchasers, and proposed to draw a deed for him to sign and for his wife to sign also, Newberry said he did not like the way his six acres were laid off, and "he says he will not sign the deed until that is laid off to suit him." Four days afterwards Rison replied that the engineers had been given the contract to go by, and no other instructions, and he regretted the way the six acres had been laid off was not satisfactory to Newberry, but that, if Newberry would please inform them how he wished the six acres laid off, an endeavor would be made to arrange the plat accordingly. These directions were never given, and in the deed tendered January 25, 1893, after decree in the cause, he adopts the way the six acres are laid off, and says it is satisfactorily laid off. Newberry refused to make a deed to the company, but proposed to give further time if the purchasers would pay him yet another \$10,000 in cash before receiving the deed. In 1891, (May 20th,) Newberry caused a deed to be made and tendered by his counsel, conveying three-fourths of the land to the purchasers, which the purchasers refused to accept as a proper deed, and in August, 1891, Newberry filed his bill for specific performance of the contract of April, 1890. The suit coming on to be heard upon the bill and exhibits, demurrers, pleas, joint and several answers, and exhibits as cross bills and answers to same, etc., the depositions of witnesses, etc., and upon release deeds by the parties in interest other than Newberry, John D. Stewart, K. C. Kent, and Mrs. C. W. Kent, filed in the papers, the circuit court overruled the demurrers, and held, and so decided, that Newberry was entitled to specific performance of his contract of April 2, 1890, upon his filing in court a deed with general warranty of title, executed by himself, conveying to the vendees named in the said contract of sale three-fourths interest in the land in said contract mentioned, with the reservation of six acres, therein mentioned, within 60 days from the date of the decree; it being the opinion of the court that the complainants' title to the said land is good, and that any possible defect that could arise because of the infancy of Flora Stuart, who had signed the deed of lease, could be indemnified by a reservation of the purchase money in the hands of the court for that purpose; decreed for the unpaid purchase money, credited the same by use and occupation by Newberry, and decreed a sale of the three-fourths interest if the money was

not paid in 60 days from that time; decreed that each party pay his own cost, and appointed commissioners to make the sale, and authorized \$3,000 to be paid into court by the defendants, to be held as indemnity against the claim of Mrs. Flora Stuart; whereupon the defendants applied for and obtained an appeal to this court.

Enough has been stated chronologically to show the proceedings between the parties pending their negotiations between the execution of the contract and the bringing of this suit. The evidence in the cause shows that the vendor, who now seeks specific performance, did not have the power—was not capable—of making a good deed to the land he sold at the time of the sale, and the decree in the cause procured and insisted on by the vendor himself shows that at that date—nearly three years after the contract was made—he was still unable to make a deed, and the circuit court was unable to cause a good deed to be made, but decreed that the parties defendants should receive a hypothetical deed, good if this young lady so willed hereafter, the court thought. The defendants pointed out the defects in Newberry's title. After long delay on his part, he at last made a deed. It appears plainly enough that for some unexplained reason he desired to get the cash payment in advance of a deed, and, receiving this, he refused to make a deed to the company which he had agreed to form with his vendees, and take the interest of one-fourth. Agreeing subsequently to do this, he then bethought him of the six acres, and found fault with the way it was laid off. Subsequently, when asked to state his objection to this, he waived it, and he put the six acres in the deed in the same manner which had so long proved an insurmountable difficulty with him when so done by others. But none of these difficulties could be surmounted by him, or were surmountable by others, until the fall in prices known as the "collapse of the boom" had come. Heretofore reluctant,—not only reluctant, but stubbornly and steadfastly refusing either to accept a deed tendered to him or to tender one himself,—he agreed to survey and plat the land, received \$10,000 before he had any valid claim to it under his contract, and yet, although he had a survey made by his own chosen surveyor, he rejected that, and did not cause any other to be made, and, when the other parties caused a survey and plat to be made by skilled engineers, he objected to that, because six acres were not laid off to suit him in general terms; and, when requested to make known his wishes precisely, that they might be complied with, lets it pass, delays for another year, and then adopts what he had so strenuously and so long objected to. We have shown that he was not capable, and it appears also that he was not ready, willing, eager, or desirous during all that period. His negotiations tended to the effort which

finally culminated in the demand of \$10,000 more in cash before a deed was made by him. And yet he seeks specific performance at the hands of the court of a contract which he had so long not only neglected, but expressly refused, to comply with on his part, until the circumstances had so changed that the object of the contract could not be carried out. It was not possible to sell lots and stock in a company until a deed could be obtained by the company free from exception. And he himself had agreed to perform on his part something else besides selling and conveying the three-fourths of the land. He plainly agreed to contribute one-fourth of the capital stock to the company and put in his one-fourth interest in the company towards this end. So that by the contract the company was to own the whole land and he to own one-fourth of the company. But he refused to do this, and asks that the contract which he made be enforced, specifically performed in part,—performed only so far as it is favorable to him and his present views,—that is, that the other side be made to fully perform on their part and he be fully released on his part; and the circuit court has so decreed. We do not deem it necessary to go into detail as to the various questions as to the defective title held by Newberry. His delay is enough to disentitle him to specific performance. And the decree of the circuit court, presented and insisted on by the other side, sufficiently shows his inability to comply with his contract to make a good deed to the land free from just exception. The principles which govern a court of equity in passing upon such suits are so well settled, have been so universally adhered to by this court since its foundation, and are so familiar to the profession, that no extended citation of authority is deemed at all necessary. We have over and over again gone over this question, until there is nothing which can be added. Mr. Sugden says, (page 279:) "In the language of some of the judges, a party who seeks specific performance must show himself ready, desirous, prompt, and eager." Chancellor Kent said in *St. John v. Benedict*, 6 Johns. Ch. 111: "Specific performance cannot be considered a matter of right in either party, but is a matter of discretion in the court; not, indeed, of arbitrary and capricious discretion, depending upon the mere pleasure of the judges, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties." All application to courts to decree a specific performance must depend upon the circumstances, governed by the established principles of the court. If specific performance would work injustice, or be unreasonable, a party will be left to his action for damages. It is general-

ly essential that a party seeking a specific performance should not have been backward: that he should not have held off until circumstances may have changed; or kept himself aloof so as to enforce or abandon the contract as events might prove most advantageous. The case of *Iron Co. v. Gardiner*, 79 Va. 305, is very much in point. *Railroad Co. v. Lewis*, 76 Va. 833; *Haskin v. Insurance Co.*, 73 Va. 700; *Ferry v. Clarke*, 77 Va. 397; 2 Lomax, Dig. p. 108; *Panitt v. McKinley*, 9 Gratt. 1; *Robertson v. Hogsheds*, 3 Leigh. 667; 1 Story, Eq. § 693; *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558; *Ford v. Euker*, 80 Va. 79, 9 S. E. 500; *Dinsmore v. Lyle*, 87 Va. 391, 12 S. E. 610; *Reynolds v. Necessary*, 88 Va. 125, 13 S. E. 348; *Grizzle v. Sutherland*, 88 Va. 584, 14 S. E. 332; *Nalle v. Railroad Co.*, 88 Va. 948, 14 S. E. 759; *Story*, Eq. Jur. § 716; 3 Pars. Cont. 301; 2 Tuck. Comm. 426.

It may be observed, upon what has gone before, that the decree appealed from did not decree performance of the contract as made by the parties, but quite a different one. The appellants did not agree to buy a two-thirds interest in the land of Newberry and pay \$100 per acre for it simply. There was an agreement between the parties in the contract sought to be specifically performed that they would form a company with Newberry one-fourth owner and contributor. They were to pay three-fourths of the agreed value and Newberry one-fourth, all to go into a company for a specific purpose. The decree complained of not only compels the appellants to take a delayed and a defective title, but compels them to take three-fourths of what they substantially bargained for. It is not proved nor alleged that the appellants ever agreed, directly or indirectly, that the contract thus set up should be their contract; nor is it reasonable to suppose that they would have agreed to pay anything for an undivided interest, great or small, in this land, in order to build a town. It would have remained uncertain under such a contract where their land would lie, whether on the railroad or off of it, whether close to or at the railroad depot or remote from it; and under the court's decree it is matter of uncertainty where the appellants' part of the land will be situated. If the court decrees specific performance at all of a contract, it should do so of the contract which the parties made and the entire contract as made. The court should have decreed, if at all, upon the entire contract, and not upon a part only, and thus left not only the question of the title uncertain and dependent upon future undetermined events, but the location and situs of the land undetermined and unascertained. It cannot be said that the parties themselves purchased three-fourths only, because their contract covered effectually the entire tract,—three-fourths to be paid for in money, one-fourth to be paid for in stock, but the whole to be held (except six acres, to be laid off and

designated) under one right; that is, by the company, which both sides agreed to form to this end.

Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties under the circumstances of the case. 22 Amer. & Eng. Enc. Law, p. 909. Bouvier defines it as the "actual accomplishment of a contract by a party bound to fulfill it." Burrill defines it: "The performance of a contract in the precise terms agreed upon; strict performance." Mr. Justice Washington, speaking for the supreme court of the United States in *Hunt v. Rousmanier*, 1 Pet. 14, says: "Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise highly beneficial to society. The latter is without its authority, and the exercise of it would not only be a usurpation of power, but would be highly mischievous in its consequences." Equity cannot make or alter a contract for the parties and then execute it. If the contract must be reformed before it can be executed, it can only be reformed in a suit for that purpose, or upon a bill particularly praying for that relief. *Grey v. Tubbs*, 43 Cal. 359; *Osborn v. Phelps*, 19 Conn. 63. Nor will equity reform a writing to make an agreement of a character different from that which the parties intentionally entered into. *Stoddard v. Hart*, 23 N. Y. 556. Under the circumstances of this case, we think Newberry is not entitled to the aid of a court of equity to have his contract specifically executed, but that this court should withhold its relief, and leave him to his action at law. And under the circumstances of this case, and the changed circumstances, this court ought not to rescind the contract at the instance of the appellee. There are no sufficient grounds alleged nor proven upon which to base a rescission. Fraud is the most frequent ground for rescission, but it cannot be said that Newberry has practiced this upon the appellants. False representations, to be fraudulent, must be a false statement of acts, positively made, not mere matters of erroneous opinions. A concealment to afford ground of rescission for fraud must be a willful suppression of such facts in regard to the subject-matter of the contract as the party making it is bound to disclose. We cannot say that there is any inadequacy of consideration, sufficient to suggest fraud; no undue influence resulting from confidence or friendship. There is no mutual mistake, no illegality, disability, coverture, or infancy. Nonperformance to justify rescission must be a total failure of performance. Under all the circumstances of this case, we will refuse specific performance, and deny the prayer for rescission, and reverse the

cause, and dismiss the bill, without prejudice to the right of either party to bring his action at law for such damages as he may be advised he has sustained in the premises; that is, the parties will be left to seek their remedy in a court of law. The decree of the circuit court decreeing specific performance is for the reasons stated erroneous, and must be reversed and annulled.

STATE v. HALLBACK et al.

(Supreme Court of South Carolina. Jan. 2, 1894.)

JURY-PANEL — TRIAL JUSTICE — CRIMINAL PROCEEDINGS—INFORMATION—WARRANT—RESISTING ARREST—SPECIAL CONSTABLE—APPOINTMENT.

1. Defendant in a criminal case is not entitled to have the panel full, or entirely read over, before entering on his right of challenge.

2. Gen. St. § 830, provides that a criminal proceeding before a trial justice shall be commenced on information "plainly and substantially setting forth the offense charged," on which, only, shall a warrant of arrest issue. *Held*, that a charge of committing a "trespass" on certain lands "after notice" showed that the offense charged was that created by Gen. St. § 2507, making "entry" on land "after notice" an offense, the term "trespass" including "entry," and the words "after notice" not occurring in section 2501, creating the offense of "trespass;" and therefore it would support a warrant, and render resistance of arrest illegal.

3. A warrant of arrest need not set out the offense.

4. Under Gen. St. § 864, authorizing a trial justice to appoint a constable to act by virtue of such appointment "only on a particular occasion, to be specified in writing," an indorsement on a warrant of arrest, appointing a person special constable "to execute the within process," is sufficient.

Appeal from general sessions circuit court of Berkeley county; James F. Izlar, Judge.

Jerry Hallback and Robert Scott were convicted of murder, and appeal. Affirmed.

Trenholm & Rhett, for appellants. Mr. Jervey, for the State.

McGOWAN, J. "Agreed case: The defendants, Jerry Hallback and Robert Scott, were indicted as principals on a charge of murder, under the usual form of indictment, at the June term of the court of sessions for Berkeley county. Upon the call of the case the defendants demanded a full panel. The clerk reported only thirty-five (35) jurors present. The judge declined to order a full panel, and directed the clerk to present the jurors. (Defendants excepted.) Before any juror was presented for challenge, defendants demanded that the panel be entirely called over in their presence, before they should be called upon to enter on their right of challenge. The court refused such demand, and the defendants again excepted. As each juror was presented, defendants renewed their previous demands, which being refused, exception was duly taken. The jury were presented and sworn under the express notice and protest of defendants that

they waived no right by such presentation and impaneling. The defendants did not exhaust their right of peremptory challenge. Counsel agree that a typewritten copy of the evidence shall be filed with this agreed case as a part of the return, to which reference can be made just as if the same were here incorporated."

The following are copies of the affidavit and warrant referred to in the testimony and exceptions:

"Affidavit: The State of South Carolina, County of Berkeley. Personally appeared before me, R. H. Sweeney, a trial justice of the said county and said state, R. B. Cuthbert, who, being duly sworn, says that on the 4th day of February, 1893, one Jerry Hallback did commit a trespass on the lands—what is known as the 'Porter Tract'—now under lease to the defendant, (deponent,) after notice, and prays that a warrant may be issued for him, he be arrested and dealt with according to law. [Signed] R. B. Cuthbert.

"Sworn to before me this February 7, 1893. R. H. Sweeney, Trial Justice."

"The State of South Carolina, County of Berkeley. Trial Justice in and for the Said County and State, to Any Lawful Constable: Whereas, complaint upon oath has been made by R. B. Cuthbert that on the Porter tract, in St. Andrews, in the county and state aforesaid, on the 4th day of February, 1893, one Jerry Hallback did commit a trespass after notice, these are therefore to command you to apprehend the said defendant, Jerry Hallback, and bring him before me, to be dealt with according to law. Given under my hand and seal this February 7th, 1893. R. H. Sweeney, Trial Justice."

Back cover indorsed as follows: "I hereby appoint Robert Halsell as a special constable to execute the within process. [Signed] R. H. Sweeney, Trial Justice. February 7th, 1893."

A book of testimony was offered, copy of which is attached to the record. Counsel for the defendants made numerous requests to charge, (16 in number,) some of which were charged, others in part, and still others were refused entirely. It will not, however, be necessary to consider any of them, except those to which objection is made in the exceptions. After a full and clear charge as to what is murder, manslaughter, and a killing in self-defense, as applicable to the facts of the case, the jury rendered a verdict of guilty, recommending Robert Scott to the mercy of the court. The defendants appeal to this court from the sentence imposed by his honor, Judge Izlar, and seek a reversal of the same upon the following grounds and exceptions: "(1) That, there being but thirty-five jurors present on the day of trial, and the prisoners having given notice of their demand for a full panel, that his honor erred in overruling such demand, and requiring defendants to exercise, against their protest, their right of challenge from such incomplete

and insufficient panel. (2) That his honor erred in overruling and refusing the demand of the prisoners that the panel be entirely called over once in their hearing before entering upon their right of challenge. (3) That his honor erred in refusing to charge the jury, as requested: 'That the warrant issued by Trial Justice Sweeney on February 4th, 1893, for the arrest of the prisoner on a charge alleged as follows: "That he, the said Jerry Hallback, did commit a trespass after notice,"—was illegal and of no legal force, in that the offense charged was neither in the warrant nor affidavit "plainly and substantially set forth," and it was unlawful for any constable or private person especially appointed to execute the same.' (4) That his honor erred in charging the jury that said warrant did substantially and plainly set forth the offense charged, and was a valid legal process, and that the prisoners had no right to resist the same. (5) That his honor erred in refusing to charge the jury as follows: "That said warrant of arrest being illegal and of no legal force, it was unlawful for Halsell to attempt to execute the same, and it was lawful for the prisoners to resist any attempt at arrest thereunder; and, further, it was lawful for the prisoner to forbid Halsell any entrance in his dwelling house.' (6) That his honor erred in refusing to charge the jury, as requested by the prisoners, as follows: "That said warrant of arrest being illegal and of no legal force, then, if the jury believe that Halsell and other armed persons attempted to enforce the same, and during such attempt attacked the prisoner in his dwelling house, and the prisoner, being himself otherwise without fault in the opinion of the jury, reasonably apprehended death or serious bodily harm unless he killed Halsell, he was justified in self-defense in killing Halsell to save himself, and he should be acquitted.' (7) That his honor erred in refusing to charge the jury, as requested by the prisoners, as follows: 'If the prisoner had a right to resist arrest on account of the warrant being without legal force, or on account of the lack of authority in Halsell to enforce the same, and if, in order to avoid such illegal arrest, he took refuge in his dwelling house, then, in such case, if the jury believe that the deceased and others, with guns and pistols, surrounded such dwelling to enforce such illegal arrest, and thereupon Halsell attempted to enter said dwelling for such illegal purpose, and in such manner and threatening attitude as, in the opinion of the jury, reasonably entitled the prisoner to believe that his life was in danger, or that he was about to receive serious bodily harm, then in such case the prisoner was justified in killing Halsell, and in driving away the other members of the attacking party, and the prisoner was not precluded from repelling such an attack by the fact that he had such prior notice of such intended attack that he might have

called upon the public authorities to intervene. When the said attack was actually made upon him he was entitled to repel it, no matter how long he may have anticipated or prepared for it.' (8) That his honor erred in refusing to charge the jury, as requested by the prisoners: "That Haisell had no authority to execute the warrant, inasmuch as he was not appointed in the manner provided by law, in that the alleged appointment contains no authority to arrest the prisoner, and no particular occasion is therein specified in writing." (9) That his honor erred in admitting in the evidence the said warrant, and in overruling the exception of the prisoners to such admission. (10) That his honor erred in charging the jury as to the law in reference to the consequence of resisting an officer, there being no evidence that Haisell was an officer. (11) That his honor erred in not granting the motion of the prisoners for a new trial upon the grounds hereinbefore mentioned. (12) That his honor erred in not granting a new trial as to the defendant, Scott, there being no evidence to support the verdict against him."

Exceptions 1 and 2. Under the authority of *State v. Stephens*, 13 S. C. 287, the first exception was abandoned; and so was the twelfth, on the ground that it does not charge any error of law, and cannot be reviewed by this court. Exception 2 charges that the presiding judge "erred in refusing the demand of the prisoners that the panel be entirely called over once in their hearing before entering on their right of challenge." This may have been demandable at one time, but it is certainly not now the established practice in this state. The principal authority relied on to sustain the demand is the case of *State v. Briggs*, 27 S. C. 80, 2 S. E. 854, in which is quoted the remark of Mr. Bishop, "that the defendant may require the panel to be full, and to be entirely called over in his hearing, before entering upon his peremptory challenges." But it is obvious that such reference was not intended to declare that to be the law of this state, for the double reason that this question was not under consideration in that case, and the context clearly shows that the reference was made merely as an illustration of the question then being considered, viz.: That it was error for a prisoner to be limited to twelve challenges for the reason that he had exhausted eight in another jury the week before; that the right of challenge, as allowed, is sacred. The case of *State v. Williams*, 2 Hill, (S. C.) 381, was an issue as to drawing talesmen, and the court said: "The prisoner is not entitled to a copy of the panel of the plea and petit jury attached to the venire. There is therefore no ground in this respect for the complaint which has been urged,—that if talesmen were to be his jurymen, that he would have no means of knowing them until they were called into the box. There is, I think, great wisdom in not allowing a copy of the panel

to the prisoner. If he were allowed to have it, it might be the means of enabling him to obtain an acquittal by bribery or influence. As it is, his triers are unknown to him until court, and often until called into the box. Impartiality is thus most usually obtained for the suppression of crime and the protection of innocence." We do not think the circuit judge committed error as charged in this exception.

Exceptions 3, 4, and 9, in different forms, make the point that the warrant issued by "Trial Justice Sweeney on February 4, 1893, for the arrest of the prisoner Hallback was illegal and of no legal force, and therefore it was no process, and to resist it was no offense." This is the most important question in the case, as to which the circuit judge charged as follows: "If the officer had the right to make the arrest, and employed no more force than necessary to do it, the killing of the officer would be murder, although done in the heat of blood. If the person sought to be arrested kills the officer after he has made known his authority, he does so at his peril. It has been urged in this case that the warrant under which the deceased sought to make the arrest was illegal and of no legal force, and that it was unlawful for any constable or private person specially appointed to execute, or attempt to execute, the same, and that it was lawful for the prisoner, Hallback, to resist any attempt at arrest thereunder. I do not think that the warrant was illegal. While it may be somewhat informal, the affidavit upon which the warrant is based does sufficiently charge an offense. I think the affidavit is a substantial compliance with the formalities prescribed by law for the issuing of warrants of arrest. This being so, the deceased had the right to make the arrest thereunder; and if, in attempting to make the arrest, he employed no more force than was necessary, and was killed in the discharge of his duty, the killing would be murder, if you believe from the evidence that the deceased had made known his authority to the defendant Hallback." Was there error of law here? Section 830 of the General Statutes provides that "all proceedings before trial justices, in criminal cases, shall be commenced on information, under oath, plainly and substantially setting forth the offense charged, upon which, and only which, shall a warrant of arrest issue." There is no doubt that the proceeding involved here was commenced by information under oath. There was the offense "plainly and substantially" set forth. The manifest object of the provision above quoted was to require that the offense with which a party was charged should be set forth plainly and substantially, to enable the party accused to understand the nature of the offense with which he is charged, so that he might be prepared to meet the charge at the proper time. It certainly never was designed to require any mere formality or technicality in stating

the offense. This, as we have seen, never was required, and it would be unfortunate for the interests of public justice that it ever should be. *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76. Now, the charge made against the defendant Hallback, and set forth in the affidavit on which the warrant issued, was that, on the day stated, he (Jerry Hallback) "did commit a trespass on the lands—what is known as the 'Porter Tract'—now under lease to the defendant, (deponent,) after notice," etc.; and in the warrant the charge is set forth substantially in the same way: "That Jerry Hallback did commit a trespass after notice." Now, while it is true that the specific offense with which Hallback was charged is not set forth in terms, yet, as we think, there can be no doubt or uncertainty whatever that the offense charged was that created by section 2507 of the General Statutes, which reads as follows: "Every entry on the enclosed or unenclosed land of another, after notice from the owner or tenant prohibiting the same, shall be deemed a misdemeanor." It seems that the supposed "uncertainty" arises out of the use of the word "trespass" instead of "entry," but it is clear that "trespass" is a more comprehensive term than "entry," and indeed includes it, especially when we consider the words that follow,—“after notice,”—which do not occur at all in section 2501, which creates the offense of "trespass." But it is insisted with confidence that the precise point was decided in the case of *State v. Mays*, 24 S. C. 191, which is conclusive of this case. It was decided in that case "that the affidavit, which is the foundation of the whole proceeding in a trial justice's court, (Gen. St. § 830,) is insufficient where it fails to set forth plainly and substantially whether the offense charged was a trespass on real estate, which is beyond the jurisdiction of a trial justice, (section 2501,) or an entry upon the lands of another after notice forbidding the same, (Id. § 2507.)" It will, however, be observed that the case of *Mays* was decided in 1885, when the offense of trespass on lands (section 2501) was not within the jurisdiction of the trial justice court, and the "uncertainty" alleged in that case was between two offenses, one of which was within the jurisdiction of a trial justice and the other was not. But in December, 1892, section 2501, Gen. St., was so amended, with respect to the punishment to be inflicted, as to bring the offense of trespass also under the jurisdiction of a trial justice, (see 21 St. p. 93;) so that, at the time the warrant in this case was issued, a trial justice had jurisdiction of the offenses created both by the section 2501 and that of 2507 of the General Statutes; and therefore, whether the offense charged was one or the other, the trial justice had jurisdiction of it, and that necessarily destroyed the analogy which might be supposed to exist between this case and that of *Mays*. "A warrant to arrest a party need not necessarily set out

the offense, although it is usually recited and made a part of it." *State v. Rowe*, 8 Rich. Law, 17. The evidence clearly shows that Hallback knew that Halsell was an officer. He had been informed three days before that Halsell had a warrant for his arrest, and he was fully aware of the particular offense for which he was wanted. Besides, while it is true that ignorance of the alleged defect in the warrant at the time did not vary the case in strictness of law, yet there was an additional circumstance in his case which may deserve to be well weighed,—that he had before deliberately resolved upon shooting Welch, the constable, in case he offered to arrest him again, which in all probability it might be his duty to do. This was held sufficient, of itself, to warrant a conviction of murder, independently of the legality of the warrant. *Rex v. Stockley*, 1 East, P. C. 311; *Graham v. State*, (Tex. App.) 13 S. W. 1013. We see no error as charged here.

Exceptions 5, 6, and 7 depend upon the alleged illegality of the warrant of arrest, now eliminated from the case by the charge of the judge, which, we have endeavored to show, was in conformity to law.

Exception 8 complains that his honor erred in refusing to charge "that Halsell had no authority to execute the warrant, inasmuch as he was not appointed in the manner provided by law, in that the alleged appointment contains no authority to arrest the prisoner, and no particular occasion is therein specified in writing," etc. The warrant was indorsed: "I hereby appoint Robert Halsell as a special constable to execute the within process. R. H. Sweeney, Trial Justice. February 7, 1893." His honor said: "I cannot charge you that request, because I have already said to you that I think the indorsement upon the warrant, if you conclude that indorsement was made by Trial Justice Sweeney, would be sufficient authority for executing the warrant, and, during the time he was acting under that warrant for the purpose of executing it, he would be an officer of the law," etc. The authority for the appointment of a special constable is found in the proviso of Gen. St. § 864: "That nothing herein contained shall prevent a presiding judge, or a trial justice, or a coroner, from appointing a constable to act by virtue of such appointment only on a particular occasion, to be specified in writing." The objection, as we understand it, is that the constable was not directed in this indorsement, *ipsisimlis verbis*, to arrest the prisoner. The indorsement became a part of the paper, and must be read in connection with the body of the warrant, wherein "any lawful constable" is commanded to apprehend the defendant, etc. The duty of a constable is a matter of law, of which the courts take cognizance. See *McConnell v. Kennedy*, 29 S. C. 191, 7 S. E. 76.

Exception 10 is based on the assumption that there was no evidence that Halsell was an officer. In the view taken by the judge,

there was conclusive evidence on that point. Besides, there is no error in charging an irrelevant proposition, unless it is shown that the defendant was injured thereby.

The judgment of this court is that the judgment of the circuit court be affirmed, and the case remanded to the circuit court for the purpose of enabling that court to assign a new day for the execution of the sentence heretofore pronounced.

McIVER, C. J., and POPE, J., concur.

CASTO v. BOARD OF EDUCATION OF RIPLEY DIST.

(Supreme Court of Appeals of West Virginia.
Jan. 20, 1894.)

SCHOOLS AND SCHOOL DISTRICTS—APPOINTMENT OF TEACHERS.

Under section 13, c. 45, of the Code as it stood in the edition of 1887, school trustees had no power, as individuals, to appoint teachers. Such trustees could only appoint at a meeting of which all the trustees had notice, and at least two of the trustees must concur in the appointment. The appointment must be in writing.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

Action by H. J. Casto against the board of education of Ripley district, Jackson county, for breach of contract. There was judgment for defendant, and plaintiff brings error. Affirmed.

Wm. A. Parsons, for plaintiff in error.

BRANNON, P. Action by Casto against the board of education of Ripley district, Jackson county, for failure to allow Casto to teach a school under a contract employing him to do so. The facts are that Casto and Shamblin and Boggess, two of the school trustees, were present at a meeting of the board of education; that the board appointed a trustee in place of Boggess, but the appointee did not qualify that day; that Shamblin and Boggess agreed, before leaving the place where the board of education was in session, to employ Casto to teach a school; that Fisher, the third trustee, was not present, and had no notice of such meeting; that Casto and Shamblin and Boggess went from the place where the board of education met to Shamblin's house, where, on July 15, 1889, Shamblin signed a written agreement employing Casto as teacher; and then the three started to go to Fisher's house, and on the way Boggess remarked that it was not necessary for him to go to Fisher's, as "two trustees were enough to employ a teacher," and did not go further; that Casto and Shamblin went on to Fisher's, and then Fisher and Casto signed the agreement; that, a few days before the time for the commencement of the school, the secretary of the board informed Casto that a new schoolhouse which was being built would not be completed by

the time fixed for commencement of the school, and he would have to defer commencing a few days, to which Casto assented; that, after it was completed, Casto informed Shamblin that he was ready to begin teaching, and Shamblin and the other trustees took steps to get a stove for the schoolhouse, but, before obtaining it, the board of education met at the new schoolhouse, and refused to take it off the contractor's hands, and informed the plaintiff that there would be no school taught, and notified the contractor that it would sue him, as it would be liable to pay Casto for teaching; that later the schoolhouse was burned, and no other house was built; and that Casto was not able to get any other school because it was so late. The said agreement employing Casto was approved by the president of the board of education.

Is the written agreement employing Casto to teach binding on the board of education? Its validity is to be tested by section 13, c. 45, of the 1887 edition of the Code, and not by that section as amended and re-enacted by chapter 60, Acts 1891, and found in the 1891 edition of the Code. The act of 1891 made alterations in section 13. How such alterations would affect, if at all, the question we have in hand, it is not proper to say, but I deem it proper to call attention to the fact of amendment of the section. The statute provided, at the date involved in this case, that the trustees should appoint teachers by written appointment, to be submitted to the board of education, or its president when the board was not in session, for approval. After so giving power to the trustees to appoint, it contained this explicit clause: "But the trustees shall take no action or proceeding relating to the appointment or removal of teachers, or expulsion or suspension of a scholar from school, unless at a meeting of which all the trustees shall have had notice, and when at least two of their number shall be present, and concur in such action or proceeding." It is plain that the important act of appointing teachers under this act must be at a public meeting of which all the trustees have notice, and the appointment must be by writing, so that we can say it is an act of the board of trustees done in open meeting as an official act, in the face of the public, not by the trustees as individuals, at indifferent places. At such a meeting the patrons of the school may know what is transpiring, and give the trustees invaluable information touching the morality, capacity, and fitness of the teacher. It is made a safeguard against the selection of improper teachers. Under this same section, in *Wintz v. Board of Education*, 28 W. Va. 227, it was held that the trustees have no power, as individuals, to appoint teachers, and that it could only be done at a meeting of which all the trustees had notice, and at least two of the trustees must concur in the appointment. In this case there was surely no meeting,

within the meaning of the statute, as construed by said decision. Where was the meeting? At the place where the board of education met? Of this Fisher had no notice. It was in no sense a meeting. Shamblin and Boggess happened there because the board was meeting. Two trustees must concur in the appointment. The two trustees present at that meeting, it is said, concurred in the appointment. They did not legally do so; for while Shamblin, before leaving that place, did sign the agreement, Boggess did not. Why did he not do so if he finally agreed to the appointment? The fact that he did not there sign, and the fact that, though he started to go to Fisher's, he excused himself, and did not go all the way, tend to show nonconcurrence. The fact that he remarked that it was not necessary for him to go, as two trustees were enough to appoint, shows that he did not intend to be considered as acting in the appointment. At any rate, he did not sign the agreement, nor any written appointment. The statute, in terms, requires a written appointment; not an agreement to appoint, but an actual appointment, as a final act, evidenced by writing. If, under an oral appointment, a teacher could recover for actual service in teaching, it thence does not follow that where he has not taught, so as to maintain a quantum meruit for service, he can enforce an oral appointment by recovering damages for noncompliance with it. Shall we say that the meeting of Shamblin and Fisher at Fisher's house was the meeting at which the appointment was made, or was it simply to execute or consummate what had been already done at the meeting of Shamblin and Boggess? If the latter is the correct view, then the agreement has the signature of only one of the two who made the appointment at that meeting. If we view the meeting at Fisher's of Shamblin and Fisher as the meeting at which the appointment was made, and to take into consideration the appointment of a teacher as an original proposition, I hardly think we can say Boggess had notice of it as such a meeting. The proceeding, in short, is so irregular that we cannot say that the appointment was made and completed at such a meeting as the statute contemplates. To do so we must strain the matter, and introduce a liberality which would more properly be called "looseness," where there is no necessity for such liberality, and a looseness violating the purposes of the legislature. We do not regard the appointment binding on the board of education. Its approval by its president would not validate an appointment made contrary to law; nor would the procuring of a stove for the school, nor the declaration of the board that it would be liable to pay the teacher.

Another point in the case is this: During the taking of evidence, after the plaintiff had given in evidence said agreement and the facts above stated and some others, the court

asked the plaintiff's counsel if he could produce evidence different from that which he had already given as to the manner of employing the plaintiff, and, the counsel replying that he could not, the court said it was unnecessary to go further with the evidence on other points, as the court's view was that the plaintiff had been illegally employed; and this is alleged to be error. From the statement of the facts proven on the trial, we feel sure that the whole case of the plaintiff had been presented, so far, anyhow, as it touched the manner of the appointment of plaintiff as a teacher; and the plaintiff took no exception, and made no objection, to this particular action of the court, but only to its finding upon the facts. Nor did the plaintiff offer any additional evidence, or even say that he had any particular further evidence, or, indeed, any further evidence; and we do not see how we can find error in this action, such as harms the plaintiff, unless we merely imagine that some evidence was thus shut out, in the absence of even a suggestion that such was the case. We think with the circuit judge that the invalidity of the appointment decides the case against the plaintiff. We are of opinion, therefore, that the finding and judgment of the circuit court for the defendant ought to be affirmed.

REED et al. v. McCLOUD et al.
(Supreme Court of Appeals of West Virginia.
Feb. 3, 1894.)

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT.

Section 1, c. 106, of the Code, among other things, prescribes that the affidavit made for the purpose of having an order of attachment shall state the nature of the plaintiff's claim, and the amount, at the least, which the affiant believes the plaintiff is justly entitled to recover. *Held*, the term "justly" is not superfluous, or insignificant, but is a material qualification of the rest of the phrase, "entitled to recover," and it, or its equivalent, must be used, in order to constitute a substantial compliance with the statute.

(Syllabus by the Court.)

Error to circuit court, Logan county; Thomas H. Harvey, Judge.

Action by Reed, Peebles & Co. against C. H. McCloud and others. From an order quashing the attachment issued, plaintiffs bring error. Affirmed.

James H. Ferguson, for plaintiffs in error.

HOLT, J. This is a suit in equity, by attachment, commenced in the circuit court of Logan county on the 27th day of October, 1891; and on the 28th day of October, 1891, the plaintiffs filed the bond and affidavit for attachment against the property of defendants, and the attachment was thereupon issued and levied on certain goods, wares, and merchandise, also upon 385 acres of land made up of six contiguous tracts. Plaintiffs' bill was filed at January rules, 1892, and at the April term of the circuit court, viz

on April 28, 1892, the defendants, by their attorneys, moved the court to quash the order of attachment sued out and levied, because the affidavit was defective and insufficient to authorize such order of attachment; which motion the court sustained, and quashed the order of attachment, and the plaintiffs appealed under eighth clause of section 1, c. 135, of the Code.

Under the one general government there are 44 state governments, foreign to each other within the meaning of the attachment law, whose citizens own property, or have debts due them, in other states, who constantly carry on with each other commercial dealings and business transactions in large numbers and of great value; so that the attachment law is not only useful, but has become indispensable, and the tendency is to widen its scope and enlarge its usefulness in various ways, according to the exigencies of the times. Many statutes on the subject have been enacted in Virginia and in this state, and these laws have been carefully revised, and the remedy extended, in the revisions of 1819, 1849, and 1868, and statutes since, in which the revisers have recognized the great importance and necessity of the proceeding, and have made it their special endeavor to render the law giving this remedy "clear, precise, and methodical," which has resulted in chapter 106 of the Code, (see Ed. 1891, p. 742,) giving, among other things, an attachment in equity, as well as at law, for a debt or claim, legal or equitable, owing to the greater flexibility and other advantages of the remedy in equity, and upon the claim, whether it be due or not, subject to certain provisos and conditions, (see latter clause of section 1, c. 106,) and with leave to file a supplemental affidavit in certain cases; thus showing a disposition to enlarge and advance the remedy, which, with a slight extension of the right to amend and supplement the affidavit, would be fully up to the most advanced Codes on the subject. The affidavit prescribed is short and simple. The plaintiff, or some credible person, shall state "the nature of the plaintiff's claim and the amount at the least which the affiant believes the plaintiff is justly entitled to recover," adding, in the case of foreign attachment, that the defendant is a nonresident of this state, and, in the case of a domestic attachment, some one or more of the grounds specified, with the material facts relied upon to show their existence. He shall state the amount, at the least, which he believes the plaintiff is justly entitled to recover. It is true this concise, clear, and precise formula is not sacramental, but it is nevertheless jurisdictional, and there should be a reasonable degree of certainty in so important a matter, being of interest to others as well as to the parties. It is true that, when the purchaser's title to the land attached and sold is hereafter impeached for

insufficiency of the affidavit, the court may go a long way in the endeavor to uphold his title; but, where the question has been presented at the inception of the suit, the courts of this state, through a long course of decisions, have shown a disposition not to tolerate any experimentation, either by substitution or omission, with this part of the affidavit prescribed by the statute, but to abide by the words the lawmaker has seen fit to use, so that no clause, sentence, or word of this fundamental part of the affidavit shall be treated as superfluous or insignificant, and for the following reasons: (1) This part of the affidavit is short and simple. It is against public policy and general convenience to needlessly endanger the jurisdictional element of so important and useful a remedy, by involving it in the confusion and uncertainty of omitting words as meaningless, or replacing others with their equivalents. (2) It is due to the court that its time should not be consumed unnecessarily, in determining whether the word used by the affiant is the equivalent of the word used in the statute, or whether the word left out of the affidavit is insignificant, or is impliedly contained in some other word or phrase. (3) It is due to the purchaser of the land at the sale under the decree that the affidavit should follow the language prescribed by the statute. Then there is no room for courts to differ as to its sufficiency, and insufficiency in such a case may not be mere irregularity, but may make void the proceeding and the title under it. (4) The remedy, especially the one by domestic attachment, is harsh; sometimes wrongfully causing the financial shipwreck of some honest business man, without the possibility of indemnity by adequate redress. And as the statute gives so harsh a remedy, it is nothing but fair to the debtor that the plaintiff should pursue the remedy as given, on pain of having his attachment quashed. See the following authorities: *Crim v. Harmon*, 38 W. Va. —, 18 S. E. 753; *Altmeyer v. Caulfield*, 37 W. Va. 847, 17 S. E. 409; *Cosner's Adm'r v. Smith*, 36 W. Va. 788, 15 S. E. 977; *Ruhl v. Rogers*, 29 W. Va. 779, 2 S. E. 798; *Chapman v. Railway Co.*, 26 W. Va. 299, 322; *Hudkins v. Haskins*, 22 W. Va. 645; *Delaplaln v. Armstrong*, 21 W. Va. 211-213; *Capehart v. Dowery*, 10 W. Va. 130-135; *Rittenhouse v. Harman*, 7 W. Va. 380; *Gutman v. Iron Co.*, 5 W. Va. 22; *Baking Co. v. Bachman*, 38 W. Va. —, 18 S. E. 382; *Mantz v. Hendley*, (1808) 2 Hen. & M. 306; *Jones v. Anderson*, 7 Leigh, 308-311, (1836.) From these cases we have a right to infer that it had become a matter of common observation that the remedy by attachment was sometimes perverted to gratify the ill will of the party against the debtor, and at other times was a contrivance to circumvent and get ahead of other creditors, or for some other mala fide purpose.

This is a domestic attachment, sued out

on the ground of fraud in contracting the debt, part due and a part not due, and of converting, being about to convert, his property into money, etc., with intent to defraud his creditors, and that he had assigned his property with like intent. There are two affidavits, covering eight printed pages, but it is nowhere stated that affiant believes that the plaintiffs are justly entitled to recover the sum mentioned, \$1,412.98. The word "justly" is omitted in both affidavits. But it is contended that the facts stated in the affidavit of plaintiff show with absolute certainty that the plaintiffs were justly entitled to recover in the suit the debt claimed therein. The affidavit does state the nature of the plaintiff's claim,—that is, that it arose out of contract between plaintiff and defendant, whereby, in consideration of certain goods, wares, and merchandise, sold and delivered by plaintiff to defendant at his special instance and request on the 11th day of August, 1891, plaintiffs were entitled to recover, etc. It does state the amount of the claim as being \$1,412.98, at the least. It also shows that, of that sum, \$612.87 was due at the date of the suit, and the balance, viz. \$800.11, was not then due, but would be due four months after the 11th day of August, 1891, the date of the sale. It is contended that these facts, thus averred, show with certainty, not simply that affiant believes, but that plaintiff is entitled to recover the same in this suit. Still, all this, no matter what it may show or tend to show, is required by the statute to be stated, and, in addition thereto, the affiant is expressly required to state that he believes plaintiff is justly entitled to recover said sum in the action or suit. If the facts above stated show that plaintiff is justly entitled to recover the sum stated, then, on the theory of appellant's contention, it could all be omitted, and leave the affidavit sufficient, as being a substantial compliance with the requirement of the statute. It cannot be said that the particular words of this formula have not passed under the careful scrutiny of the lawmaker; for, as we now have it, it is, as we have seen, the result of many years of legislative consideration, and attention has been repeatedly directed to the terms "just," "justice," "justly," and, instead of being omitted as unmeaning or superfluous, they have been retained, or introduced where they were not to be found before. Hence, we must attribute to the legislature a deliberate, intelligent purpose to qualify the term "entitled to recover" with the term "justly," and thereby put the affiant under the stress of making a sworn statement that plaintiff is entitled to recover such sum,—not only justly entitled to recover it, as against the creditor, but also in regard to other creditors and other persons interested. In other words, that the claim, and the proceeding to recover it, are bona fide,—not set on foot from any improper motive, or for any unlaw-

ful purpose; and it would be contradicted when it was made to appear that affiant had sworn recklessly and falsely, or against his knowledge of the facts, as to the grounds of the attachment; and it is not meant merely as a guaranty that his claim, or the plaintiff's claim, is a just debt. If this view be correct, then this affidavit does not, in this respect, meet the requirements of the statute by any circumlocution or implication. But, grant that this omitted word does not make the phrase as comprehensive as we have supposed, why leave it out? If we turn to the statute, we find it there, (Code, c. 106, § 1;) if we turn to the form books, we find it there, (Hutch. Treat. § 1142, form 290;) and, upon principles of public policy and general convenience, in advancement of the remedy, and in aid of its usefulness, in relief of the courts, I do not think it error to require suitors by attachment to follow, in their affidavits, the language of the statute, on pain of having them quashed, although, if the jurisdiction depended alone on the sufficiency of the affidavit, and the title of the purchaser alone on the question of jurisdiction, the court might, by hunting through the whole affidavit, and by putting this and that implication together, make out enough to supply the deficiency. At this stage of the case, therefore, the court had a right to decline to search through the two affidavits to see if it could make out and supply, by implication, the one short line required by the statute, and put in the front, as the stem and support of all the rest of the affidavit, and as a guaranty that both the claims and the proceeding are bona fide. Judgment affirmed.

HARROW v. OHIO RIVER R. CO.

(Supreme Court of Appeals of West Virginia.
Jan. 20, 1894.)

CERTIORARI TO JUSTICE OF THE PEACE — WHEN LIES — ACTION AGAINST RAILROAD COMPANY — SERVICE OF AGENT — READING TO JURY FROM BOOKS.

1. The remedy by writ of certiorari, given by chapter 110 of the Code, to review the judgment of a justice, is not given as a matter of right, but is awarded by the court, or judge, for cause, on proper case shown.

2. A railroad company, by contract under seal, bound itself to make and maintain necessary cattle guards at the boundary lines of the premises of H., which it failed and neglected to do. Its trains, running through said premises, frightened and drove H.'s horse off his premises, through the gap where the cattle guard was to be made, into the premises of an adjoining owner, where the track was fenced, whereby and by reason whereof said train struck the horse, and caused its death. Held, the railroad company may be sued before a justice, and held liable therefor, as for a wrong, under section 23, c. 50, of the Code.

3. The summons to commence the suit before the justice may be served upon the freight and passenger agent of the company in the county where the suit is brought, and where such agent resides, according to section 34 of chapter 50.

4. The extent to which counsel may read

to the jury, from law books, sound law, relevant to the case on trial, is left largely to the discretion of the trial judge, subject to review in case of abuse of discretion.

(Syllabus by the Court.)

Error to circuit court, Jackson county; V. S. Armstrong, Judge.

Action by J. L. Harrow against the Ohio River Railroad Company to recover the value of a horse killed by defendant. From a judgment for plaintiff defendant brings error. Affirmed.

V. B. Archer and Warren Miller, for plaintiff in error. N. O. Prickitt and Wm. A. Parsons, for defendant in error.

HOLT, J. On the 22d day of January, 1892, plaintiff, J. L. Harrow, brought suit before a justice of Jackson county against the defendant railroad company for \$300 damages for negligently killing his horse. It was tried by a jury. During the trial defendant saved, by bill of exceptions, various points ruled against him. The jury found a verdict for the plaintiff for \$137.78. Defendant moved for a new trial. The justice overruled the motion, and gave judgment. Defendant excepted, and had all the evidence certified, and then presented its petition to the judge of the circuit court for a writ of certiorari to the judgment; but the circuit court judge refused the writ, and to such order of refusal this writ of error was obtained. The defendant assigns as errors the various points saved by it in the action of the justice, overruling its various motions.

Error No. 1. The justice did not err in overruling defendant's motion to quash the summons,—it follows the form given in the statute,—nor in overruling the motion to quash the return of its service, for the return shows service on a freight and passenger agent of defendant residing in the county at the time, no other officer, etc., being then found in the county. See Code, c. 50, § 34. And the agent mentioned in this section, by section 20 of chapter 52, is construed to include a depot or station agent in the actual employment of the company, residing in the county wherein the action is brought. See *Taylor v. Railroad Co.*, 35 W. Va. 328, 13 S. E. 1009.

Error No. 2 is based on the action of the justice in overruling defendant's objection to the complaint filed by plaintiff. The pleadings in the justice's court are—First, the complaint by the plaintiff; second, the answer by the defendant. The complaint shall state, in a plain and direct manner, the facts constituting the cause of action, and, if more than one cause of action be stated therein, each shall be separately stated and numbered. Such pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. Either party may except to a pleading of his adversary, when it is not sufficiently ex-

PLICIT to be understood, or it contains no cause of action or defense. If the justice deem the exception well founded, he shall order the pleading to be amended, and, if the party refuse to amend, the defective pleading shall be disregarded. Code, c. 50, § 50. There are two counts in plaintiff's complaint. No. 1 states, in substance, that defendant so negligently and wrongfully ran and conducted its train that plaintiff's horse was killed by defendant by such wrongful and negligent running of its train. To this statement, or count, no objection is made. Count No. 2 states, in substance, that defendant, by written contract dated May 25, 1885, bound itself to make necessary cattle guards at the boundary lines of plaintiff's said farm, which defendant, though often requested, had neglected and refused to do; that defendant, by running its train through plaintiff's farm, drove plaintiff's horse from his land, where the cattle guards ought to have been made, onto the adjoining land, where it was killed by the negligence of defendant in running its train. The objection to this count is that it alleges a breach of contract, and cannot be joined with No. 1, which is for a wrong or tort, pure and simple. I do not think this exception well taken, and it was properly overruled by the justice. By it the killing of plaintiff's horse is stated to be due in part to the negligence of defendant in not making the cattle guards as it had, by written contract, bound itself to do. And the fact that it had bound itself by express contract to make the running of its trains through plaintiff's farm safe, in this respect, to his horses, does not make the breach of it, which is in whole or in part the proximate cause of the killing of this particular horse, any the less a wrong, within the meaning of the term as used in that part of chapter 50 of the Code which relates to the pleadings. See *State v. Lambert*, 24 W. Va. 399; *Poole v. Dilworth*, 26 W. Va. 583.

Error No. 3. The counsel for plaintiff, in his opening argument before the jury, began to read a certain part of the opinion of the court in *Layne v. Railway Co.*, 35 W. Va. 438, 446, 14 S. E. 123. To this defendant objected, but the justice overruled the objection, and the counsel read from the opinion of the court, delivered by Judge Lucas, which states what was decided in the case of *Washington v. Railroad Co.*, 17 W. Va. 190. The law read seems to be good law, and relevant to the case in hand, and, therefore, not ground of error. *Gregory's Adm'r v. Railroad Co.*, 37 W. Va. 606, 16 S. E. 819. If there was danger of misleading the jury, as there may have been, the defendant should have asked the justice to instruct them as to the different questions presented between the case then on trial before them and the one cited and read from, which was discussed and decided from the standpoint of a motion for a new trial, on the ground of want of evidence or insufficient evidence, after a jury had

found a verdict. Here nothing was said or read encroaching upon the province of the justice to expound the law, or in defiance of any instruction given; but it was a pertinent point of law from an analogous case, which only needed the qualification already mentioned to make it useful, rather than misleading, and no doubt was intended for the court as well as the jury, as no instruction had been given, and as it is a common practice in this state to give them after the arguments to the jury, as well as before. It is quite obvious that such practice is liable to abuse, but, for the reasons given, I do not think there was any such abuse in this instance. For a discussion of the subject see 1 Thomp. Trials, § 945, et seq.; *Com. v. Porter*, 10 Metc. (Mass.) 263; *Gregory's Adm'r v. Railway Co.*, 37 W. Va. 606, 16 S. E. 819, where the subject is fully examined and discussed.

Error No. 4. That the justice erred in not granting defendant's motion to set aside the verdict and grant a new trial; and this brings us to the facts of the case, as shown by the evidence certified by the justice. The plaintiff, J. L. Harrow, is the owner of a farm on the Ohio River Railroad, on Muses bottom, in Jackson county, W. Va., through which the defendant's railroad runs a distance of about 40 poles, or one-eighth of a mile. The plaintiff and defendant executed an agreement under seal, dated the 25th day of May, 1885, whereby plaintiff granted to the defendant the right of way in consideration of the sum of \$110, and in consideration that the said company, among other things, should make and maintain necessary cattle guards at the boundary lines of said premises, which were bounded on the lower or south side by the premises of Mr. Howell. The defendant never made any of the cattle guards provided for in the contract, though it had been notified and requested by plaintiff to do so. He was the owner of the horse in question, a gelding three and one-half years old and worth \$150. This horse was killed by the running of defendant's south-bound freight train on the night of the 15th and 16th of September, 1891, under the following circumstances: On the night in question this horse and another of plaintiff's came out of plaintiff's hill field, which reached down within 200 yards of the track, into the bottom field, through which the railroad runs, having pushed down the two fences between the two fields, and having crossed the track, which was not fenced. He was on the west or river side of the track, 250 feet above the line between the land of Howell and plaintiff's land, about 40 feet from the railroad; and, being frightened by the approaching down freight train, about 3 or 4 o'clock in the morning, he ran down the railroad keeping about 40 feet from it, till he came to the dividing line between plaintiff and Howell, which was fenced on the dividing line from the

right of way, and on the Howell farm the right of way was also fenced. The horse, instead of turning from the railroad and running off down this dividing fence toward the river, ran straight on into this lane on the Howell land, along defendant's inclosed right of way, and after running about 100 feet from the dividing line he got onto the track, and after running on the track some 150 feet he was struck by the train, crippling him so badly that he had to be killed. The track was straight from where he started to where he was struck, about 350 feet, and for about 200 or 300 yards above where he started, when scared by the train. The morning was clear when he was found. It had rained a little in the night. The railroad was nearly on a level with the place from which he started; where he was struck, there was a fill. The horse could not have passed from plaintiff's land into the lane where he was struck, had the cattle guards been there as contracted for, but none were ever made. He would have remained in plaintiff's field, where he could have escaped either way, the track not being fenced. The horse was young, large, broke to work, and was worth \$150. The engineer of this south-bound freight train did not see the horse, but knew when they struck an obstruction at that place; was looking ahead at the time; had the cab window in front closed; from moisture on the window, or fog, could not see any distance ahead. The fireman's testimony is, in substance, the same.

The jury evidently based their verdict on the failure and neglect of defendant to build the cattle guard. The evidence tends to show that the running of the train, together with such neglect, was the direct, proximate cause of the accident; for, if that had been built, the horse could not have run into the railroad lane on the Howell land where he was killed, but, in all likelihood, would have veered off on his own side.

This statutory writ of certiorari is intended as a method whereby the rulings of the justice, etc., may be reviewed, especially his rulings granting or refusing to set aside verdicts; and the scope and tenor of the act show plainly that it was intended that the circuit court should be liberal in granting it, so far as it is a substitute for appeal from the judgment of a justice, so that the petitioner may have the judgment of the justice reviewed upon the merits, and such judgment or order made upon the whole matter as law and justice may require. Yet the language of the act does not warrant the construction that the writ is given as matter of right. See Code, c. 110, § 4. Upon a review of the judgment of the justice upon the merits, as it arises on a consideration of the law and evidence, we are of opinion that there is no error therein, and that the writ of certiorari was not improperly refused by the judge of the circuit court.

JENKINS v. BENNETT et al.

(Supreme Court of South Carolina. Feb. 22, 1894.)

ABATEMENT AND REVIVAL—DEATH OF PARTY—ACTION WHEN SURVIVES—INSPECTION OF PAPERS IN POSSESSION OF ADVERSE PARTY—AFFIDAVIT—SUFFICIENCY.

1. A complaint alleging that plaintiff contracted to do certain work for a specified price, that he was prevented by defendants from performing it, and asking damages resulting from the loss of profits which he expected to make, states an action in tort which does not survive the death of defendants.

2. An order to compel defendant to furnish papers in his possession to plaintiff for inspection should not be granted on an affidavit alleging that such papers "contain evidence relating to the merits of the action," as such allegation is no more than an expression of plaintiff's "opinion," and not a statement of a "fact."

3. It was further ground to deny the motion that the affidavit did not show that any demand to be permitted to make the inspection had been made and refused.

4. Under Code, § 389, providing that the court may order either party to give to the other within a specified time an inspection of papers in his possession containing evidence relating to the merits of the action, and that, if compliance with the order be refused, the party refusing may be punished, a penalty for such refusal should not be imposed till it is ascertained judicially that such refusal was without good reason.

Appeal from common pleas circuit court of Charleston county; J. B. Kershaw, Judge.

Action by Edward N. Jenkins against Elizabeth H. Bennett and Mary J. Ross to recover damages resulting from defendants preventing plaintiff from performing work which he had contracted to perform for defendants. Pending the action, Bennett died, and Ross was appointed her administrator. The court made an order continuing the action against the representative of Bennett and against Ross individually, and made a further order requiring defendants to furnish certain papers in their possession to plaintiff for inspection. From both orders defendants appeal. Reversed.

The following is the complaint: "The above-named plaintiff, Edward N. Jenkins, complaining of the above-named defendants, Elizabeth H. Bennett and Mary J. Ross, alleges: First. That the plaintiff is a contractor and builder, residing in Charleston county, South Carolina, and that the above-named defendants were, at the times hereinafter mentioned, seised in fee simple and the owners of a certain piece of property known as the 'Old American Hotel,' situate on the corner of King and George streets, in the city and county of Charleston, state aforesaid. Second. That on the 1st day of October, 1890, said defendants, by their agent, John H. Devereux, architect, published in the Charleston News and Courier, the following advertisement: 'Office of John H. Devereux, Architect, Charleston, S. C., September 29, 1890. Proposals will be received until Monday, the 20th day of October, 1890, for the work of furnishing the materials and labor required

to alter and improve the Old American Hotel property, at the corner of King and George streets, according to plans and specifications to be seen at my office and at the rooms of the Builders' and Dealers' Exchange, in this city. The bids will be open at 12 m. on Monday, 20th October, 1890, by the president of the Builders' and Dealers' Exchange, in the presence of the architect and such of the bidders as may desire to be present. The right is reserved to reject any and all bids. John H. Devereux, Architect.' Third. That thereafter, in response to said advertisement, on the 20th day of October, A. D. 1890, this plaintiff, at the Builders' and Dealers' Exchange aforesaid, according to the terms of said advertisement, offered to John H. Devereux, agent of said defendants, and put in a bid to do said work as aforesaid, and furnish the labor and material therefor in accordance with said plans and specifications, for the sum of nineteen thousand and two hundred dollars. Fourth. That the defendants, through their agent, the said John H. Devereux, thereupon accepted the said bid of this plaintiff, and thereby contracted and agreed to pay this plaintiff nineteen thousand and two hundred dollars in consideration of the performance by this plaintiff of the work of furnishing the materials and labor required to alter and improve the Old American Hotel property, at the corner of King and George streets, aforesaid, according to said plans and specifications so contracted and agreed by this plaintiff with the defendants to be done by this plaintiff at said price. Fifth. That then and thereafter this plaintiff was always ready, able, and willing to perform the said contract on his part, and duly offered then forthwith and from time to time to perform and complete the same, and to do all things necessary and usual for securing the same to be done. Sixth. That said defendants, in breach of the said contract, thereafter continuously hindered and prevented this plaintiff from performing the same, to the damage of this plaintiff by the loss of the direct profits on said contract in the sum of five thousand dollars. Wherefore plaintiff demands judgment against said defendants in the sum of five thousand dollars, together with the costs of this action."

McCrary, Sons & Bacot, for appellants.
Northrop & Memminger, for respondent.

McIVER, C. J. This action was commenced by the plaintiff against the defendants on the 12th of October, 1891, to recover damages for the loss of profits on a contract which he alleged the defendants hindered and prevented him from performing. In the complaint (a copy of which should be incorporated in the report of the case) the plaintiff alleges substantially as follows: (1) That he is a contractor and builder, and that the defendants were "seised in fee simple and

the owners of" certain real property in the city of Charleston, known as the "Old American Hotel." (2) That on the 1st day of October, 1890, the defendants, by their agent, Devereux, an architect, advertised for proposals "for the work of furnishing the materials and labor required to alter and improve the Old American Hotel property * * * according to plans and specifications" to be seen at the office of said architect and at the rooms of the Builders' & Dealers' Exchange, and that the bids would be opened at said exchange on the 20th day of October, 1890; the right of rejecting any and all bids being reserved. (3) That on said 20th of October the plaintiff put in a bid to do said work, and furnish the labor and materials therefor, according to said plans and specifications, for the sum of \$19,200. (4) That defendants, by their said agent, accepted said bid, "and thereby contracted and agreed to pay this plaintiff nineteen thousand and two hundred dollars in consideration of the performance by this plaintiff of the work of furnishing the materials and labor required" to do the work advertised for. (5) "That then and thereafter this plaintiff was always ready, able, and willing to perform the said contract on his part, and duly offered then forthwith and from time to time" to perform the same. (6) That said defendants, in breach of the said contract, thereafter continuously hindered and prevented this plaintiff from performing the same, to the damage of this plaintiff, by the loss of the direct profits on said contract, in the sum of five thousand dollars," for which sum, with costs, judgment is demanded. After issue was joined, the defendant Elizabeth H. Bennett departed this life intestate, and on the 24th of February, 1891, letters of administration upon her personal estate were duly granted to the other defendant, Mary J. Ross; and on the 3d of March, 1892, a notice was served on Messrs. McCrady, Sons & Bacot, defendants' attorneys, (they having signed the original answer of the defendants as such,) of a motion "to continue the above-named action against Mary J. Ross, as administratrix of Elizabeth H. Bennett, deceased, and against her individually." This motion was heard by his honor, Judge Kershaw, who granted an order continuing the action "against the representative of the said Elizabeth H. Bennett, deceased, and also against Mary J. Ross individually." From this order Mary J. Ross, in her own right, and as administratrix of Elizabeth H. Bennett, appeals upon the several grounds set out in the record, which need not be set out here, as they raise substantially but a single question, to wit, whether the right of action in this action survives. The solution of this depends largely upon the nature of the action,—whether it is an action *ex contractu* or an action *ex delicto*. If it is the former, then the general rule is that the right of action does survive; but, if the latter, then it

does not, unless the wrong which is the basis of the action has resulted in some gain or advantage to the estate of the wrongdoer. *Huff v. Watkins*, 20 S. C. 477, and especially the case of *Caldwell v. Ford*, Riley, 285, 286, where Richardson, J., explains the reason for the exception to the general rule that actions *ex delicto* do not survive. Now, what is the nature of the present action? To answer this question we must look alone to the allegations of the complaint, for that contains all that we can properly know of it. Looking to that source, we find that, while the complaint does set forth a contract that the plaintiff was to do certain work for the defendants, in consideration whereof the defendants were to pay the plaintiff a specified sum of money, yet there is no allegation of any breach of that contract; and it is difficult to conceive how any such allegation could have been made, for under the contract, as stated in the complaint, there was no duty or obligation imposed upon the defendants until after the work was done; and, as there is no allegation that any work was ever done, it is somewhat difficult to understand how it could be said with any propriety that the defendants had committed any breach of such contract. There is no allegation that the plaintiff had incurred any expense or made any outlay in preparation for the work, or that plaintiff had been deprived of the opportunity to obtain another job, but the only wrong complained of is that he was hindered and prevented by the defendants from performing said work, and the only damages claimed is, not any actual damages sustained by reason of loss of time or expense incurred in preparing to do the work, but simply the damages resulting from the loss of profits which he expected to make by performing the contract. It is also to be observed that the complaint does not state how the plaintiff was prevented by the defendants from performing the contract, but how that was effected is left entirely to conjecture. If this was effected by the use of force or other like means, if the defendants had unlawfully procured the arrest and imprisonment of the plaintiff, or had driven him from the country, then, clearly, the wrong complained of would have been a tort, remediable by an action *ex delicto*, and not by an action *ex contractu*. The wrong complained of was not any breach of the terms of the contract, nor did it arise out of any expense incurred in preparing to perform the work contracted for, as none such is alleged, but the only wrong complained of is hindering and preventing plaintiff from performing said work by some means not stated; and that was clearly a tort, and not a breach of the contract set forth in the complaint. In *Hammond v. Railroad Co.*, 6 S. C. 130, the plaintiff, who was a mail agent, intrusted with the charge of mail matter transported over the railroad of the defendant company, under a contract with the United States

government, one of the terms of which was that the mail agent should be transported free of charge, brought his action to recover damages for injuries sustained by reason of the negligence of the defendant while traveling over said railroad. The court held that the action was *ex delicto*, and not *ex contractu*; for the contract under which the plaintiff was transported free of charge had nothing to do with the matter, the wrong complained of being the tort of the defendant company. This, then, according to our view, being an action *ex delicto*, and not an action *ex contractu*, and there being no allegations in the complaint which would bring this case under any of the recognized exceptions to the general rule, we must hold that the circuit judge erred in holding that plaintiff's right of action survived, and in granting the order appealed from.

The defendants also appeal from another order made in this case, requiring the defendants or their representatives to permit the plaintiff or his attorneys or agents to inspect and take copies of certain papers mentioned in the order. In the notice of the motion for said order it is stated that the motion would be based upon the pleadings in the action and the accompanying affidavit of the plaintiff. In that affidavit it is, among other things, stated "that subsequently to the publication of said advertisement [referring to the advertisement hereinbefore referred to, calling for bids to furnish materials and do the work proposed to be done on the Old American Hotel] there was a written contract entered into by these defendants and one John D. Murphy to perform the work and furnish the materials for remodeling the said American Hotel." And it is further stated "that said plans and specifications [referring to the plans and specifications originally prepared by the architect, Devereux] and said contract contain evidence relating to the merits of the above-named action; that he has not the possession and control of said papers, nor has he copies thereof, but deponent says he verily believes that the same are in the possession or under the control of defendants or their representatives." Upon this showing the order in question was granted, which concludes in these words: "Further ordered that, if the defendants or their representatives fail to comply with this order, that said papers shall be excluded on the trial of the cause if offered in evidence by defendants or on their behalf, and that plaintiff be allowed to give parol evidence of their contents if he be so advised; or this order may be enforced by attachment as for contempt. That plaintiff have ten dollars costs herein." Section 389 of the Code, upon which the application for this order is based, or rather so much thereof as relates to this matter, reads as follows: "The court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, or-

der either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both." Inasmuch as we are satisfied that the order in question was erroneously granted on other grounds, we will not stop now to consider whether the doubt expressed as to the scope and intention of this section in *Cartee v. Spence*, 24 S. C., at page 558, is or is not well founded, especially as it does not appear from the moving papers in this case whether the object of the inspection asked for is to obtain evidence to be used by the plaintiff, or to ascertain what is the documentary evidence to be used by the defendants. We think it clear that before this somewhat extraordinary power should be exercised, the moving party should show, at least *prima facie*, such fact or facts as would enable the court to exercise its discretion as to whether such a power as is invoked should be exercised. Now, in this case, no facts of any kind are stated in the affidavit upon which the motion was based. The bald statement that the papers desired to be inspected "contain evidence relating to the merits of the action" is nothing more than an expression of the plaintiff's opinion, and cannot be regarded as a statement of any fact. Again, we think that there should be some statement showing a necessity for the exercise of such a power. It does not appear that any request or demand to be permitted to make the inspection has been made and refused. For aught that appears, such a demand or request would have been complied with; and this, we think, ought to have appeared, especially before any order mulcting defendants with costs should have been granted. In addition to this, it does appear that plaintiff had already enjoyed the opportunity of inspecting the plans and specifications for a period of at least 20 days, which we must infer the plaintiff had availed himself; and no reason is stated, or even suggested, why another inspection was necessary. As to the contract alleged to have been made with Murphy, it is impossible for us to conceive how it could throw any possible light upon the merits of the present action. Indeed, so far as appears, an order requiring the inspection of any other papers in any way relating to the Old American Hotel property might just as well have been asked as for the inspection of the contract with Murphy. We do not think that the power conferred by section 389 of the Code can be invoked for the purpose of gratifying mere idle curiosity, or possibly a worse motive, though, of course, we are not to be understood as even intimating that the plaintiff was actuated by

any improper motive in applying for the order in question, but we are simply considering the conditions upon which the power conferred by that section can be exercised. It seems to us that the order was erroneously granted, and should therefore be reversed; not because the circuit judge erred in the exercise of his discretion, but because the moving papers showed no facts upon which his discretion could be exercised.

As to the appeal from that portion of the order imposing the costs of the motion upon the defendants, it may be possible that we would have no authority to consider it if it stood alone, but when the order is reversed the provision requiring payment of costs must go with the order. See *Singleton v. Allen*, 2 Strob. Eq. 166. We must add, however, that we do not think this was a case for costs, unless it had appeared that the order asked for was rendered necessary by the refusal of defendants to allow the inspection of the papers referred to.

We must also say that we think it was error to impose a penalty, especially so harsh a one as an attachment for contempt, before it was ascertained judicially that defendants had refused or failed to comply with the order without good reason. It seems to us that the provisions of the section of the Code above referred to plainly imply that upon the refusal or failure to comply with the order a motion should be made, under a rule to show cause, for the imposition of the penalty, as it may be that the defendants might be able, in their return to such rule, to show sufficient reason for their failure to comply. See *Mills Co. v. Walker*, 19 S. C., at pages 112, 113. The judgment of this court is that both of the orders appealed from be reversed.

McGOWAN and POPE, JJ., concur.

STATE v. JENNINGS.

(Supreme Court of South Carolina. Jan. 15, 1894.)

Appeal from general sessions circuit court of Laurens county; W. H. Wallace, Judge.

G. T. Jennings was convicted of murder, and appeals. He now moves that the appeal be suspended to enable him to move for a new trial on the ground of newly-discovered evidence. Denied.

Ball, Simkins & Ball, Ferguson & Featherstone, and R. C. Watts, for appellant. Mr. Schumpert, for the State.

PER CURIAM. The defendant in this case, having been convicted of murder, and having perfected his appeal from the judgment of the circuit court, now moves to suspend the appeal for the purpose of enabling him to move for a new trial in the circuit court upon the ground of after-discovered

evidence. Under the well-settled practice of this court it is necessary that the appellant should make such a prima facie showing as would satisfy this court that this was a proper case for the granting of the motion submitted by the appellant. After a careful consideration of the affidavits upon which the motion is made, we cannot say that such a showing has been made. It is therefore ordered that the motion be refused.

DOMINICK v. ROOF, Ex-Sheriff.

(Supreme Court of South Carolina. Dec. 21, 1893.)

Appeal from common pleas circuit court of Lexington county.

Action by F. H. Dominick, administrator, against S. M. Roof, ex-sheriff. From a judgment for defendant, plaintiff appeals. Dismissed.

Meetze & Muller, for respondent.

McIVER, C. J. It appearing to the satisfaction of this court that the papers required to be filed herein, by consent order dated 18th December, 1893, by 11 o'clock this day, have not been filed. On motion of Messrs. Meetze & Muller, attorneys for respondent, it is ordered that the appeal herein be, and is hereby, dismissed.

REEVES et al. v. BRAYTON.

(Supreme Court of South Carolina. Dec. 20, 1893.)

Appeal from common pleas circuit court of Edgefield county.

Action by Sarah N. Reeves and others against Helen B. Brayton. From a judgment for defendant, plaintiffs appeal. Dismissed.

Allston & Patton, for appellants. Bachman & Youmans, for respondent.

McIVER, C. J. This is a motion to dismiss the appeal, based on the following notice and grounds: "Plaintiffs' attorneys will please take notice that the defendant will move the supreme court on Monday, December 17th, 1893, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, to dismiss the appeal herein on the grounds (1) that the matter appealed from is not appealable; (2) that this court has not jurisdiction to hear and determine the exceptions herein, and the questions they involve, under the appeal herein. Bachman & Youmans." After hearing argument pro and con, the court granted the following order: "The State of South Carolina. In the Supreme Court. Sarah N. Reeves, Mary O. Pope, Eliza A. Lewis, Robert N. Lewis, Lena Lewis, William Lewis, and Daniel B. Lewis, Plaintiffs,

Appellants, against Helen B. Brayton, Defendant, Respondent. On hearing respondent's motion to dismiss the appeal herein, and the argument of Mr. Le Roy F. Youmans, for respondent, pro, and of Mr. H. C. Patton, for appellants, contra, and it appearing that there is no appealable matter from which the appeal has been taken, ordered, that the motion be granted, and the appeal be dismissed. This order is without prejudice to plaintiffs' right to take such legal steps hereafter as she may be advised, no opinion beyond the point decided being intimated."

O'LEARY v. BRADLEY et al.

(Supreme Court of South Carolina. Jan. 3, 1894.)

Appeal from common pleas circuit court of York county.

Action by George H. O'Leary against A. J. Bradley and others. From a judgment for plaintiff, defendants appeal. The appeal was dismissed by the clerk, and defendants now move to reinstate, while plaintiff makes another for dismissal. Reinstatement denied.

J. P. Thomas, Jr., for appellants. Geo. W. S. Hart, for respondent.

McIVER, C. J. There are three motions in this case, as follows: (1) The defendant, appellant, moves for an order vacating the order of the clerk dismissing the appeal under rule 1, and to reinstate the same, on the ground of excusable neglect on the part of the appellant. (2) The plaintiff, respondent, moves to dismiss the appeal on the ground of failure on the part of the appellant to file the "case," as settled, in the office of the clerk of the circuit court, as required by rule 49 of the circuit court, in the event of the first motion being granted. (3) The plaintiff moves for an order dissolving the order of injunction, granted by Mr. Associate Justice Pope pending the motion made by the defendant, appellant, to reinstate his appeal. The appellant submitted various affidavits in support of his motion, and the respondent submitted affidavits in reply thereto. After hearing counsel on both sides, the court decides as follows: The real question is whether the appellant has made such a showing of "excusable neglect" as will entitle him, under the rule of this court, to have his appeal reinstated. If this is decided adversely the motion of the respondent to dismiss, under rule 49 of the circuit court, does not arise and need not be considered. The motion to dissolve the order of injunction is dependent on the result of the first motion. There is no doubt as to the right of the clerk to dismiss the appeal, under rule 1, upon the affidavit submitted to him, and no question has been raised as to that. It does seem to us, without going into all the minute details of this case, that the ap-

pellant has not shown any sufficient reason for his neglect. The notice of intention to appeal was given as far back as 27th April, 1893. But, without discussing all the details, we are impressed with the belief that there has not been shown any excusable neglect in appellant's failure to file his return as required by the rule. The motion must therefore be refused.

The court granted the following order: "State of South Carolina. In the Supreme Court. Geo. H. O'Leary, (Respondent,) Plaintiff, against A. J. Bradley (Appellant) and others, (Respondents,) Defendants. The appeal herein was dismissed by the clerk of this court, under rules 1 and 2, and the appellant (A. J. Bradley) moves to reinstate the appeal. The respondent resists the motion, and moves to dissolve the order of injunction herein, granted by Hon. Y. J. Pope, one of the justices of this court, on November 1, 1893, staying the sale of the land by the clerk of the circuit court for York county in this state. After due consideration: Ordered, that the motion to reinstate the appeal be refused; and, the motion to reinstate having been denied, ordered, further, that the order of injunction, staying the sale of the land by the clerk of the circuit court for York county, be and the same is hereby dissolved. Let the papers be filed with this order."

STATE v. GREEN.

(Supreme Court of South Carolina. Feb. 13, 1894.)

CRIMINAL LAW — CONFESSION OF CO-CONSPIRATOR — OPINION EVIDENCE.

1. A confession by a conspirator after the crime is accomplished binds him, but not his co-conspirators.

2. Where the witness had traced before the jury the peculiarities of accused's foot, and had shown how such peculiarities were reproduced in a track, it was error for him to express his opinion that the track which he saw was made by accused.

Appeal from general sessions circuit court of Laurens county; W. H. Wallace, Judge.

Charles Green was convicted of arson, and appeals. Reversed.

Defendant appealed from the judgment and verdict on the following grounds: "(1) Because his honor erred in refusing to charge the jury that if they believed that any confessions introduced in evidence were not made freely and voluntarily, without any inducement or circumstances inciting hope of favor in the mind of the accused, or without any threat or violence producing conclusion or fear of punishment in the mind of the accused, they must not take such evidence into consideration. (2) Because his honor erred in charging the jury that whether the confessions of George Bowers and Wade Cannon were admissible in evidence was a question for the court, and not for the jury; and after it goes to the jury they

are not to consider the question of its admissibility, but whether or not they believe it, and its force and effect. (3) That his honor erred in allowing state's witness D. H. A. Mason to make prejudicial remarks on the witness stand, not connected with the case, and calculated to inflame the minds of the jurors against the prisoner. (4) Because his honor erred in allowing state's witness D. H. A. Mason to give his opinion as to when Charley Green ought to have been hung, and also to name special instances of his bad conduct. (5) Because his honor erred in allowing state's witness T. L. Johnson to give his opinion that a certain track found in the field was that of the defendant, Charley Green. (6) Because his honor erred in ruling that, if a conspiracy was established, the confession of one codefendant is the testimony of all. (7) Because his honor erred in refusing to charge, without modification, the fourth request, and in saying to the jury: 'In order to convict upon such testimony as that,—upon the testimony of circumstances,—the jury must be satisfied that the existence of these circumstances are consistent with the prisoner's guilt, and inconsistent with his innocence, because, if they are not inconsistent with his innocence, then there is reasonable doubt of his guilt, so far as these circumstances are concerned.' (8) Because his honor erred in charging the jury that, in order to constitute guilt in a felony, it is not necessary that all the parties charged should actually participate in the act which of itself constitutes the offense. If they are present, knowing of, aiding, abetting, concurring, inciting, participating in, in any way, they are all felones upon an equal footing,—they are all principal felons. (9) Because his honor erred in stating to the jury that 'It is proven here, and admitted, that the house was set fire to in the nighttime, and consumed, by others than the owner thereof.' (10) Because his honor erred in admitting in evidence the confessions of George Bowers and Wade Cannon."

J. Wright Nash, for appellant. O. L. Schumpert, for the State.

POPE, J. The appellant was tried and convicted of the crime of arson at the July term, 1893, of the court of general sessions for Laurens county, and, after having been duly sentenced, has appealed therefrom. His grounds of appeal, 10 in number, will be set out in the report of the case, and hence will not be reproduced here. After a careful examination of these suggestions of error, we find that two are well taken, thereby necessitating a new trial in the court below.

The first of these is raised by an excep-

tion at the trial to the competency of the confessions of two defendants, of whom the appellant was not one, made after the crime had been fully consummated, to affect the accused, who was not a party to such confession, on the alleged ground, as ruled by the circuit judge, "that, if a conspiracy is established, what one says is the testimony of all." Such is not the rule of law. The circuit judge for the moment overlooked the marked distinction between the acts and declarations of parties to a conspiracy before the object is actually reached, on the one side, and the acts or declarations of any party to such conspiracy, made after the object of the conspiracy is reached, on the other side. There is no doubt but that, when persons have banded themselves together to accomplish some crime, every word or act of each conspirator in furtherance of such accomplishment of the crime binds every other of such conspirators. But it is equally true that, when once a conspiracy is ended, no such ligament binds each co-conspirator, so that a confession of any one or more of such co-conspirators binds all who conspired. The confession binds him who makes it, but not his fellow conspirators. *State v. Dobson*, 14 S. C. 628; *State v. Brown*, 34 S. C. 46, 12 S. E. 662; 1 *Greenl. Ev.* § 333.

The next error below consisted in allowing Mr. Thomas L. Johnson, a witness for the state, to give his opinion that a track in dispute was made by the accused, Charles Green, against the objection of his counsel. The witness was evidently intelligent and conscientious. It was perfectly competent for him to trace minutely before the jury the peculiarities of the foot of the accused, and also how these peculiarities were reproduced in the track the witness saw. Beyond this we fear he ought not to have been required to go,—we mean in expressing his opinion that the track was made by Green. Such an inference should have been left to the jury. 1 *Greenl. Ev.* § 440; *State v. Senn*, 32 S. C. 400, 11 S. E. 292.

We do not deem it our duty, having been forced to the conclusion that a new trial must be had, to discuss the other alleged objections of the appellant, especially as we find no error there. It is the judgment of this court that the judgment of the circuit court be reversed, and that the cause be remanded, to the end that there may be a new trial of the defendant, Charles Green.

McIVER, C. J. I concur in the result only, as I am not now prepared to commit myself upon the questions raised by the first and second exceptions.

McGOWAN, J., concurs.

NURNBERGER'S ESTATE v. LUDEKINS.

(Supreme Court of South Carolina. Feb. 16, 1894.)

MARRIED WOMAN—POWER TO ADMINISTER ESTATES.

Act 1891, (20 St. p. 1121.) giving a married woman the same power to contract as if single, except as to suretyship and guaranty, empowers her to sign an administration bond as principal, and therefore to administer an estate.

Appeal from common pleas circuit court of Aiken county; T. B. Fraser, Judge.

In the matter of the estate of C. F. Nurnberger, deceased. Petition of C. F. Nurnberger, Jr., for revocation of letters of administration granted to Mrs. Elizabeth Ludekins. From a judgment of the circuit court affirming the decree of the probate court dismissing the petition, petitioner appeals. Affirmed.

Patterson & Holman, for appellant. Henderson Bros., for respondent.

McGOWAN, J. There is no controversy about the facts, which are admitted as follows: C. F. Nurnberger, a resident of Aiken county, died intestate, and his eldest sister, Mrs. Elizabeth Ludekins, filed her petition in the probate court of Aiken county to have granted to her letters of administration upon his estate. She was and is a married woman. The probate judge, after the publication of the usual citation, calling upon the kindred and creditors of the deceased to show cause why letters of administration should not be granted to the petitioner, on the — day of October, 1892, granted her such letters, and, having given the bond required by the probate court, she entered upon the discharge of her trust. Within a short time thereafter, but after the time allowed to appeal therefrom had expired, on November 25, 1892, C. F. Nurnberger, Jr., a nephew of the deceased intestate, filed in the probate court his petition praying that the letters of administration granted to Mrs. Elizabeth Ludekins should be revoked, upon the ground that she was a married woman, and therefore not entitled to letters. It seems that the petitioner was a resident of Barnwell county, adjoining that of Aiken, where the citation was published; but he does not claim that he had no notice of the application of Mrs. Ludekins, and he makes no charge of fraud against her or the court in regard to the grant of letters. The probate court rendered a decree dismissing the petition, on grounds stated. The petitioner appealed to the circuit court, and his honor, Judge Fraser, dismissed the appeal, and affirmed the decree of the probate court, saying: "I feel constrained to dismiss the appeal for the reasons given by the probate judge, and for the further reason that it seems to me that under the act of 1891 a married woman may become the administra-

trix of an estate. She becomes administratrix by signing a bond, and this is a contractual act, which is not inhibited by said act, but is covered by its terms." Another appeal now comes to this court, upon substantially two grounds, as follows: (1) Because his honor erred in holding that the previous grant of letters of administration to Elizabeth Ludekins was conclusive against the right of the petitioner (C. F. Nurnberger) to have the same annulled in this proceeding; (2) that his honor erred in holding that Elizabeth Ludekins, being a married woman, could take upon herself the duties of administratrix of an estate, and that such power was conferred upon her by the act of 1891.

It will be observed that, in the order required in the appointment of administrators by section 1893 of the General Statutes, a sister has priority over a nephew, and therefore Mrs. Ludekins has the better right to the administration, unless, under the law existing at the time of her appointment, she was without power or right, as a married woman, to receive the office and discharge the duties thereof. This is really the only question in the case. Did Mrs. Ludekins, a married woman, have that power, under the law, at the time of her appointment? Under the constitution of 1868, and the first laws passed under it, there has been much discussion as to what were the powers and rights of married women in this state. But, as we think, it can hardly be necessary to open the argument here, since the passage of the act of 1891, (20 St. p. 1121.) which provides as follows: "A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyances therefor, and to bind herself by contract in the same manner and to the same extent as though she were unmarried, which contracts shall be legal and obligatory, and may be enforced at law or in equity by or against such married woman in her own name, apart from her husband: provided that nothing herein shall enable such married woman to become an accommodation indorser or surety; nor shall she be liable on any promise to pay the debt or answer for the default or liability of any other person; and provided further that the husband shall not be liable for the debts of the wife, contracted prior to or after their marriage, except for necessary support, and that of their minor children residing with her," etc. This act is clear and unequivocal in its terms. The case does not fall within either of the exceptions made, and we therefore feel constrained to concur with the probate and the circuit judges that the signing of an administration bond is a contractual act, which is not inhibited by the act, but, on the contrary, is covered by its express terms. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER and POPE, JJ., concur.

WALKER v. CHESTER COUNTY.

(Supreme Court of South Carolina. Feb. 16, 1894.)

HIGHWAYS—DEFECTS—PLEADING—CONTRIBUTORY NEGLIGENCE.

Gen. St. § 1087, giving the right of action against the county for damages for defects in roads, as amended in 1892 by the proviso that the person injured has not himself caused the injury or negligently contributed thereto, requires the complaint to affirmatively disclaim contributory negligence.

Appeal from common pleas circuit court of Chester county; Ernest Gary, Judge.

Action by Bersha H. Walker against Chester county for damages for injuries caused by a defect in a highway. Demurrer sustained, and complaint dismissed. Plaintiff appeals. Affirmed.

Henry & Gage, for appellant. Will A. Barber, for respondent.

MCGOWAN, J. This was an action to recover damages, alleged to have been sustained by reason of a defective highway. The complaint stated that on February 23, 1893, the plaintiff was passing along the public highway of Chester county on the Worthy's ferry road, at a point between Dry Fork and the intersection of the said road by the Georgia, Carolina & Northern Railway, and that by reason of a defect in the repair of the said road the buggy which conveyed the plaintiff was overturned and broken, the horse which drew plaintiff was held fast in the mire so that it had to be prized out, the harness upon the horse was broken, the plaintiff was bruised and injured in her person, and her wearing apparel was utterly ruined; that the defect in said highway consisted in a bog, caused by the excessive accumulations of water and the wear of passing wheels; that its existence was well known to the proper authorities of the defendant, and was the result of their gross negligence, as plaintiff verily believes; that by reason of the injuries suffered by the plaintiff in her person and property, and enumerated in paragraph 1 hereof, she has been damaged in the sum of \$250, etc. The defendant answered, denying each and every statement in the said complaint contained; that if the highway referred to in the complaint was defective, it was due to providential causes, and not to any carelessness on the part of the defendant county, or its agents or servants; that the defendant and its agents and servants used due care and diligence in repairing said highway and keeping the same in good repair; and that, if the plaintiff were injured in her person or property, such injury was not caused by any negligence or carelessness on the part of the defendant or its agents and servants, but was owing to the carelessness and negligence of the plaintiff herself, etc. The cause came on to be heard at the October term, 1893, before Judge Gary and

a jury, when the defendant interposed an oral demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that it failed to allege that the plaintiff did not in any way bring about her injury or damage by her own act, or negligently contribute thereto; and, further, that it failed to allege that at the time of the injury the plaintiff's load did not exceed the ordinary weight, etc. The judge sustained the demurrer, and dismissed the complaint, whereupon the plaintiff appeals to this court, upon the ground that the judge erred in holding that the complaint failed to state a cause of action in the plaintiff against the defendant, in that it failed to allege that the plaintiff "did not negligently contribute to the accident set out in the complaint," etc.

The only question in the case is whether the circuit judge erred in sustaining the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action. As we understand it, a county was not liable at common law in a civil action for injuries received from defects in the repair of highways, bridges, etc. See *Young v. City Council of Charleston*, 20 S. C. 116. But the legislature, (section 1087 of the General Statutes,) by act gave a right of action to persons suffering damage through a defect in the repairs of roads, etc., but denied damages to persons hauling "loads" in excess of the ordinary weight; but, while this was the law, it was held that the general rule as to contributory negligence applied, but could only be shown as matter of defense. See *Acker v. Anderson Co.*, 20 S. C. 495, and *All v. Barnwell Co.*, 29 S. C. 161, 7 S. E. 58. This was the law until the amendment of 1892 was passed, which added the following remedial provisions, all in one section of the act, and clearly within the purview of the same: "Provided such person has not in any way brought about such injury or damage by his own act, or negligently contributed thereto. If such defect in any road, causeway or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceeded the ordinary weight. Provided further, that such county shall not be liable unless such defect was occasioned by its neglect or mismanagement," etc. This action was commenced after this amendment became law, and now the question arises for the first time as to its proper construction. It will be observed that no reference is made to it in the complaint, which was framed just as if the amendment had never been passed. Was it necessary that the complaint should have stated affirmatively that the plaintiff "had not brought about the injury or damages by her own act or negligently contributed thereto"? If not, we cannot understand what was accomplished by the amendment. We can hardly suppose that the lawmakers meant to

more than simply to reaffirm the law as it then stood. One of the established rules of construction is that it will not be presumed that the legislature intended any part of a statute to be entirely without meaning. The legislature was restating the terms and conditions upon which damages, in a civil action, might be recovered from a county; and we rather suppose that the intention was to change the law as to contributory negligence being only a matter of defense, and to make it necessary to a right of action that the complaint should allege, as a part of the plaintiff's cause of action, that he had not in any way brought about such injury or damage by his own act, or negligently contributed thereto, the effect being merely to shift the burden of proof. The right of action being purely statutory, the proof should fulfill every requirement of the statute, and to do so it was necessary that the complaint itself should contain appropriate allegations to sustain that proof. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, O. J. I concur in the result. The right of action in this case being based entirely upon a special statute, it seems to me that the conditions upon which such right is conferred must appear in the complaint, for otherwise no right of action is stated.

POPE, J., concurs.

STATE v. MORGAN.

(Supreme Court of South Carolina. Feb. 17, 1894.)

MURDER—DRUNKENNESS AS A DEFENSE—ACCIDENTAL KILLING—INSTRUCTIONS.

1. Drunkenness of defendant at the time of committing a homicide cannot be considered in determining intent as bearing on malice.

2. An instruction that if defendant put himself in a position to defend himself against an attack by deceased, and his gun went off accidentally, he would not be guilty, was properly limited by a condition that defendant held the gun in a proper manner, and took particular care in holding it.

3. There is no error in the use in an instruction of an illustration of the law of accidental killing where the defense is of that nature.

Appeal from general sessions circuit court of Greenville county; James Aldrich, Judge.

J. W. J. Morgan was convicted of murder, and appeals. Affirmed.

A. Blythe, for appellant. Mr. Ansel, for the State.

McIVER, C. J. The defendant was indicted for and convicted of the murder of L. Washington Hipps, and, having been duly sentenced, appeals upon the following grounds: "(1) Because his honor refused to charge the jury that they had the right to

consider the intoxication or drunkenness of the defendant in any event, even in determining the intent with which he acted, or whether he acted with malice. (2) Because his honor, the circuit judge, not only refused to charge the jury as above set forth, but charged the jury as follows: 'In the eye of the law a man is responsible for his acts, and a drunken man is just as responsible as a sober man, because, if the law were otherwise, a man would only have to fill himself up with whisky, and go on and perpetrate an offense, and then plead that he was under the influence of liquor. That is not the law of this state, and it never has been the law.' (3) Because his honor, the circuit judge, refused to charge the jury that if they believed from the evidence that the deceased drew the hoe to strike at the defendant he had a right to put himself in position to defend himself; and if, under these circumstances, the gun went off accidentally, he would not be guilty of any offense at all. (4) Because the presiding judge not only refused to charge the jury as above requested, but, in reference thereto, charged as follows: 'That would be correct law, gentlemen, if you also believed that he held that gun in a proper manner, and took particular care in holding it. I think this covers the case,—he must have been careful in holding it.' (5) Because his honor, the circuit judge, did not charge the jury correctly as to the law of accidental killing, and did not charge the law fully with reference to the facts of this case, but, amongst other things, erroneously charged as follows: 'If a workman in a town was on a house, and threw off a scantling, and gave due notice of the injury, and it hit some one and killed him, that would be an accident, and he should go free; but if, on the other hand, a workman in a town should throw a piece of scantling or other heavy substance off a house into a street where people are wont to pass, and it strikes and kills some one, that would be murder.' (6) Because his honor, the circuit judge, refused the defendant's motion for a new trial."

This case was submitted to us without argument on either side, and all that we know of it is derived from the record submitted here. The first remark which we have to make is that the record does not show that any requests to charge were submitted except that upon which the third ground of appeal is based; and that request was not really refused, but was simply modified by the very proper qualification that where one seeks to be excused for taking the life of another with a deadly weapon, on the ground of accident, it must appear that due care was exercised in handling such weapon. We might, therefore, under the well-settled rule, decline to consider all such grounds of appeal as rest upon refusal to charge alleged requests, where such requests do not appear from the record to have been made. But in-

favorem vitae we will not hold the appellant to the strict rule in this case, and will proceed to consider the several grounds of appeal in their order.

The first and second grounds of appeal are intended to raise the question whether the alleged fact that defendant was drunk at the time the homicide was committed should be considered by the jury in determining the question of the intent of defendant as bearing upon the question of malice. In the first place, we would remark that there is nothing in the evidence upon which such a question could be raised; for there is not only no evidence that the defendant had reached such a stage of drunkenness as might, under some authorities, warrant the raising of such a question, but, on the contrary, the defendant himself said, while on the stand as a witness, that he was not drunk at the time he committed the homicide. His answer to the question propounded by his own counsel, "Were you drunk when you shot Mr. Hipps?" was: "No, sir; I was not. I had just had two or three drinks." But it seems to us that the law upon the subject of drunkenness as an excuse for crime, as laid down in 1 Bish. Cr. Law, c. 28, and especially section 401, amply vindicates the ruling of the circuit judge. See, also, *State v. Bundy*, 24 S. C. 444. There is nothing in this case which renders it necessary, or even proper, to go into any consideration of the supposed limitations of the general doctrine that voluntary intoxication furnishes no excuse for crime committed under its influence, which are discussed by Mr. Bishop in the chapter above referred to. These grounds must be overruled.

The third ground of appeal cannot be sustained, for, as we have seen, the request upon which that ground is based was not refused, but the proposition contained therein was modified, as common sense, as well as the authorities, clearly required. This covers also the fourth ground.

The fifth ground of appeal imputes error to the circuit judge in using the illustration which he did as to the law of accidental killing. Inasmuch as a similar illustration has been used by standard writers on the criminal law, as may be seen by reference to 1 Russ. Crimes, marg. p. 461, and 1 Bish. Cr. Law, § 314, it is very obvious that this ground cannot be sustained.

The sixth ground, as has been often held, cannot be considered by this court, for it imputes no error of law to the circuit judge. Indeed, it does not appear from the record submitted to us that any motion for a new trial was ever made. The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court, in order that a new day may be assigned for the execution of the sentence heretofore imposed.

MCGOWAN and POPE, JJ., concur.

HAMER v. BROWN et al., County Commissioners.

(Supreme Court of South Carolina. Feb. 16, 1894.)

FENCE LAWS—EXEMPTIONS—EXTENSION—INJUNCTION.

An owner of land within the additional exemption from the stock law in Williamsburg county, under Act 1892, cannot enjoin the commissioners from proceeding under the act merely because the removal of the old fence will oblige him, at great expense, to fence his crops against the stock running at large in the exemption, and the taxes to keep up the new fence will be a further loss to him, where he does not aver that any part of the old fence is to be removed, or new fence built, on his land, or any of his timber used for the new fence, nor seek to enjoin any tax now to be levied.

Appeal from common pleas circuit court of Williamsburg county; T. B. Fraser, Judge.

Action by Daniel H. Hamer against W. R. Brown, J. J. Graham, and B. B. Chandler, commissioners of Williamsburg county, for an injunction. Demurrer to complaint sustained, and writ denied. Plaintiff appeals. Affirmed.

The complaint alleges as follows: "(1) That the defendants, W. R. Brown, J. J. Graham, and B. B. Chandler, are the county commissioners of the said county of Williamsburg, having been duly elected as such at the last general election for state and county officers held in said county, and having duly qualified as such county commissioners according to law, and they are now discharging the duties of said office. (2) That the plaintiff is the owner in fee simple and lawfully possessed of all that certain tract of land in said county known as the 'Gordon Place,' containing fifteen hundred acres more or less, bounded on the north by Black river, south by lands of William Blakeley, east by lands of the estate of N. W. McCullough, and west by the public road leading from the lower bridge to Lenud's ferry; and he has so owned and been in possession of said lands since the 8th day of February, 1882. (3) That now, and ever since he has owned said lands, the plaintiff is and has been exclusively engaged in planting and cultivating said place for a livelihood, raising and producing agricultural products for the market and for home consumption, and he has no other means of support. That there are now three or four hundred acres of said land under cultivation, about two hundred thereof being planted and cultivated by the plaintiff, and the balance by his tenants, who pay him reasonable rents therefor. (4) That any of said land is reasonably worth five dollars per acre. (5) That ever since he has owned the said place the plaintiff has been planting and cultivating the same without fences, and without interruption from roaming stock or otherwise; that said place is very scarce of material for building fences, and the plaintiff could not now fence his lands under cultivation without buying ma-

terial at enormous expense, and at such prices and on such terms as he is unable to pay. (6) That under the act of the general assembly entitled 'An act to provide for the exemption of certain counties in this state from the provisions of chapter 27 of the General Statutes, relating to the general stock law,' approved December 23, 1882, (18 St. at Large, p. 238,) the county commissioners for said county, for some years past, have erected and maintained a fence between the section in said act exempted and the rest of said county of Williamsburg, which fence lies east of the said plantation of the plaintiff, and does not embrace the said plantation in the said exempted territory; that the said plantation lies between the said fence and the Lenud's Ferry road. (7) That under an act of the general assembly of this state entitled 'An act to exempt certain portions of Anderson and Penn townships, in Williamsburg county, from the provisions of chapter 27 of the General Statutes relating to the general stock law,' the defendants are proceeding, against the will of the plaintiff and of the majority of the freeholders in the section of country in said act described, and in which plaintiff's said plantation is situated, and without any compensation to the plaintiff for his reasonable damages, or provision for the same, to remove the fence from where it now runs, and build another fence along the Lenud's Ferry road, so as to include plaintiff's said plantation in a general pasture provided for by the acts aforesaid, and thereby appropriate the same to the use of the stock owners in the said pasture, notwithstanding notice from the plaintiff to the defendants prohibiting the same. (8) That, in said additional section of country now proposed to be embraced in said general pasture, there are not more than ten head of cattle and twenty-five head of hogs, no sheep and goats, and very few dogs, and an absolute sale of all such stock in said 'section' would not build the fence now projected. (9) That the cattle in said general pasture roam in large herds, of from twenty-five to one hundred head; and if allowed to run at large, and about plaintiff's land, in one night a single herd could almost run over and destroy plaintiff's entire crop, and he is without sufficient means to prevent such destruction. (10) That many of the persons owning stock in the said general pasture, are utterly insolvent, and could not be made to respond in damages for any injury that their stock might do to plaintiff's crop or premises. (11) That if his plantation is inclosed in said pasture the plaintiff's tenants would desert his premises, and he would thereby lose, his rents, and his income from that source. (12) That by said actions and proceedings on the part of the defendants, the plaintiff would suffer great, permanent, and irreparable damage, and he is without other remedy in the premises. Wherefore, the plaintiff

demands judgment (1) that the said defendants be restrained and enjoined from inclosing the plaintiff's said plantation in said pasture; (2) for such other and further relief as to the court may seem just; (3) for the costs of this action."

T. M. Gilland, for appellant. E. Girardeau Chandler, for respondents.

McGOWAN, J. This was an action to enjoin the county commissioners of Williamsburg from carrying into effect certain provisions of an act of the legislature, (Acts 1892, p. 361,) by which, it will be observed, certain additional territory in said county of Williamsburg was exempted from the operation of chapter 27 of the General Statutes, relating to the general stock law, and by said injunction preventing the defendants from removing the fence around the original exemption, and building another fence around the lines of the additional exemption, including the plaintiff's plantation, of 1,600 acres of land. The complaint does not state that the old fence is to be removed from, or the new fence placed upon, any portion of plaintiff's plantation, which lies entirely within the additional exemption, or that any of the plaintiff's timber is to be used in the construction of the new fence, nor does the complaint ask for any injunction against the collection of any tax now proposed to be levied. As the circuit judge states it: "The injuries which the plaintiff seeks to avoid are those which will grow out of the exposure of his crops to the stock roaming at large in this portion of the county and adjoining, on what it is proposed to call a 'big pasture,' unless the plaintiff shall, at very heavy expense, protect his crops by suitable fences, which are not now necessary, and also the loss from taxation which the plaintiff and others expect hereafter to suffer, from the carrying out of the provisions of the aforesaid act," etc. (A full copy of the complaint should appear in the report of the case.) The defendant commissioners demurred that the complaint does not state facts sufficient to constitute a cause of action for an injunction; and the cause coming on to be heard before his honor, Judge Fraser, he decreed as follows: "The question presented to me is the constitutionality of the whole act, and to this I will confine my ruling, so far as the plaintiff has the right to make it in this case, leaving it for the landowners whose lands will be appropriated for the new fence to make their own points in their own way. * * * There may be serious constitutional objections to this act, as to which I do not feel at liberty to express an opinion here. The only injuries complained of in this action are such that I do not think will warrant the court in granting the injunction prayed for; and, though in a more aggravated form, they are only such as every planter endured from the colonial days until the passage of the general stock law, a

few years ago. The plaintiff only complains here that it will be necessary for him to fence in his crops, to protect them from stock roaming at large. It is ordered that the demurrer be sustained; that, however, the plaintiff have leave, within twenty days, to amend his complaint in any way he may be advised; and, if not amended by that time, that the complaint be dismissed. It is further ordered that if the complaint be amended the defendants have twenty days after service of a copy of the amended complaint to answer or demur to the same," etc. The plaintiff excepts to the ruling of the presiding judge: (1) "That he erred in ruling that the injuries complained of in this action do not warrant the granting of the injunction asked for, and that the act of 1892 is constitutional; (2) that the presiding judge erred in holding that the complaint does not state facts sufficient to constitute a cause of action."

We think it is a mistake to suppose that the circuit judge held that the act of 1892 is constitutional, in all of its provisions. On the contrary, he was very careful to guard against any such impression, by expressly confining his rulings to the questions which the plaintiff had the right to make in this case, under the allegations and prayer of his complaint; leaving it for the land holders whose lands will be appropriated for the new fence to make their own points in their own way, as in the case of *Fort v. Goodwin*, 36 S. C. 445, 15 S. E. 723. The circuit judge construed the complaint as only making one specific allegation,—that the defendants are about to remove the fence "from where it now stands, and building another fence, so as to include plaintiff's plantation," without actually touching it at any point. It is not stated in the complaint whether or not certain provisos in the act have been complied with on the part of the county commissioners, etc. We think the judge did right in limiting his rulings to the case made in the pleadings; and as a consequence this court, here, cannot consider any original questions not made below, or decided by the judge. We cannot say that, in this view, he committed error in sustaining the demurrer; for, if the legislature had the constitutional right to create the first exemption from the operation of the general stock law, we cannot clearly see why, considered as the sole question, they had not the right simply to enlarge that exemption. But the judge said, further, that there might be serious constitutional objections to the act, as to which, on the complaint alone, he was not at liberty to express an opinion; and therefore, while sustaining the demand, he gave the plaintiff leave, within 20 days, to amend his complaint in any manner he may be advised, and, if not amended within that time, that the complaint be dismissed; and he ordered, further, "that if the complaint be amended the defendants have 20 days after service of a copy of the amended complaint to answer or demur to

the same," etc. We also agree with the circuit judge that it was proper to give to the plaintiff the right to amend his complaint as he may be advised. The general stock law, with the exemptions made to it at different times, has given rise to questions which are important and novel, and should receive the fullest consideration; as, for example, the act under consideration, (1892,) "To exempt certain portions of Williamsburg county from the operations of the general stock law," etc., contains these provisions, as to which the complaint makes no specific allegations in regard to performance or nonperformance on the part of the defendants. The proviso of the second section is as follows: "Provided, that the said county commissioners shall levy a special tax upon the assessed value of all the cattle, hogs, sheep, dogs and goats, embraced in such section, exempted as aforesaid, sufficient to remove said old fence, and to build said new fence: and repairs," etc. And the fourth section provides as follows: "That this act shall go into effect, from and after the provisions of sections 2 and 3 of same, are complied with." It seems to us that these are important provisions, upon the question as to whether the plaintiff is entitled to have an injunction against the removal of the old fence, and the act of 1892 declared unconstitutional. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and POPE, J., concur.

STATE v. TRAMMELL.

(Supreme Court of South Carolina. Feb. 13, 1894.)

HOMICIDE—SELF-DEFENSE—PROVOKING QUARREL.

1. Accused being, as he thought, insulted by a negro waiter, left the restaurant, and 20 minutes later returned, and remarked that he was going back to see about his supper. The proprietor tried to restrain him, but he went into the kitchen, and cursed the negro, who begged his pardon. In spite of the proprietor's remonstrances, accused continued to curse the negro, and then shot him twice. He asserted that the negro was advancing on him with a carving knife. Held proper to charge that, if he went into that room, and provoked the quarrel, there was no question of self-defense.

2. When only one's own safety is in question, he is bound to avoid bloodshed, if possible, by retreat.

Appeal from general sessions circuit court of Greenville county; J. J. Norton, Judge.

J. Luther Trammell, convicted of manslaughter, appeals. Affirmed.

Earle & Mooney, for appellant. Martin F. Ansel, for the State.

POPE, J. On the 22d day of December, 1892, in the city of Greenville, in this state, J. Luther Trammell gave an order to the proprietor of a restaurant for his supper. When seated in the dining room of such

restaurant, Eugene Robinson, who was the sole waiter in such dining room, brought to the said Trammell his supper. The latter, upon discovering that one of the articles of food he had ordered was not supplied, said to the waiter, "This is not what I ordered;" to which Robinson, the waiter, replied, "You are blamed hard to please;" to which remark Trammell replied, "I don't want to take any insults from a damned negro," immediately leaving the dining room. He complained to the proprietor, Mr. Legon, who promised to send him his supper over at the Windsor Hotel. Becoming very much engaged with his other customers, Mr. Legon neglected to send the supper over to the hotel. Some time afterwards—15 or 20 minutes—Trammell returned to the restaurant, and said, "I am going back to see about my supper," to which remark Mr. Legon, the proprietor, said: "Luther, [Mr. Trammell,] for God's sake don't have any trouble here in my place. I have had trouble enough." Although Mr. Trammell said he would not, he still went through the dining room, through the pantry, and into the kitchen of the restaurant. Mr. Legon, the proprietor, caught him by the right arm. When they entered the kitchen the defendant, Trammell, said, cursing Robinson, the waiter, "You have insulted me;" to which Robinson replied, "I beg your pardon." Trammell was much excited. Mr. Legon not only had hold of his arm, but also stood between him and the waiter, and said: "Luther, he has begged your pardon. Now come on, and let us go out." Trammell did not do so, but still cursed the negro. Finally he drew his pistol, and emptied the contents of two barrels of the pistol into the body of Eugene Robinson, the waiter, causing his instant death, claiming as his justification that said Eugene was advancing upon him with a large carving knife. At the July term, 1893, of the court of general sessions for Greenville county the defendant, Trammell, was tried upon an indictment for murder, before Judge Norton and a jury. He was convicted of manslaughter, and sentenced to four years' imprisonment in the state penitentiary. He now appeals to this court upon two grounds, substantially as follows: (1) Because the circuit judge erred in charging the jury "that, if the defendant did go into that room, and did provoke the difficulty by his language and manner in that room, then the plea of self-defense would be gone, although the other elements of self-defense would be present in the case; and if you find that you need not consider the other elements of self-defense." (2) Because his honor erred in charging the jury as follows: "Now, gentlemen, I desire to correct the theory of the law which the last counsel who addressed you for the defense says is his theory of the law,—that a man is not bound to retreat. Our books are full of law on that subject. Our law does require that a man should retreat."

We are not impressed with these grounds of appeal as furnishing sufficient reasons for the reversal of the judgment of the court below. In the first place, it was not error, under the circumstances testified to in this case, for the circuit judge to charge the jury as is complained of in the first ground of appeal. Clearly, one of the foundation rocks upon which the plea of self-defense must be bottomed is that it was necessary for the accused to take the life of his fellow man to protect his own, or to protect him from serious bodily harm. *State v. Wyse*, 33 S. C. 594, 12 S. E. 556; *State v. Merriman*, 34 S. C. 40, 12 S. E. 619. In the case at bar, every witness on both sides who saw the difficulty testified that the waiter was where his duty called him to be; while, per contra, the accused was forcing himself into a place that the proprietor besought him not to go. Not only so, but such proprietor actually caught his arm, and placed himself in the way of the accused, so as to prevent his coming in collision with the colored waiter; and, after the waiter had apologized, the proprietor again urged the accused to leave. Under these circumstances, the charge of the presiding judge was exactly in line with his duty on such an occasion. It is high time that the shedding of human blood within the limits of this commonwealth should meet with a firm and stern upholding of the principles of the law of self-defense, when such defense is relied upon.

In the second place, the circuit judge was right in stating that under the laws of this state, if it was necessary to retreat to avoid shedding human blood, retreat should be made. Of course, this relates to the class of cases under consideration here. There are cases, however, when no retreat is demanded by the law. For instance, the honor of one's family, when in peril by the evil-minded, permits nothing save action, and no step backward is tolerated. The judgment of this court is that the judgment of the circuit court be affirmed.

McIVER, C. J., and McGOWAN, J., concur.

DAVIS v. HOOD, Sheriff.

(Supreme Court of South Carolina. Nov. 22, 1887.)

DISMISSAL OF APPEAL—FAILURE TO FILE RETURN.

Though the case or brief for argument has been properly made and served, an appeal may be dismissed, under rule 1, if the return has not been filed.

Motion to reinstate appeal from Chester county.

Action by Davis against Hood, as sheriff. An appeal from the judgment was dismissed. Appellant moves to reinstate. Denied.

J. K. Henry, for appellant. W. A. Sanders and Edward McCrady, Jr., for respondent.

PER CURIAM. This is a motion to reinstate the appeal dismissed by the clerk of this court under rules 1 and 2. After hearing argument pro and con, the court refused the motion, delivering its judgment orally. The return and case or brief for argument move on separate and distinct lines. The respondent may have the appeal dismissed, under rule 1, because the return has not been filed, though the case or brief for argument has been properly made up and served upon him; and he may have the appeal dismissed for default of appellant in not serving three printed copies of the case or brief on respondent, although the return has been filed in due time. See *Gardner v. Mays*, (decided May 23, 1887,) 7 S. E. 71; *State v. Moore*, (previously decided,) *Id.* 72.

MARJENHOFF v. MARJENHOFF et al.
(Supreme Court of South Carolina. Nov. 29, 1893.)

APPEAL—RETURN—"CASE"—TIME OF FILING—EXTENSION—DISMISSAL—REINSTATEMENT.

1. Supreme court rule 1, requiring the return to be filed within a certain time after the record constituting the return is completed, does not allow that length of time after the case is agreed on; it being no part of the return, which rule 2 states shall consist of the judgment roll, notice of appeal, and exceptions.

2. Application for extension of time for filing return must be made within the time allowed by rule for such filing.

3. Under supreme court rule 2, allowing a reinstatement of an appeal dismissed under rule 1 for default in filing return, on a showing that default arose from excusable neglect or inadvertence, it is not sufficient excuse that counsel, being pressed by business, called in counsel to assist him, and that each expected the other to do the filing.

4. Where appellant fails to file his case or exceptions as required by circuit court rule 49, appellee is entitled to have the appeal dismissed.

Appeal from common pleas circuit court of Charleston county.

Action by Francis W. Marjenhoff against Johannes M. Marjenhoff, trustee, and others. Judgment for defendants. Plaintiff moves to reinstate appeal dismissed for default in filing return. Motion denied.

Trenholm & Rhett and Mr. Sinkler, for appellant. W. H. Thomas, for respondents.

PER CURIAM. Counsel for plaintiff (appellant) moved, upon affidavits, to reinstate the appeal dismissed by the clerk under rule 1; and counsel for defendant trustee (respondent) moved, in case this motion should be granted, to dismiss the appeal under rule 49 of the circuit court.

As to the first motion: There can be no question as to the duty of the clerk to dismiss the appeal upon the showing made before him; and the appellant should then move to reinstate the appeal, if he has proper grounds therefor. In this case the record constituting the return was completed

when the exceptions were served, on the 8th day of June, 1893. The "case" (technically so called) was not agreed upon, however, until the 18th day of June, 1893; and counsel for appellant seems to have supposed that this was necessary to complete the return. Rule 2 of the court prescribes what the return shall consist of, to wit, copies of the judgment roll, the notice of appeal and exceptions, or if the appeal is from an order, as allowed by the Code of Procedure, copies of the order appealed from, with the papers upon which the court below acted in granting the order, together with the notice of appeal and the exceptions. The case is not a part of the judgment roll, and therefore not a part of the return. See *Davis v. Hood*, (decided by this court Nov. 22, 1887,) 18 S. E. 941; *Tribble v. Poore*, (May 14, 1888,) 6 S. E. 577. The appellant complains that the time in which he was to have filed the return was cut down to 20 days. But the time,—40 days,—as required by the old rule, had expired before he obtained an extension of time from the circuit judge. Judge Izlar's order extending the time for filing the return was made on the 22d of July. The time, by that order, was extended to the 27th of July. The return was filed on that day, viz. 27th of July. The clerk dismissed the appeal on the 25th of July, before the order of the circuit judge and the return were filed in his office. The 20 days allowed by the new rule expired on the 28th of June. Under the old rule, the time expired on the 18th of July. It has been decided, as far back as *Scurry v. Coleman*, 14 S. C. 168, that the application for extension of time must be made within the time allowed by the rule. The circuit judge could not extend the time which had already expired.

Appellant's counsel urges that he had at the time such a pressure of business that he called to his assistance other counsel to prepare the case, which was very voluminous and difficult; that said counsel expected him to file the case, and that he was relying upon said counsel to do so; and that the matter, consequently, was neglected. Rule 2 prescribes that the court may reinstate an appeal dismissed by the clerk under rule 1, upon its being made to appear to the satisfaction of the court that the default on the part of the appellant has arisen from some excusable neglect. The court does not consider the excuse for the default excusable neglect, or an inadvertence.

As to the respondent's motion to dismiss the appeal, under rule 49 of the circuit court, in case the court reinstated the appeal under rule 2, the questions thereunder do not properly arise, as appellant's motion cannot be granted. However, it may be said that the respondent would be entitled to the benefit of rule 49, if necessary. There is no evidence before the court that the appellant has ever filed his case or exceptions, as required

by rule 49. This rule is a very hard rule, and has, perhaps, caused some hardship, and may be changed; but it was then and is now in force, and parties have a right to invoke its exercise. If they apply for its benefit, the court is compelled to enforce its provisions, however reluctant to do so. Motion of appellant refused.

VENABLE et al. v. CHAVOUS.

(Supreme Court of South Carolina. Dec. 5, 1893.)

APPEAL—DISMISSAL—REINSTATEMENT.

An appeal dismissed by the clerk for failure to file return in accordance with supreme court rules 1 and 2 will not be reinstated; neither unavoidable cause for the default, nor mistake or inadvertence, being shown.

Appeal from common pleas circuit court of Barnwell county.

Action by Venable & Heyman against F. Chavous. Judgment for defendant. Plaintiffs move to reinstate their appeal, dismissed for default in filing return. Motion denied.

J. J. Brown, for appellants. I. L. Lobin, for respondent.

McIVER, C. J. This is a motion to reinstate the appeal dismissed by the clerk for failure to file the return with the clerk of this court in accordance with rules 1 and 2. Neither unavoidable causes for the default of the appellant, nor mistake or inadvertence, having been shown, ordered that the motion to reinstate the appeal herein be refused.

TERRY et al. v. DAVIS.

(Supreme Court of North Carolina. Feb. 20, 1894.)

MALICIOUS PROSECUTION—WHAT CONSTITUTES—CIVIL SUIT.

A suit for damages, wherein defendants are charged with making a fraudulent contract to defraud plaintiff, unaccompanied by attachment of property or person, or other circumstance of special damage, is no ground for an action for malicious prosecution.

Appeal from superior court, Pasquotank county; Brown, Judge.

Action by Harvey Terry and Timothy Ely against John F. Davis for damages for malicious prosecution. Judgment on demurrer for defendant. Plaintiffs appeal. Affirmed.

For report of former action, see Ely v. Davis, 15 S. E. 878.

Harvey Terry, for appellants. W. J. Griffin, for appellee.

MacRAE, J. This is substantially the same action which is reported under the caption of Ely v. Davis in 111 N. C. 24, 15 S. E. 878, being an action to recover damages for malicious prosecution. We then sustained the demurrer upon the ground that there was

no allegation in the complaint of want of probable cause, nor statement of facts which, if proved, would establish the want of probable cause in the alleged malicious charge of fraud and false representation. We proceeded further to intimate—in order that the plaintiffs might understand that this litigation ought to cease—our opinion that an action will not lie for malicious prosecution, in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law, or their equivalent in equity, or in proceedings in bankruptcy, or like cases where there was some special damage resulting from the action, and which would not necessarily result in all cases of the like kind. We affirmed the judgment below, dismissing the action. The plaintiffs seem to have immediately begun an action against the same defendants or their personal representatives. It is here again upon substantially the same complaint, with the addition of the allegation of want of probable cause. We have listened with attention to the argument of counsel, and have examined the authorities presented by him, and are still of the opinion that the action will not lie, for the reasons fully stated in the opinion above referred to, and which we deem unnecessary to repeat. It is therefore unnecessary that we should examine the other grounds of demurrer. The judgment of his honor below, sustaining the demurrer and dismissing the action, is affirmed.

WEISEL v. COBB.

(Supreme Court of North Carolina. Feb. 20, 1894.)

SUIT FOR ACCOUNTING—TRUSTS—SURVIVING PARTNER—POWERS.

Where the surviving partner of a firm has conveyed to "C., administrator" of the deceased partner, all the assets of the firm, for the purpose of paying first the firm debts and then the debts of the deceased partner, and "to legally account for all such moneys as may come into his hands by virtue of this assignment," he may properly bring suit against said C. individually for an accounting as to the property so conveyed.

Appeal from superior court, Pasquotank county; Brown, Judge.

Suit by Moses Weisel against George Cobb for an accounting. From a judgment for defendant, plaintiff appeals. Reversed.

The assignment by Moses Weisel was as follows: "Whereas the late firm of S. Weisel & Son had pecuniary liabilities; and whereas George W. Cobb had administered upon the estate of Samuel Weisel, deceased, who was senior member of said firm; now, therefore, in order to enable the said Cobb, administrator, to pay off all the debts and liabilities of the said Samuel Weisel, including the debts of the said firm, I, Moses Weisel, the sole surviving partner of the said firm, for one dollar to me in hand paid by said Cobb,

(the receipt of which is hereby acknowledged,) do hereby transfer and assign to said Cobb, administrator, all the stock of goods, all notes and accounts and choses in action, and all other personal property of said firm, and I do hereby vest him with full power to bring suit in his name as administrator aforesaid upon all notes and accounts, and to collect the same, and to legally account for all such moneys as may come into his hands by virtue of this assignment. Witness my hand and seal this, the sixteenth day of June, 1886."

The complaint was as follows: "Plaintiff, complaining against defendant, alleges: (1) That the plaintiff and S. Weisel were merchants in Elizabeth City, N. C., and partners doing business under the firm name of S. Weisel & Son. (2) That during the continuance of said firm S. Weisel died during the year 1886, and left this plaintiff surviving partner. (3) That shortly after the death of S. Weisel the defendant, G. W. Cobb, administered on his estate. (4) That on the 16th day of June, 1886, this plaintiff, as surviving partner of the firm of S. Weisel & Son, made assignment to G. W. Cobb, administrator of S. Weisel, of all of the stock of goods, all notes and accounts and choses in action, and all other personal property of said firm, and to sue for and collect all notes and accounts, and to legally account for all amounts and moneys so collected and received by virtue of said assignment. Copy marked 'A,' and made a part of complaint. (5) That said G. W. Cobb, by virtue of said assignment, took charge of all of the goods, merchandise, notes and accounts, choses in action, and all other personal property belonging to the said firm, of the value of thirty-three thousand dollars, or some other large sum, and commuted same to his use. (6) That by virtue and force of said assignment, defendant, Cobb, was required to legally account for and settle with this plaintiff for all of the property, goods, merchandise, notes and accounts, etc., that went into his hands belonging to the said firm of S. Weisel & Son. (7) The plaintiff has demanded a settlement and account of defendant, showing his management and disposition of said property belonging to said firm, and to him as surviving partner of same, with all of which fair, reasonable, and just request and demand defendant has refused to comply. (8) That this defendant is indebted to plaintiff in the sum of two thousand dollars, or some other large sum, on account of money received belonging to said firm, for his management and conversion of the property herein set out, for which he refuses to account and settle. Wherefore plaintiff demands judgment against defendant for the sum of two thousand dollars; that an account may be taken, showing amount of property received by defendant, value of same, amounts paid out under the assignment, also amount remaining in the hands of defendant due the

plaintiff; and for such other and further relief as the nature and circumstances of the case may require, and for costs."

Grandy & Aydlett, for appellant.

BURWELL, J. The plaintiff, being the survivor of the firm of S. Weisel & Son, succeeded by right of such survivorship to all the assets of the partnership upon the death of his partner. They were vested in him as trustee—First, to pay out of them all the debts of the firm; and, secondly, to divide between himself and the administrator of his deceased partner what should remain after the payment of the firm debts according to the terms of the copartnership. The law gave him the title to all these assets, but along with it put upon him the burden of the trust. By the assignment set out in the record he stripped himself, so far as he could, of this title, and put it in the defendant (who had been appointed to administer the estate of the deceased partner) "to enable the said Cobb, administrator, to pay off all the debts and liabilities of the said Samuel Weisel, including the debts of the said firm." The plaintiff could not thus, or indeed in any way, escape his liability to the partnership creditors. That liability remained upon him notwithstanding the assignment. And his right to a share of what remained after the payment of the partnership debts was unaffected, for, far from surrendering his personal interest in the assets, as we construe the assignment, he expressly imposed upon the assignee, whom he thus substituted for himself to administer the trust, the duty "to legally account for all such moneys as may come into his hands by virtue of this assignment;" that is to say, to administer these partnership assets just as he would administer them under the law if the assignment had not been made. For two reasons, therefore, the plaintiff could call for an account of the management of these assets: To ascertain if the firm debts had been paid, and, if not, to have that done; and to ascertain if any sum was due to himself, and, if so, to receive its payment. He therefore most unquestionably had a good cause of action against the assignee, to whose care he had committed the valuable partnership assets. If it should appear on the taking of the account that the debts of the firm had all been paid, and that the balance remaining after such payment had been applied as plaintiff had expressly or impliedly agreed that it should be, there would be a judgment against him for costs, and the whole matter would be finally settled. The plaintiff, being thus circumstanced, sued "George W. Cobb," and alleged, among other things, that the value of the assets was "thirty-three thousand dollars, or some other large sum;" and that "G. W. Cobb, by virtue of said assignment," took charge "of said assets, and converted same to his use." The record shows that by con-

sent there was a reference to state an account. The referee heard the cause, and made a report, and, upon the hearing of the case upon exceptions to that report, "G. W. Cobb" made a motion to dismiss the cause for the reason that the assignment spoken of was made to "G. W. Cobb, administrator," and upon this motion the action was dismissed. The facts set out in the complaint constituted a good cause of action in favor of the plaintiff against the defendant. If, upon the taking of the account, it shall be found that on a proper settlement of the partnership business there was a balance left after the payment of all the liabilities of the firm, the question will arise, was the plaintiff entitled to any part of this balance under the terms of the copartnership? And, if that be answered in the affirmative, the question will arise, did the plaintiff expressly or impliedly agree that the defendant should apply the balance so due him to the payment of the individual liabilities of Samuel Welsel? And, should this also be answered in the affirmative, there would arise the further question, has the defendant used that fund in the prescribed way? About this last question the plaintiff had a right to inquire. He is the trustor. It is his privilege to demand of the trustee an account. As we have said, the plaintiff, a surviving partner, was invested with the title to all the partnership assets as a trustee. He transferred that trust to "George W. Cobb, administrator." The duty of winding up the affairs of S. Welsel & Son, there being a surviving partner, was not imposed by law on the administrator of Samuel Welsel. He received these valuable assets, not as administrator, we think, but the title to them was put in him because he was such administrator. At any rate he took them in some capacity and for some purpose from the plaintiff, who by this action demands an account of his trusteeship. He is, we think, clearly entitled to it. If "George W. Cobb, administrator," has applied those assets as they were legally and properly applicable, all well. That will protect "George W. Cobb." If either "George W. Cobb" or "George W. Cobb, administrator," has misapplied them, it is not well, and "George W. Cobb" must answer for the breach. The action should not have been dismissed. Error.

STATE v. WALTON.

(Supreme Court of North Carolina. Feb. 20, 1894.)

FALSE PRETENSES—EVIDENCE.

1. On a trial for obtaining money under false pretenses, evidence of other similar transactions by defendant is admissible.

2. On a charge of inducing the county treasurer to cash an order, by falsely representing it to be genuine, it is no defense that the order was for a bill of stationery for a county officer, where the bill had not been authorized by the county commissioners.

v.188.E.no.22—60

Appeal from superior court, Gates county; Graves, Judge.

J. T. Walton was convicted of obtaining money under false pretenses, and appeals. Affirmed.

The defendant is charged with intending to "cheat and defraud J. F. Bond, as treasurer of the county, out of the money, goods, and chattels in the custody of said Bond, and unlawfully, feloniously, and designedly did falsely pretend to the said Bond, as said treasurer, that a certain paper writing, in words and figures," etc., "was a true and genuine order for the payment of money," etc., "and that he owned the same, and had the right to transfer it to the said Bond, as treasurer, and receive the money therefor, to the amount mentioned in said paper writing, being \$41.32, whereas, in truth and in fact," etc. Upon the trial the jury found the defendant guilty, and he appealed from the judgment pronounced.

The Attorney General, for the State.

MacRAE, J. The first exception cannot be sustained. In order to show the scienter and the intent, and for that purpose only, the state offered evidence of similar transactions on the part of the defendant. The question of the admissibility of evidence of this character has been so clearly stated by Ashe, J., in the case of *State v. Murphy*, 84 N. C. 742, that we have only to reproduce a part of the opinion in that case: "It is a fundamental principle of law that evidence of one offense cannot be given against a defendant to prove that he was guilty of another. We have been unable to find any exception to this well-established rule, except in those cases where evidence of independent offenses has been admitted to explain or illustrate the facts upon which certain indictments are founded, as where, in the investigation of an offense, it becomes necessary to prove the *quo animo*,—the intent, design, or guilty knowledge. In such cases it has been held admissible to prove other offenses of like character, as, for instance, in indictments for passing counterfeit money, the fact that the defendant, about the same time, had passed other counterfeit money of like kind, has been uniformly held to be admissible to show the scienter or guilty knowledge. So, on a charge for sending a threatening letter, prior and subsequent letters from the defendant to the person threatened have been received in evidence, explanatory of the meaning and intent of the particular letter upon which the indictment is found." Many authorities are there cited and illustrations offered. The charge in the present case was that the defendant did falsely, etc., pretend to the county treasurer that a certain paper writing was a true and genuine order for the payment of money, as it purported to be, and that by means of said false pretenses the defendant obtained the money from said treasurer. The defense was

the absence of any intent to defraud. There could not be more direct evidence of such intent than the facts that the defendant had presented other false papers to the treasurer, and obtained money upon the same, and upon the discovery thereof had refunded the money. In *State v. Wilkerson*, 98 N. C. 696, 3 S. E. 683, where the defendant was indicted for falsely obtaining from the county commissioners an order for the payment of money, evidence was admitted of continuous transactions of the same character, and the state proposed to prove the obtaining of other orders of the same kind, without producing the orders; and, testimony having been admitted, the court said: "The extent of the general rule which requires the production of a written instrument to prove its contents, and admits of secondary evidence when it is lost or destroyed, is often misconceived. The rule does not apply to cases where the orders come up on a collateral inquiry, and a party is not expected to be prepared to produce them." In that case, no point was made upon the admissibility of the evidence, except as above stated. The decision in the case of *State v. Bullard*, 100 N. C. 486, 16 S. E. 191, where evidence was offered as to reports that defendant had been guilty of similar offenses, is not in conflict with that which is cited above. The witness had testified to the good character of defendant, and the state proposed to ask the witness if he did not know that it was extensively talked about and said that the defendant practiced a fraud upon the firm of A. B. This was admitted after objection by defendant, and the defendant excepted to the answer. The court said, "The inquiry allowed in this case was of a specific act of deceit and fraud, and this resting on rumor only," etc.

The second exception, to the refusal of his honor to admit evidence as to the stub book kept by the defendant in the office of the register of deeds, and the stub therein which would show the order was issued for a bill of stationery, etc., is also untenable, because the evidence offered was irrelevant. It was not corroborative of the evidence of defendant as to intent, or competent for any other purpose. It did not in any manner tend to show the representation of defendant to the county treasurer that the order presented was a genuine one. Admitting this evidence, still the question was, did the defendant obtain the money by means of the false representation charged? If said representation was false, the reiteration of it would not tell in favor of defendant. It is said for the defense that a man might collect an honest debt by means of false pretenses, and there would be no intent to defraud; and several authorities are cited, which it will be unnecessary to consider, for, according to the testimony in this case, even if there had been such an indebtedness as claimed, the county commissioners had never ordered its payment. The county treasurer had no authority

to pay the same, except upon such order. The fraud was practiced upon him, and the money was obtained upon the false representation that it was a genuine order. The intent to deceive was established to the satisfaction of the jury by the proof of the false representation that the paper presented was a genuine order, when, whatever may have been the motive of the defendant, this representation was, to his own knowledge, false, the commissioners never having made such order. It was calculated to deceive, because it was apparently genuine, and attested by the proper officer. It did deceive, because by means of it the defendant obtained the money. *State v. Phifer*, 65 N. C. 321. We see no error.

LASSITER et al. v. RAPER et al.
(Supreme Court of North Carolina. Feb. 20, 1894.)

SUFFICIENCY OF PLEADING—ALLEGING CONCLUSIONS OF LAW.

In an action on an administrator's bond, a plea "that since the final account and settlement of said estate, and the institution of this suit, the time elapsed is sufficient in law to bar a recovery against these defendants," and they plead "the statute of limitations in bar of plaintiffs' recovery," is bad, as containing but an allegation of law.

Appeal from superior court, Pasquotank county; G. H. Brown, Judge.

Action by L. C. Lassiter and another against Caleb Raper and others on an administrator's bond. From a judgment for plaintiffs, defendants appeal. Affirmed.

Grandy & Aydtlett, for appellants.

SHEPHERD, C. J. In *Bayard v. Malcolm*, a case reported in 1 Johns. 453, Chief Justice Kent remarked: "I entertain a decided opinion that the established principles of pleading, which compose what is called its 'science,' are rational, concise, luminous, and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation." It was but in keeping with the spirit of these views that our present system of civil procedure was framed and enacted, and we find this court, very shortly after its adoption, repudiating the idea that loose and uncertain pleading would be tolerated. In *Crump v. Mims*, 64 N. C. 767, the court said: "We take occasion here to suggest to pleaders that the rules of common law as to the pleading, which are only the rules of logic, have not been abolished by the Code." In *Parsley v. Nicholson*, 65 N. C. 210, it was said: "The rules of pleading at common law have not been abrogated. The essential principles still remain, and have only been modified as to technicalities and matters of form." In *Oates v. Gray*, 66 N. C. 442, it was said that the object of the Code was "to abolish the different forms of ac-

tion, and the technical and artificial modes of pleading, used at common law, but not to dispense with the certainty, regularity, and uniformity which are essential in every system adopted for the administration of justice." After other decisions to the same effect, it again became necessary, as it now is, to emphasize these early declarations of the court, and it was therefore remarked in *Vass v. Association*, 91 N. C. 55, that "it was a false notion, entertained by some of the legal profession, that the Code of Civil Procedure is without order or certainty, and that any pleading, however loose and irregular, may be upheld. On the contrary, while it is not perfect, it has both logical order, precision, and certainty when it is properly observed. Bad practice, too often tolerated and encouraged by the courts, brings about confusion and unjust complaints against it." It is hardly necessary to say that it was one of the elementary principles of the common law pleading that "facts, only, are to be stated, and not arguments or inferences or matters of law," (1 Chit. Pl. 214;) and that it is still essential to state the facts, which, indeed, is the chief office of pleading, is apparent from the explicit language of the Code, (sections 233-243,) which provides that there must be a "plain and concise statement of the facts constituting a cause of action;" and the same rule, of course, applies to a defense set up in the answer. *Rountree v. Brinson*, 98 N. C. 107, 3 S. E. 747. In accordance with the foregoing principles, the court held that a complaint "which merely states a conclusion of law,—that is, that the defendant is indebted to the plaintiff, and that the debt has not been paid,—is demurrable both at common law and under the Code." *Moore v. Hobbs*, 79 N. C. 535. So, in *Rountree v. Brinson*, supra, in which the defendant pleaded that "the bond was executed by this defendant to the said R. H. Rountree for an illegal and usurious consideration," it was held that the plea was bad because it did not set forth the facts constituting the defense of usury. In *Pope v. Andrews*, 90 N. C. 401, the plea that "the plaintiff's alleged cause of action is barred by the statute of limitations" was held bad. The court said: "We have before adverted to this insufficient manner of setting up the effect of the lapse of time as an impediment to the suit. This averment that the demand is barred by the statute is but stating a conclusion of law, and not the facts from which it is deduced. This is neither in conformity to the former nor the present mode of pleading the defense." In *Humble v. Mebane*, 89 N. C. 410, the plea of the statute of limitations was held to be defective, "in that it failed to state when the cause of action accrued, and when the wards arrived at full age." See, also, *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77. In *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243, the language of the answer was that the defendants "plead the

statute of limitations of ten, seven, six, and three years, as prescribed in the Code, to all said claims, and aver that they are unable to plead the same more definitely to each and all of said claims." This was held defective. The court said: "This is clearly bad and insufficient pleading. The court might, in its discretion, have allowed appropriate amendments; but it was not bound to do so, nor is the exercise of its discretion reversible here." In the case of *Pemberton v. Simmons*, 100 N. C. 316, 6 S. E. 122, cited by counsel for defendant, the defense was the presumption of payment under the Revised Code, (chapter 65,) and the defective plea seems to have been aided by a reference to "the whole of the pleadings." Whatever may be the true ground of the judgment, it cannot be considered as an authority against the principles laid down in the unbroken line of decisions to which we have referred, and especially in view of the more recent decision of *Turner v. Shuffler*, supra. It must be manifest that, according to the above authorities, the plea in the present case is fatally defective. The plea is as follows: "That since the final account and settlement of said estate, and the institution of this suit, the time elapsed is sufficient in law to bar a recovery against these defendants, or either of them, and they, and each of them, pleads the statute of limitations in bar of plaintiffs' recovery in this action." This simply amounts to the plea in *Pope v. Andrews*, supra, which was held to be defective. It contains no facts whatever, but is a simple allegation of law, and nothing more. There are no facts in the other parts of the answer which lend any aid to the plea, and from which any legal conclusions can be deduced. Indeed, it is remarkable that there is but one date in the entire pleading, and that is simply as to the death of the intestate. It would introduce inestimable uncertainty and confusion, and bring merited reproach upon our present method of procedure, were we to uphold the plea in this case. It is a very simple requirement of the Code, as well as the common law, that the facts constituting a cause of action or defense shall be plainly set forth. This has not been done by the defendants, and we are therefore of the opinion that the ruling of his honor must be affirmed.

DAVIS v. TERRY et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

SPECIFIC PERFORMANCE—RIGHT TO DECREE—COUNTERCLAIM—SUFFICIENCY.

1. A party to a land contract containing a condition that such party should pay one-half the cost of a survey does not forfeit his rights under the contract by a refusal to pay as costs a sum greater than half thereof.

2. The fact that a party to a land contract brought an action to reform it does not show

such a repudiation as will defeat his right to maintain a subsequent action for its specific performance.

3. A counterclaim for the malicious prosecution of a prior action, which fails to allege the facts showing want of probable cause in instituting such action, is bad.

Appeal from superior court, Pasquotank county; Bynum, Judge.

Action by John F. Davis against Harvey Terry and others for the specific performance of a contract to convey land. Judgment for plaintiff. Defendants appeal. Affirmed.

Harvey Terry, for appellants. W. J. Griffin, for appellee.

SHEPHERD, C. J. This is an action for the specific performance of a contract to convey a certain part of what is called the "Great Park Estate." Under the terms of the contract the defendants Ely and wife, through their attorney in fact, Terry, covenanted, in consideration of the sum of \$5,000, (which has been paid by the plaintiff,) to convey to the plaintiff one-half of said real estate, to be ascertained by a survey, running a line nearly north and south, the said survey to be made at the joint expense of the parties. The defendants in the same agreement also covenanted to convey to the plaintiff 1,300 acres of land adjoining the Great Park estate, which we may designate as the "Hall Tract." The survey was made by one Cassall, and a deed was prepared containing one-half of the said estate according to the survey, and also including 1,300 acres of adjoining land, according to the contract as it was written. This deed was tendered to the plaintiff upon the condition that he pay to the said Terry the sum of \$700, which was stated to be one-half of the expenses of the survey. The plaintiff refused to pay this amount on the ground that the charge was excessive, being more than one-half of the said expenses, and his contention was sustained in an action brought against him for the said amount, the recovery being only for the sum of \$400. This amount was paid by the plaintiff, and he has been in possession of the estate for many years. Since that time he has demanded a conveyance according to the survey and the terms of the contract, but the defendants have refused and now refuse to execute the same. Very clearly the plaintiff did not forfeit his rights under the contract because of his refusal to pay the excessive charges of the defendants, and the only ground upon which a specific performance is resisted is based upon a supposed repudiation of the contract by the plaintiff. This is a total misapprehension on the part of the defendants, as the action brought by the plaintiff (upon which the defendants rely as sustaining their defense) was not for the purpose of rescinding the contract, but for its correction by including all of the Hall tract, and enforcing the contract with the

variation as corrected. The plaintiff alleged that he was induced to enter into the contract by reason of the false and fraudulent representations of the defendant Terry, the agent of the defendants, as to the quantity of land embraced in the Hall tract. The testimony tending to establish the alleged fraud was properly excluded by the court on the ground that the plaintiff expressly disclaimed any purpose to rescind the contract, and that it would be in contravention of the spirit and policy of the statute of frauds to correct the contract by adding additional land upon verbal testimony alone. The ruling of the court was affirmed upon appeal, (Davis v. Ely, 104 N. C. 16, 10 S. E. 138,) but we explicitly declared that the plaintiff could enforce the performance of the contract in its present form, and this is precisely what he is seeking to do in this action. We are wholly at a loss to understand why the plaintiff is not entitled to the relief prayed for, as it is not pretended that he is barred by the statutes of limitations, or that he has been guilty of such laches as will stay the hand of a court of equity. The motion for nonsuit, therefore, simply on the ground that the plaintiff had brought the said action to correct the contract, was properly overruled. This being determined, there is nothing in the other objections to a decree for specific performance, as the issues were submitted without objection, and found against the defendants without a single exception, either to the rejection or admission of testimony or the charge of his honor. According to these findings, the plaintiff has complied with all of the terms of the contract, and is "the equitable owner of that part of the Great Park Estate set out in the complaint, and entitled to a conveyance therefor from the defendants Ely and wife." The exception to the judgment upon such findings is manifestly untenable.

The other exceptions are addressed to the rulings upon the counterclaim of the defendants. As it is admitted in the answer that the facts set forth in the counterclaim are the subject of another action now pending in the courts of this state, the counterclaim would have been abated had the objection been insisted upon by proper pleading. This seems to have been waived, and cannot now avail the plaintiff. *Hawkins v. Hughes*, 87 N. C. 115. The other objections, however, were properly raised, and in apt time. In an action brought by the defendants against the plaintiff upon substantially the same allegations, it was decided by this court, upon demurrer *ore tenus*, that the complaint did not set forth facts sufficient to constitute a cause of action, for that it failed to allege or set forth facts showing that the prosecution of the suit by the plaintiff against the defendants to reform the deed, etc., (which was the basis of the action,) was without probable cause. The court said that "this omission was in itself fatal

to plaintiff's action." *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878. As this disposes of the counterclaim, it is unnecessary to consider the other exceptions relating thereto. We are of the opinion that there was no error and the judgment must therefore be affirmed.

SAWYER v. FIRST NAT. BANK OF ELIZABETH CITY et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

PARTNERSHIP—WHAT CONSTITUTES—AGREEMENT.

An agreement setting out that B. has employed S. as clerk to superintend his store as long as B. chooses; that S. shall have half the net profits, and is a half owner of all the goods, moneys, accounts, notes, etc., belonging to the store,—constitutes B. and S. partners; and S., as survivor, can recover the store's bank balance.

Appeal from superior court, Pasquotank county; George H. Brown, Judge.

Action by Alfred Sawyer, as surviving partner of the firm of T. S. Berry, against the First National Bank of Elizabeth City, N. C., for balance due said firm on deposit account. Judgment for plaintiff. Defendant appeals. Affirmed.

The agreement held to be a partnership agreement is as follows: "North Carolina, Camden County. Agreement is this day entered into between T. S. Berry of the one part and Alfred Sawyer, Jr., of the other part, both of the county of Camden and State of North Carolina, as follows, to wit: The said T. S. Berry is now selling goods at Bell-cross and has employed the said Alfred Sawyer, Jr., as a clerk to superintend the said store as long as the said Berry chooses to employ him, and the said Sawyer is to have for his services one half ($\frac{1}{2}$) of all the profits the said store makes after paying all expenses of the said store and further the said Sawyer is to-day one half ($\frac{1}{2}$) owner of all the goods, moneys, accounts, notes etc. that belong to the store and further the said Berry is not to make any charges as rent for said store, warehouse or dwellinghouse where the said Sawyer now lives, for this & his daily service is his compensation is equal division of profits with the said Berry. Witness our hands & seals this May 30th 1891. [Signed] T. S. Berry. [Seal.] [Signed] A. Sawyer. [Seal.]"

Grandy & Aydlett, for appellant. W. J. Griffin, for appellee.

SHEPHERD, C. J. We think his honor was correct in holding that, on the face of the contract, a copartnership existed between the plaintiff and T. S. Berry, deceased. Tested by our old cases, it is very clear that the absence of any personal liability on the part of Berry to the plaintiff for compensation for his services, and the presence of a right to demand an account in order to as-

certain his half of the profits, (which half interest is directly conferred upon him by the contract,) would constitute a copartnership. *Cox v. Delano*, 3 Dev. c. 89; *Holt v. Kernodle*, 1 Ired. 199. Whether there should be any modification of the rule as to making the sharing in the profits an absolute test of copartnership in all cases (see *Fertilizer Co. v. Reams*, 105 N. C. 283, 11 S. E. 467,) is a question that does not arise on this appeal, as we have here, not only a community in the profits, but also a community in the capital. In this class of cases, says Mr. Bates, "the conclusion is irresistible that there is a communion of interests in the profits, and not a portion of them as compensation, for each has as much right as the other, and hence that a partnership results." Bates, Partn. §§ 31, 32. Apart from any holding out, we think that under our decisions the creditors of the firm could have recovered of the plaintiff, and, if this be so, it must follow that he is entitled to the assets as surviving partner. We have examined the other exceptions, although they were not very strenuously pressed on the argument. They are without merit. Affirmed.

STATE, to Use of TREASURE STOVE WORKS, v. PROUDFOOT et al.
(Supreme Court of Appeals of West Virginia. Jan. 20, 1894.)

RELEASE OF SURETY—FAILURE TO APPROVE BOND.

1. P. was duly appointed a constable of Jackson county, and, in pursuance of an order of the county court of said county, directing that he should not transact any business as such constable until he should file his bond as such constable in the penalty of \$5,000, conditioned according to law, to be approved by the clerk of said court, he executed a bond conditioned according to law in the penalty aforesaid, with two sureties, who, with him, acknowledged said bond before said clerk, and left it for record, and he thereupon took the oath of office, and entered upon his duties as constable. In a suit upon such bond against P. and his sureties for failure to pay over money collected by him as such constable said sureties are not relieved from liability for the default of their principal by reason of the fact that said bond was not approved by the county court.

2. The failure of an officer to obtain an approval of his official bond as required by statute does not affect his liability or that of his sureties, if it was otherwise legally executed and delivered.

3. The approval of an official bond by the court is not intended to increase or decrease the liability of the officer and his sureties, but is intended for the protection and indemnity of the public against any default which may occur in his official acts.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

Action in the name of the state, for the use of R. P. Thompson and W. H. Francis, partners doing business under the firm name of the Treasure Stove Works, against J. H. Proudfoot and others, on an official bond. From the judgment for a part of defendants, plaintiff brings error. Reversed.

Warren Miller, for plaintiff in error. J. H. Riley, N. C. Prickett, and Okey Johnson, for defendants in error.

ENGLISH, J. On the 27th day of May, 1889, J. H. Proudfoot was appointed a constable for the county of Jackson to succeed one B. F. West, who had on that day resigned. On the 7th day of June, 1889, said Proudfoot, with I. M. Adams, W. Lytle, and W. Lytle, Jr., as his sureties, executed a bond conditioned for the faithful performance on the part of said Proudfoot of all of his duties as such constable according to law, and that he should account for and pay over all money that might come into his hands by virtue of said office to the party or parties entitled to receive the same, which bond was acknowledged before and approved by T. H. B. Lemley, then clerk of the county court of said county, in the vacation of said court, on the 7th day of June, 1889; said county court having on the 27th day of May, 1889, by an order entered of record, provided that said Proudfoot should not transact any business as such constable until he should file his bond as such constable in the penalty of \$5,000, conditioned according to law, and said bond should be approved by the clerk of the said court. At the date of said bond the said J. H. Proudfoot took the oath of office prescribed for a constable, and entered upon the discharge of the duties of said office, and continued to act in that capacity until the 13th day of July, 1892, when he tendered his resignation as such constable to the said county court, which resignation was by said court accepted, and said office was declared vacant. At an election held on the 4th day of November, 1890, the said J. H. Proudfoot was elected constable of said county, and was so declared by the county court on the 10th day of November, 1890. He, however, did not execute bond as such constable after he was so declared elected, nor take the oath of office required, but continued to act as constable until the 11th day of July, 1892, when, on motion of the prosecuting attorney of said county, a rule was awarded against him to show cause why he should not give bond, and why said office of constable should not be declared vacant; and on the 13th day of July, 1892, the said Proudfoot resigned said office, as above stated. On the 13th day of October, 1891, while said Proudfoot was acting as such constable, he received on an execution placed in his hands for collection in favor of Treasure Stove Works against A. W. Kidd & Sons the sum of \$124.33, with interest thereon from the 22d day of August, 1891, and \$3.10 costs, and no part of said sum has ever been accounted for or paid over by said Proudfoot, or any person for him. This state of facts existing, an action of debt was brought to the September rules, 1892, in the name of the state of West Virginia, which sued at the relation and costs of R. P. Thompson and W. H.

Francis, partners doing business under the name and style of Treasure Stove Works, against said J. H. Proudfoot, as late constable, and I. M. Adams, W. Lytle, and W. Lytle, Jr., sureties on his official bond. The defendants I. M. Adams and W. Lytle cravedoyer of the writing obligatory, demurred to the declaration, in which demurrer the plaintiffs joined, and thereupon they pleaded conditions not broken, and issue was thereon joined, the demurrer was overruled and disallowed, and the cause was submitted to the court in lieu of a jury, which resulted in a finding for the defendants I. M. Adams and W. Lytle, to which finding and judgment the plaintiffs excepted, and moved the court to set aside said judgment, and grant them a new trial of said action, which motion was overruled, and moved the court also to certify all the evidence given or heard upon the trial, and presented their bill of exceptions, which was signed and sealed and saved to the plaintiff, and made a part of the record.

Did the circuit court err in finding for the defendants I. M. Adams and W. Lytle, and dismissing the action as to them? It is a conceded fact that said J. H. Proudfoot, together with I. M. Adams, W. Lytle, and W. Lytle, Jr., entered into and executed the bond declared on by the plaintiffs. It was also ordered by said county court that said Proudfoot should not transact any business as such constable until he should file his bond as such constable in the penalty of \$5,000, conditioned according to law, and directed that said bond should be approved by the clerk of said court; but said court did not at any time take the acknowledgment of or approve said bond, while our statute (Code, p. 111, c. 10, § 14) provides that every constable shall give bond with good security, to be approved by the county court. Now, it must be conceded that the county court had no power to delegate its right and duty to approve such bond to the clerk of said court when the statute expressly provides that the bond shall be approved by the county court, but the question for our consideration is: Did the failure on the part of the county court to perform its duty by approving said bond relieve the sureties in said bond in voluntarily executing the same, acknowledging it before the clerk, and delivering it for record? Can said sureties complain that the bond was not approved? The manifest object of the law requiring its approval is not that the sureties may in any manner be benefited thereby, but that the public—the people who may intrust their claims to the constable for collection—may be protected. The court in this case, with a view of affording such protection, entered its order directing that said Proudfoot should not transact any business as such constable until he should file his bond as such constable in the penalty of \$5,000, conditioned according to law, which bond should be approved by the clerk of said

court; and at the date of said bond the said Proudfoot took the proper oath of office, and entered upon the discharge of the duties of said office. The said bond was acknowledged before said clerk and approved by said clerk, it is presumed, by satisfying himself as to the sufficiency of said sureties; and while it cannot be said that this action on the part of the clerk in vacation was an approval of said bond by the county court, yet it was acknowledged before him, and delivered to him for record, and the action of said sureties in thus executing and delivering said bond enabled said constable to qualify and assume the duties of the office. Murfree, in his valuable work on Official Bonds, under the head of "Approval of Bonds," (section 175,) says: "Attempts are frequently made by officers and their sureties to evade the responsibility of their official bonds on the ground that the bond was not approved by the proper officer or in the appropriate manner or not approved at all. They have usually failed for the obvious reason that, if the officer has been inducted into office, and thus enjoyed the advantage afforded by the execution of the bond, it does not lie with him or his friends to controvert the validity of their obligation because of the omission of a ceremonial which is not intended for their protection, but the precise reverse,—to protect the public against them. The courts in such cases very readily accept slight proof of approval of bonds under which the obligors have gone into office. Hence, in Missouri, a bond was held to be approved because it was handed to the clerk of the county court in vacation, who marked it 'Filed,' and put it away in a proper place in his office. Indeed, the court went so far as to say that the failure of the county court to either approve or reject at all in no degree invalidated the bond." The case referred to by the author is found in 7 Mo. 46, styled *Jones v. State*. The second point of syllabus reads as follows: "The failure of the county court to approve or reject a constable's bond taken by the clerk in vacation will not invalidate the bond. The duty enjoined upon the county court in this respect was intended for the security of the public, and their omission to perform such duty cannot injure the constable and his securities." The Missouri statute under which this decision was rendered provides that the bond shall be approved by the court or clerk in vacation, and, if taken by the clerk in vacation, shall be approved or rejected by the court at the next term. So, also, in the case of *Moore v. State*, 9 Mo. 198, it was held that "a bond given by a collector is valid against him and his securities, although not approved by the county court." Upon this point, see, also, *State v. Fredericks*, 8 Iowa, 553. In the case of *Lytle v. Cozad*, 21 W. Va. 199, which was a contest in reference to the validity of a commissioner's bond executed by a commissioner under the statute

before proceeding to make sale of land, one of the securities claiming and showing that he had signed the bond and delivered it to said commissioner with the agreement and understanding that others were to sign it as securities before it was delivered, Green, J., in delivering the opinion of the court, says: "When one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it."

The question as to the effect of a failure to properly approve an official bond was before the supreme court of Arkansas in the case of *Auditor v. Woodruff*, 2 Ark. 73, and it was there held that, although the statute requires the official bond of the state treasurer to be approved by the governor, and that approval to be indorsed thereon, before the commission issues or the person qualifies or proceeds to discharge the duties of his office, yet the failure of the governor to indorse such approval or to approve the bond neither creates nor destroys, increases nor diminishes, the obligation of the contract, which, if in every other respect legally executed, is perfect. The statute, by implication, imposes on the person whose bond is required to be thus approved the duty of submitting it to the executive for his approval. The design of the legislature in requiring the bond to be approved by the governor was to provide for the public as well as individuals an undoubted assurance that the security is perfect, and amply sufficient to indemnify them for any loss or injury which they may sustain by failure of the officer to perform his official duties. But the failure of the governor to approve the bond neither discharges the officer nor his securities. The approval is not a condition precedent until the happening of which the obligation of the contract remains, as it were, suspended, so that it does not attach upon the obligors. The bond became perfect by execution and delivery as at common law. And in the case of *Taylor v. Auditor*, reported in 2 Ark. 174, it was held that the failure of an officer to obtain an approval of his official bond as required by the statute does not affect his liability, or that of his sureties, if it was otherwise legally executed and delivered. These cases, as we think, state the law correctly.

Counsel for the defendants in error, in their brief, rely upon the case of *People v. Van Ness*, 70 Cal. 85, 21 Pac. 554, where it is held that "an official bond, like every other deed, is not operative until a delivery, nor are the sureties liable thereon for any breach until after delivery. There can be no delivery of an official bond until its approval by the proper authority." This is quoted from the syllabus of the case, and, turning to the opinion of the court, we find Thornton, J., delivering the opinion of the court, says: "There was no delivery of the second official bond executed by Van Ness and sureties until the day on which it was approved by the governor.

We cannot see how there could have been any delivery until that date. The bond was not in a condition to be delivered until that date. Prior to that time it was inchoate, and imperfect as a bond. Like every other deed, that bond was not operative until delivery. It follows that the parties to the second bond were not liable for any breach until after its delivery," etc.; citing *Sacramento v. Bird*, 31 Cal. 74. But when we turn to that case we find that it simply lays down the proposition that "when an official bond, proper in form and substance, is signed and sealed by the obligors, and approved by the proper officer, and filed in the office appointed by law, it is both executed and delivered to the people of the state of California,"—a proposition which must be readily conceded; but the question is whether other acts on the part of the obligor and his sureties may not constitute a delivery, although in some respects they may fall short of this standard. By a decision of the supreme court of the same state, reported in 29 Cal. 429, in the case of *People v. Evans*, it was held that "the sureties on an official bond are liable under the statute, notwithstanding it was approved by the wrong officer or board;" and in the case of *People v. Edwards*, 9 Cal. 286, it was held that "the defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law." The opinion in this last case was delivered by Field, J., who for many years has been one of the justices of the United States supreme court. On this point we quote the *American & English Encyclopedia of Law*, under the head of "Bonds," (page 466,) where it is said: "In some states an official approval is required as a condition precedent to its validity, and of the title of the principal to his office. Such an approval is a condition required for the protection of the public, and its omission can in no instance inure to the benefit of the obligors. Attempts to invalidate bonds for such reasons have usually failed." So in the case of *McCracken v. Todd*, 1 Kan. 149, it was held that "the sureties on a sheriff's bond cannot take advantage of an omission to have the bond approved, and its amount prescribed by the probate court, where the amount is within the statutory limit. The deposit of such bond for record held to be a delivery." In the case under consideration the constable's bond was executed by the principal and his sureties, and in pursuance of an order of the county court, which fixed the penalty of the bond at \$5,000, was acknowledged before the clerk of said county court in vacation, and approved by him in pursuance of the direction of said court, and was admitted to record in said office. By depositing the bond in

said clerk's office, executed in the penalty prescribed by said court, said constable and his sureties gave said court the option of accepting or rejecting the same at the next term thereof; and, besides, if the court was not satisfied with the security in said bond, under section 20 of chapter 10 of the Code the court might at any time require from said constable a new bond, or an additional bond to that already given, to be approved by such court; but it does not appear that said court at any time required a new or additional bond, although it was recorded in the clerk's office of said court, and the court must have had notice of its character. The weight of authority, however, as we have seen by the cases above cited, leads to the conclusion that sureties on a bond of this character cannot take advantage of the fact that the bond has not been approved by the proper court or officer to shield themselves from liability occasioned by the default of their principal, as the approval of the bond neither adds to nor detracts from the obligation of parties signing such bond; and, if the bond in controversy could not be considered good as a statutory bond, there is nothing to prevent its being held good as a common-law bond. *Murfree on Official Bonds* says, (section 64:) "It very often happens that a bond executed in consequence of a statute, and with the design, by conformity to its terms, of being a valid statutory or official bond, falls short of the statutory requirements, and fails to become a bond of that peculiar character. In such cases the question arises whether the bond so imperfect or defective is absolutely void or valid as a common-law bond, irrespective of the design to impart to it a statutory and official character. The rule upon this subject is well stated in a recent case in Illinois. The court says: 'We have several times held that an obligation entered into voluntarily, and for a sufficient consideration, unless it contravenes the policy of the law, or is repugnant to some provision of the statute, is valid at common law, notwithstanding the attempt may have been made to execute it pursuant to a statute with the terms of which it does not strictly comply.' * * * And if an officer and his sureties of their own accord fix upon the amount of the penalty, (within the prescribed limits,) execute the bond, and deposit it with the proper custodian, it is not only good as a common-law bond, but, in Kansas, valid as a statutory bond as well, although the proper court neither fixed the amount of the penalty nor approved the security;" citing *McCracken v. Todd*, 1 Kan. 148, above quoted. In the case of *Supervisors v. Dunn*, 27 Grat. 615, *Staples, J.*, delivering the opinion of the court, says: "A person who signs, seals, and delivers an instrument as his deed will never be heard to question its validity upon the ground that it was not acknowledged by him, nor proved at the time of the delivery. It is the sealing and delivery that gives efficacy

to the deed, and not proof of the execution." And this, we think, propounds the law correctly upon this point.

In the case under consideration, however, the county court fixed the amount of the bond, and directed that it should be deposited with its clerk. It is, however, insisted by counsel for the defendants in error that the successor to the constable did not qualify in a reasonable time after the expiration of his official term, and that the sureties should be exonerated. In this case said Proudfoot was elected his own successor, and was so declared on the 10th day of November, 1890. He failed to qualify or give bond, but continued to perform the duties of his office, and while acting as such constable, on the 13th day of November, 1891, received the execution mentioned in the plaintiff's declaration, less than a year after his election. The case of *Com. v. Fairfax*, 4 Hen. & M. 208, is cited and relied on to show that the sureties in this bond were released, but that decision was under a Virginia statute which required that the sheriffs should be nominated and commissioned annually, (see section 1, c. 80, of the Revised Code,) the sixth section of which provides that every person commissioned and qualified as aforesaid should be continued in office for one year after his qualification, and might, with his own consent, and the approbation of the executive, be continued for two years, and no longer, etc.; very different from the provision in our constitution (article 4, § 6) which provides that such officers shall continue to discharge the duties of their respective offices until their successors are elected or appointed and qualified. In the case of *Monteith v. Com.*, 15 Grat. 172, the sheriff was re-elected, and gave bond and qualified, and it was held in that case that it could not be held that he continued to hold over under his first election on the ground that his successor had not qualified so as to subject his sureties in his previous bond. Article 6, § 23, of the Virginia constitution then provided that such officer should continue to discharge the duties of their respective offices until their successors were qualified, and Allen, J., in delivering the opinion of the court, among other things, said: "In the case under consideration the sureties are liable for the discharge of the duties of the office for the term for which the bond recites he was elected, and thereafter until a successor qualifies." Upon this question, see, also, *Ex parte Lawhorne*, 18 Grat. 85; also *Com. v. Drewry*, 15 Grat. 1, which last-named case is very similar in its facts,—the sheriff held over, and it was held that his sureties were liable for acts performed after his term expired. Again, section 21 of chapter 10 of our Code provides for the relief of sureties on such bonds on petition when they apprehend pecuniary loss, but these sureties, with full notice of the law, allowed their principal to go on and perform the duties of the office, and thus put it in his power to receive claims

from the public, and, when a default occurred, they claim to be released, because he has held over an unreasonable time, which they had it in their power to prevent. Numerous authorities have been cited to show that sureties are liable only for the term for which the officer was elected or appointed, but most of them refer to officers of corporations who are required to be elected annually, and under provisions of statutes and by-laws so different from our constitution and statutes that we think they should have little controlling influence in this case. My conclusion, therefore, is that the circuit court erred in finding for the defendants I. M. Adams and W. Lytle, the sureties in said bond, and giving judgment for them. The judgment complained of is reversed, and the cause remanded to the circuit court of Jackson county, in order that a proper judgment may be rendered therein, there being no evidence that J. H. Proudfoot and W. Lytle, Jr., were before the court; and the defendants in error must pay the costs of this writ.

HALSTEAD v. HORTON.

(Supreme Court of Appeals of West Virginia:
Jan. 27, 1894.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—CONTINUANCE—APPEAL—EXCEPTIONS.

1. A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

2. A motion to postpone until another day the submission of the case to the jury is addressed to the sound discretion of the trial court under all the circumstances, and the appellate court will not reverse a judgment on the ground of a refusal to postpone, unless such refusal plainly appears to have been an abuse of such discretion.

3. Where a party intends to review in the appellate court the action of the trial court in rejecting or admitting evidence, he must make such ruling the subject-matter of a formal bill of exceptions, or he must in some way distinctly and specifically make such ruling a ground of his motion for a new trial.

4. A case in which these rules are applied.
(Syllabus by the Court.)

Error to circuit court, Greenbrier county. Action by Virginia Halstead against John D. Horton under the civil damage law. There was judgment for defendant, and plaintiff brings error. Affirmed.

J. W. Arbuckle, for plaintiff in error.
Henry Gilmer, for defendant in error.

HOIT, J. This is an action of trespass on the case, brought in the circuit court of Greenbrier county on the 29th day of February, 1892, by the plaintiff, Mrs. Virginia Halstead, against defendant, John D. Horton, under section 20 of chapter 32 of the Code, (see Ed. 1891, p. 236,) averring that she was injured in property and means of support in consequence of the intoxication of her husband, John J. Halstead, caused by defendant, on the 27th day of November, 1891, at the town of Ronceverte, by said defendant then and there unlawfully selling and giving him intoxicating liquors, whereby, among other things, defendant caused her husband to lose, squander, and waste the sum of \$600, her sole and separate property, then in her husband's possession, laying her damages at \$5,000. The case was tried by a jury on the plea of not guilty, and on the 15th of July, 1892, the jury returned a verdict for defendant. Thereupon the plaintiff moved the court to set aside the verdict and grant her a new trial, because the same was contrary to the law and the evidence; also on the ground of newly-discovered evidence, and because the defendant procured the verdict by false evidence, and a fraud upon the jury; but the court overruled the motion, and gave judgment for the defendant, and plaintiff obtained a writ of error. All the evidence is certified, but no instruction was asked by either party, and none was given. During the progress of the trial, after plaintiff had introduced her evidence in chief, and defendant had closed his evidence, plaintiff called John G. Tobin, who stated: "I know John D. Horton. I have seen John J. Halstead." Witness was then asked by plaintiff: "Did you see John J. Halstead, and examine him at the time he was robbed in Ronceverte? If so, did he have any money?" Question objected to by counsel for defendant. Objection sustained, and plaintiff excepted. Plaintiff, by her counsel, then moved the court to continue the case until next morning, (it being about 5 o'clock P. M.,) that plaintiff might get an important witness, (John F. Bowes,) stating he had been regularly summoned, and had gone to Caldwell, about four miles from the courthouse. The court overruled plaintiff's motion, and refused to continue the case, to which ruling of the court the plaintiff excepted, and prayed that her exception be saved to her, which was done.

The law of the case involved in the trial is as follows: "If any person having a state license to sell spirituous liquors * * * shall sell or give any such liquors * * * to any person who is intoxicated at the time, or who is in the habit of drinking to intoxication, when he knows or has reason to believe such person * * * is intoxicated or is in the habit of drinking to intoxication, or if he

permit any person to drink to intoxication on any premises under his control, * * * he shall be guilty of a misdemeanor, and fined not less than twenty nor more than one hundred dollars." Code, c. 32, § 16. "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, * * * against any person who shall, by unlawfully selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person." Code, c. 32, § 20. The undisputed facts are as follows: About the 27th day of November, 1891, at the time in question, John D. Horton had license to sell whisky, etc., at his premises in the town of Ronceverte. On that day the husband, John J. Halstead, came to defendant's saloon, having about \$288 in currency and a check on the Bank of Ronceverte for \$312, the proceeds of the sale of a lot of cattle, the sole and separate property of plaintiff. John J. Halstead told defendant, Horton, he had a check, and wanted him (Horton) to go to the bank to identify him. Defendant went to the bank, and said to the cashier, "Mr. Morton, this is John Halstead, from Nicholas county, ex-sheriff." Defendant went out of the bank, and the cashier cashed Halstead's check for \$312. Horton sold him a quart bottle of whisky before they went to the bank. Halstead went back to the saloon. He went to a restaurant, got his breakfast, drank some out of the bottle, became intoxicated to insensibility. When he came to, he was in the "lockup," and all his money was gone. The only question in dispute was, was the sale or sales by Horton unlawful? There is no question on this evidence that the husband, John J. Halstead, was then and before in the habit of drinking to intoxication; but did defendant know, or have reason to believe, that such was the habit of John Halstead? Halstead had been in Ronceverte in the fall of 1890, about November, "was on a spree several days," and was in Horton's premises during that spree; but defendant says in his evidence that about July 14, 1890, he went to Buckhannon, Va., under a contract to superintend some grading, and was only at home on Sundays to see his family, until December 3d; that he would come home Saturday night, and go back to Buckhannon on Monday. Plaintiff, on her motion for a new trial on the ground of newly-discovered evidence, files the affidavits of three witnesses, who state that there was a camp meeting in Greenbrier county, eight miles west of Lewisburg, beginning on the 16th day of August, 1890, lasting about one week, and that defendant, Horton, was at the camp meeting for several days; but this does not cover the time in November, 1891, when Halstead was drunk and drinking in

Ronceverte; but this would only go to the credit of the witness, "and the general rule is that a new trial will not be granted to enable the party asking it to discredit a witness who testified against him on a former trial." *State v. Betsall*, 11 W. Va. 703. When in the evening, about 5 o'clock P. M., at the close of her evidence in rebuttal, plaintiff moved the court to continue the case until the next morning, to enable her to have present and examine the "important witness John T. Bowes, who had been summoned, had been present, but was then absent, being at a place about four miles away, the court, in the exercise of its wise discretion, and as is often done in such circumstances, could without error have continued the case until morning; but there is nothing in this record to show that the court, in refusing to do so, abused such discretion, or in any respect plainly committed error. There is no affidavit of his materiality, no statement of what plaintiff expected to prove by him, whether it was in rebuttal or in chief, or anything by which this court can determine upon its competency, much less its importance; and the business of the court may have been urgent and pressing, and, in any event, the plaintiff then had it in her power as matter of right to suffer a nonsuit. The question asked the witness John G. Tobin by plaintiff and rejected by the court would seem to have been relevant and material, for the loss of \$600 from the person of John J. Halstead, as caused by his intoxication, is expressly averred in the declaration; and it would seem to have been also admissible in rebuttal, as tending to show that it was not upon his person when he was put in the "lockup." But the counsel for plaintiff seem to have abandoned the question, although, when the objection was sustained, they noted an exception. At any rate, they did not modify the question so as to relieve it from the objection of assuming an important fact not proved. There is nothing but the inference to be drawn from the question itself to inform this court what answer the witness was expected to give. It is not made the subject of a formal bill of exceptions, as distinguished from a mere note of exception in passing, made during the trial, and found in the certificate of evidence; nor is it made one of the grounds of the motion for a new trial; nor does it appear to have been in any way brought to the attention of the trial court on such motion, so that it could be reviewed. Under our statute, the evidence, not the facts, is certified. It often covers hundreds of printed pages, with exceptions noted by the dozen, sprinkled throughout the certificate. It would be unreasonable to expect the circuit or appellate court "to explore the entire mass for the ascertainment of defects which the exceptor himself would not or could not point to their view." See opinion of Justice Daniel in *Camden v. Doremus*, 3 How. 515,

530; 2 Thomp. Trials, § 2786; *Gregory's Adm'r v. Railroad Co.*, 37 W. Va., 606, 609, 16 S. E. 819.

The first ground assigned on the motion for new trial is that the verdict is contrary to the law and the evidence. No instructions were given or refused, and the rulings of the court as to the evidence have already been considered. As to the evidence, that was conflicting, so that the verdict cannot be disturbed as plainly contrary to the evidence. The second ground is that of newly-discovered evidence, and on this plaintiff filed six affidavits and defendant five counter affidavits. Plaintiff filed her own affidavit and the affidavit of her husband, who attended to this suit, and transacted her business, showing satisfactorily (1) that the newly-discovered evidence hereafter mentioned was discovered since the former trial; (2) that reasonable diligence on the part of plaintiff and of her husband and agent was used, but did not and could not have secured it at the former trial. The remaining questions are: (3) Is it material in its object, and not merely cumulative, corroborative, or col. ate. al? and (4) Is it such as ought to produce, on another trial, an opposite result on the merits? See *Carder v. Bank*, 34 W. Va. 33, 11 S. E. 716, where the rule is laid down, and the cases in point are collected and cited. See *Betsall's Case*, 11 W. Va. 703; 16 Amer. & Eng. Enc. Law, 564.

Affidavit No. 6 filed by plaintiff is that of Robert A. Rutherford, and is as follows: "West Virginia, Greenbrier County. Robert Rutherford, on his oath, says that in November, 1891, he was at the saloon of John D. Horton, in the town of Ronceverte; that John J. Halstead was in the saloon, intoxicated, at the time, and purchased while in there a bottle of whisky from said Horton, and paid him for it; that Halstead and Horton were talking as friends, and, after Halstead went out of the saloon, affiant thought he was too tight then to 'make it' around Moore's corner, and he stepped to the door to see if he (Halstead) would 'make it,' or if the police would get him. He saw him go towards Eldridge's restaurant, and remarked to some boys who were there that he (Halstead) was all right, as he had passed the corner. Affiant says that this was the day before it was charged that Halstead had been robbed of his money in Ronceverte. Affiant further says that he never gave this information to the plaintiff in this case until after the trial of the case against Horton at the present term of this court. R. A. Rutherford. Subscribed and sworn to before me this 18th day of July, 1892. S. R. Patton, Notary Public." This witness says, in substance, that in November, 1891, the day before it was charged that Halstead had been robbed of his money, he was at the saloon of John D. Horton, in the town of Ronceverte; that John J. Halstead was in the saloon, intoxicated, at the time,

and purchased while in there a bottle of whisky from said Horton, and paid him for it. Cumulative evidence is generally said to be additional evidence of the same kind to the same point. Black, Law Dict.; *People v. Superior Court*, 10 Wend. 285, 294; *Parker v. Hardy*, 24 Pick. 246, 248; *Able v. Frazier*, 43 Iowa, 175, 177; 1 Greenl. Ev. (15th Ed.) § 2. Plaintiff introduced no evidence upon this point except that of her husband. He says: "In November, 1891, I went to Horton's saloon. Got a drink of whisky from him. Went to the bank, where they did not know me. Went back to get Horton to identify me, and got another drink. Horton went to identify me at the bank. I got \$312. Went back with him to saloon. Got another drink, and a quart of whisky. Took a drink or two out of it in saloon. Then went to get breakfast, and can't tell what became of balance of it. I suppose Horton knew I was in the habit of getting drunk. He saw me the fall before. * * * I was not drunk when I got the quart." This evidently covers the same time and place that affiant Rutherford speaks of. Rutherford says he was intoxicated, so much so as to attract his attention, and to cause him to watch and see if, when on the street, "the police would get him." Halstead says he was not drunk when he bought the bottle of whisky. When he would be of the opinion that he was intoxicated he does not say, unless we are to infer that he means intoxication to that degree that he lost memory and sensibility, — being helpless, and not knowing when his money was taken. "Intoxicated," within the meaning of the statute, is such as attracts observation, and becomes known to others, or gives them reason to believe the person is intoxicated; and of this a bystander would generally be a better judge than the party himself, whose opinion on the subject for obvious reasons is worth but little. There is no question that he was in the habit of becoming intoxicated, that he did become so on this occasion, and, by his own testimony, had taken three drinks in a short time. But the newly-discovered evidence of affiant Rutherford is certainly evidence of the same kind and to the same point, except that one spoke from what he saw, the other from what he felt; but it was not "additional" evidence of the same kind, to the same point, but antagonistic and contradictory, and therefore not cumulative; and the plaintiff is not bound by the mistaken opinion of her own witness.

Is it such as ought to produce on another trial an opposite result on the merits? For the purpose of this motion, credit will be given to the affidavit, unless something appears to discredit it. The counter affidavits do not tend to discredit the affidavit of Rutherford, for none of them touches the same point, but all relate to the point made on the trial, did Horton see and know Halstead when he was on a spree in Ronceverte, in

the fall of 1890, and therefore know that he was in the habit of becoming intoxicated? The affidavit of Rutherford is in for the present purpose, and not discredited. How are we to determine that it ought to, or would likely, produce a verdict for the plaintiff on the merits? It must not be taken by itself, but "in connection with that exhibited on the trial. The question is not whether a jury might be induced to give a different verdict, but whether the legitimate effect of such evidence would be to require a different verdict." *Hitchcock, J., in Ludlow v. Park*, (1829,) 4 Ohio, 5, 44. On the vital point that on that morning in November, 1891, in his saloon in Ronceverte, defendant, John D. Horton, sold whisky, in a bottle or otherwise, to John J. Halstead, when he was intoxicated, the newly-discovered evidence set forth in this affidavit stands alone amid all the direct evidence on both sides. Plaintiff's witness Halstead says he was sober when he bought of Horton the bottle of whisky. Her witness Quinn Morton, the cashier of the bank, says he was sober when Horton introduced him to get the check cashed. Horton says he left him in the bank, and did not see him again for more than 24 hours. When he saw him in the saloon, he bought a bottle of whisky, to take home to his wife, and he was sober. He did not see him drink anything. That his saloon keeper, Wikoff, was in the saloon at the time, and no one else, when Halstead bought the bottle of whisky, which was not opened, but wrapped up; and that he individually never sold him a drink of whisky in his life; and that he did not know as matter of fact, and had no reason to believe, that Halstead was in the habit of drinking to intoxication. The saloon keeper, M. F. Wikoff, says he came in about 9 o'clock in the morning. He saw Horton sell him the bottle of liquor. He came there twice that day. The next day he was drinking; did not see him drink, and refused to sell him any liquor for that reason. Defendant's witness Edward Eldridge says that about 9 o'clock of the morning in question Halstead came to his restaurant for his breakfast; had his bottle with him. He looked sober, took a drink out of his bottle, ate his breakfast, paid for it, and went away. Charles Lee, witness for defendant, saw Halstead come in and get the quart of whisky; had it wrapped up; said he wanted it for his wife. He got nothing to drink while witness was in there. Halstead is in the habit of becoming intoxicated, but the jury has already found that defendant did not know of such habit. He was certainly sober that morning. The burden of proof is on the plaintiff to show that at or about the time Halstead bought the bottle of liquor of Horton he had become intoxicated, and Horton knew it, or had reason to believe it. Can we say that, if this new testimony had been before this jury, it would have been enough to entitle plaintiff to a verdict on this

point,—enough on behalf of the one with the laboring oar to outweigh and overcome the testimony of every one of the witnesses who testified on this point, including all plaintiff's witnesses who were examined on this point as well as the witnesses introduced by defendant who so testified,—and make it the duty of the jury to find an opposite verdict on the merits? As I have already shown, the affidavits of Kelly, Knight, and Dwyer only tend to show that defendant, Horton, was in the county of Greenbrier several days after the 16th day of August, 1890, and therefore it is not true, as stated by him, that about July 14, 1890, he went to Buckhannon, Va., and was only at home on Sundays until December 3d; but this only tends to discredit or impeach the witness, and does not show that he was at home in November, 1890, when Halstead was at Ronceverte on a "spree," or in any way tend to show that Horton knew or had reason to believe that Halstead was in the habit of drinking to intoxication; or to contradict Horton where he says he had never seen Halstead but once before, (November, 1891,) and that was about four years before that time, when he met him over at Lewisburg, when Halstead was introduced to him as ex-sheriff of Nicholas county, and he was then sober. There is no controversy about the law of the case, but I may mention that the law on the subject when *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485, was decided has been amended, dispensing with the notice then required, among other changes, and now reads as found in section 20, c. 32, of the Code, (Ed. 1891, p. 236.) See *Abb. Tr. Ev.* 775; *Lawson, Rights, Rem. & Pr.* § 1124 Judgment affirmed.

OHIO RIVER R. CO. *v.* BLAKE.

(Supreme Court of Appeals of West Virginia.
Feb. 3, 1894.)

CONDEMNATION PROCEEDINGS — COMPETENCY OF JURORS — WAIVER OF OBJECTIONS — NEW TRIAL — DAMAGES.

1. The record need not show in terms that a jury formed under section 17, c. 42, of the Code, in a proceeding to take land or material therefrom for public use, are freeholders.

2. The record in such a proceeding shows that the jurors were "drawn, elected, tried, and sworn in the manner required by law." It will be presumed they were freeholders.

3. No objection having been sooner made against a juror for want of freehold qualification, it is too late after verdict in such a proceeding to make such objection based on affidavit or other evidence dehors the record.

4. An objection to a juror for want of qualification comes too late after verdict.

5. In such case, the release of a portion of the compensation found by a jury as suggested by the court as a condition of the refusal of a new trial, and the refusal of a motion for a new trial on account of excessiveness in the amount found, is not error for the reason, if for no other, that the evidence furnishes data on which the compensation can be measured, and the reduced sum is not excessive. *Remittitur.*

6. Can the court, in an action for a tort, where the law furnishes no rule for the assessment of damages, on a motion for a new trial, based on excessiveness of damages, suggest the release of a part, and, upon such release being made, refuse a new trial? *Cases of Vinal v. Core*, 18 W. Va. 1, and *Unfried v. Railroad Co.*, 34 W. Va. 260, 12 S. E. 512, discussed in this regard.

(Syllabus by the Court.)

Error to circuit court, Cabell county.

Condemnation proceedings by the Ohio River Railroad Company against Capple B. Blake. From the judgment rendered, plaintiff brings error. Affirmed.

Vinson, McDonald & Thompson, for plaintiff in error. Campbell & Holt, for defendant in error.

BRANNON, P. Under section 14, c. 52, Code 1891, the Ohio River Railroad Company made application to a justice of Cabell county to appoint commissioners to ascertain the compensation which it should pay to Capple B. Blake for gravel which it proposed to take from land of Blake for use on its road, and, commissioners having been appointed, and returned their report to the circuit court, and Blake having excepted to it and demanded that such compensation be assessed by a jury, and a jury having assessed it, the company moved the circuit court to set the verdict aside, and, its motion having been overruled, the company brought the case here. The plaintiff in error points out as error that the court ought to have set aside the verdict because some of the jurors were not freeholders, as required by statute and constitution in such a case. Counsel say—First, that the record ought to show on its face that the jury was made up of freeholders; and, second, that at any rate, when it is shown dehors the record that it was not so composed, the verdict ought to have been annulled.

1. The record does not show its own error by its omission in words to say that the jury consisted of freeholders. It says that they "were drawn, selected, tried, and sworn in the manner required by law." The word "selected" imports that they were freeholders,—that is, that they were set apart from all other persons as required by law, which required them to be freeholders,—and we would assume that legal qualification was an essential element in the act of selection. We would not assume that in it the law was not observed, and use this assumption to overthrow a proceeding, rather than presume what is reasonable to sustain it. The word would, from common understanding, import this; but, as used in such a proceeding, it has a legal signification, since section 14, c. 52, Code, says that, if a jury be demanded, proceedings shall be according to chapter 42, and, turning to it, in section 17 we find that it says that "a jury of twelve freeholders shall be selected and impaneled," and hence

the use of the words, "selected in the manner required by law," in the record of a proceeding under section 17, implies that the jury were freeholders. And the word "tried," in the order, imports that the jurors were tested as to their fitness and qualifications under the law. In *Stephen's Case*, 4 Leigh, 679, a capital felony case, the record said the jury came and were "elected, tried, and sworn the truth of and upon the premises to speak," and it was held that it need not expressly show that they were freeholders. Here the record says more in saying they were elected and tried in the manner required by law. I think that if it had not said so the presumption would be that the law was observed, and so the *Stephen Case* holds. This view is supported by *Bridge Co. v. Comstock*, 36 W. Va. 264, 275, 15 S. E. 69, and *Railroad Co. v. Patton*, 9 W. Va. 658.

It is argued that there ought to have been an order to summon freeholders, and that we are to infer that the jury was formed from the jurors attending for the trial of causes generally. Section 17, c. 42, which applies, says the jury shall be selected and impaneled in such manner as the court may direct, and that "the cause shall be tried as other causes." Trial includes the selection of a jury, and I construe this statute as authorizing the formation of such a jury from those in attendance; and section 6, c. 116, has the broad provision that "all jurors required for the trial of cases in any circuit court including cases of felony, shall be selected" from those so in attendance for trials generally. Why except a jury in condemnation cases from these provisions? It is a case in the court. And then, how can we say in what way they were selected? No exception under this head was made at the time. We would presume they were selected as they should have been, as above stated.

2. But though the record is not vulnerable in falling on its face to show these things expressly, still the fact that some of the jurors were not freeholders is shown. Was this ground for new trial? No, because the exception came too late. The appellant knew its right to have freeholders on the jury. It could have had the court ask every juror as to his qualifications, or itself asked him. When the jury was being impaneled the court "called on the attorneys, if they had any objections to the jurors, or any of them, or to the manner in which they were sworn, to say so." The freehold qualification was not mentioned. It was a thing that could be either waived or required. It was thus waived. Are long, tedious, costly trials to be made nugatory, and justice delayed, for such causes? If the attorneys for the company did not know that the jurors were incompetent, they could have known by a few questions. It does not appear that they were ignorant of the jurors' disqualification, but, if they had been, I would say that it would make no difference, because, where a party is given by

law the right to have jurors of certain qualifications, and sits by and does not ask them, especially when called on by the court to make any objection or suggestion, it is a waiver. Section 18, c. 116, Code, says that "no exception shall be allowed against a juror after he is sworn upon the jury on account of his age or other legal disability, unless by leave of the court." While the constitution gives the right to have jurors of certain qualifications, yet the legislature has the right to regulate the time of its enforcement to the end of the speedy administration of justice. Under this statute, in *Thompson's Case*, 8 Grat. 637, it was held that objection to a venireman in a criminal case is too late after he is sworn. In the condemnation case of *Railroad Co. v. Patton*, 9 W. Va. 658, it was held that the objection that jurors were not freeholders came too late after verdict.

The second point of error assigned is that, on the motion for a new trial, because the amount of compensation fixed by the jury was excessive, the court gave Blake election between accepting a less sum or a new trial, and, she accepting that sum, the court refused a new trial, whereas it ought to have given it. This assignment of error is based on the cases of *Vinal v. Core*, 18 W. Va. 1, and *Unfried v. Railroad Co.*, 34 W. Va. 260, 12 S. E. 512; the latter following the syllabus of the former case. The law which these cases propound is that in all actions for damages, where the verdict is so enormous in amount as to clearly indicate prejudice, partiality, passion, or corruption in the jury in arriving at their conclusions, the defendant is entitled to a new trial, and it is error to allow the plaintiff to elect to take a less sum, suggested by the court, when there are no data before the court by which the smaller sum can be rightly and definitely ascertained, but which is fixed by the discretion of the court, unaided by evidence. This doctrine we cannot apply to the present case for two reasons: First, we do not regard the finding excessive so as to justify a court in setting it aside for that cause, and, this being so, of course there is no reversible error to the prejudice of the railroad company. The company took all the gravel bed, or all the gravel in a parcel of nearly 6 acres of land, on the Ohio river and on said railroad, 15 miles from the growing city of Huntington, and 12 miles from the Chesapeake & Ohio Railroad, containing a deposit of 13 feet of gravel, valuable in paving streets in towns and for railroad ballast. Removal of the ballast would remove the soil of the valuable land, and injure the residue of the tract. The assessment of \$2,933 seems to me high, but not so as to justify us in overruling the verdict. A calculation of the product of this gravel deposit at a fair price under the evidence would produce more than double this sum, not to say anything of the destruction of soil and in-

jury to the residue of the tract. The jury fixed it. We see no partiality or prejudice. We cannot value it as farming land. The owner is entitled to its peculiar value from its happening to contain a valuable deposit of gravel. And the second reason why said cases do not call for reversal, but justify the action of the circuit court in allowing a remittitur, or partial release of damages, is that, as above stated, we have data or basis on which to fix compensation, and show that the sum fixed can do no injustice to the company. It is not like an action of tort, where there is no settled basis of estimation of damages. Here I could stop as to this assignment of error, so far as the decision of the case requires; but, as it is germane to the subject, I add that my examination has started doubt in my mind as to the correctness of point 23 in the syllabus in *Vinal v. Core*. It was obiter, because the court held that the verdict was not excessive, and could not have been set aside; and therefore the question whether, had it been so excessive as to call on the court to set it aside, it was error to accept a partial release of the damages found by the verdict, did not arise. Where there is a verdict, legally speaking, excessive, the right and duty of the court to set it aside cannot be questioned. What is the point of objection? That the amount is too large. Then, if the court allows a part to be released, can we say that the defendant is deprived of the right to have the amount fixed by another jury, and that the court arbitrarily fixes the damages in allowing a reduction and usurps the function of a jury? I think not. The court has power over the question of damages. That settles the point. It has power to say whether the damages found are too great. This inevitably concedes that it has right to say that a given sum is too great, but that another sum is not; that, if the verdict had been for a given sum, it would not disturb it. Then, why can it not suggest a certain sum as a proper one? If the verdict were set aside, a new one may come back to the court for review. It may do so repeatedly. Why may not the court accept a reduction at once? It gives the court a healthy power and control over verdicts, and ends litigation. The defendant is not hurt. The appellate court can yet be called upon to say whether the substituted sum is excessive. Where the action is based on contract, or in any case where there are legal rules or principles by which damages may be ascertained, it is clearly within the power of the court, as all concede, to allow a partial release, and render judgment for the reduced sum; but in actions based on tort involving negligence, malice, wanton wrong, and like elements, where the damages are unliquidated, and there are no fixed rules of law by which to fix them, then it is said there can only be a new trial, and no release

of part of the damages can be allowed, because it would deprive the party of a jury right under the constitution, and be an arbitrary assessment by the court. But the issue and assessment have been once before the jury, and the judge does not act arbitrarily in suggesting or accepting a less sum, but by the light of the same evidence which guided the jury. My opinion is that not only in actions for damages based on contract, or for civil injuries, where the law furnishes rules and principles for measuring damages, but also in actions based on tort, though the law does not furnish such rules and principles, but the amount of damages rests with the fair, impartial, and enlightened conscience of a jury, on a motion for a new trial the court may suggest or accept a less sum, and if the plaintiff accept it, overrule the defendant's motion for a new trial. The authorities are somewhat divided. Earlier authorities denied the proposition, perhaps, but later ones uphold it, and the great and decided preponderance of the highest authorities sustains it, to the ends of the exercise by the court of a salutary power over verdicts, and especially to end litigation. I cite the following cases to support the opinion just expressed: *Railroad Co. v. Herbert*, 116 U. S. 642, 646, 6 Sup. Ct. 590; *Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458; *Branch v. Bass*, 5 Sneed, 366; *Corcoran v. Harran*, 55 Wis. 120, 12 N. W. 468; *Baker v. City of Madison*, 62 Wis. 150, 22 N. W. 141, 583; *Davis v. Southern Pac. Co.*, 98 Cal. 13, 32 Pac. 646; *Diblin v. Murphy*, 3 Sandf. 19; *McIntyre v. Railroad Co.*, 47 Barb. 515, affirmed in 37 N. Y. 287; *Hayden v. Sewing Mach. Co.*, 54 N. Y. 221; *Doyle v. Dixon*, 97 Mass. 208; *Guerry v. Kerton*, 2 Rich. Law, 507; *Blunt v. Little*, 8 Mason, 102; *Young v. Englehard*, 1 How. (Miss.) 19; *Woodruff v. Richardson*, 20 Conn. 238; *Black v. Railroad Co.*, 10 La. Ann. 33; *Belknap v. Railroad* 49 N. H. 358; *Collins v. City of Council Bluffs*, 35 Iowa, 432; *Lombard v. Railroad Co.*, 47 Iowa, 494; *Whitehead v. Kennedy*, 69 N. Y. 462; *Jewell v. Gage*, 42 Me. 247; *Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Railroad Co. v. Hodge*, 6 Bush, 141; *Cotton Wool Co. v. Mills*, 28 N. J. Law, 60; *Pratt v. Press Co.*, 35 Minn. 251, 28 N. W. 708; *Clark v. Brown*, 116 Mass. 504; *Lambert v. Craig*, 12 Pick. 199; 1 Suth. Dam. 813; *Railroad Co. v. Rahman*, 22 Ohio St. 446; *Reddon v. Railroad Co.*, 5 Utah, 344, 15 Pac. 262. As to torts, this doctrine is denied by some cases. Nunnally v. Talliaferro, 82 Tex. 286, 18 S. W. 149; *Carliste v. Callahan*, 78 Ga. 320, 2 S. E. 751; *Koeltz v. Bleckman*, 46 Mo. 320. I have found but few cases clearly denying it. I observe that the opinion in *Nudd v. Wells*, 11 Wis. 415, referred to by Judge Green in *Vinal v. Core*, 18 W. Va. 60, has been called, as it was, obiter, and not followed in the later Wisconsin cases cited above. Some of the

cases admit a qualification in this: that where, in cases of tort, the amount of damages found by a jury is so enormous as to give evidence of prejudice, partiality, passion, or corruption in the jury, the verdict ought to be set aside, and a new trial granted, without allowing a remittitur of part, and this because of such bad influences operated in producing the unjust verdict, so it likely operated upon the jury in passing on other matters in the case. *Lowenthal v. Streng*, 90 Ill. 74; *Stafford v. Hair Cloth Co.*, 2 Cliff. 82. There is force in this view, and yet why should not those other matters stand on their own merits? If there was no issue, and only the quantum of damages to be passed on by the jury, or if, where there are other issues, and the finding as to them is plainly right, why should not a remittitur be allowed? True, in cases where the case is nicely balanced, or involving credibility of witnesses, it would seem proper to apply this qualification; but that is only to say that this action is within the discretion of the court, and this question only an element in its exercise, and it can refuse a remittitur when it thinks bad influences may have tainted findings on other matters; for the allowance or disallowance of a remittitur is within the sound discretion of the trial court, and its refusal to allow it would not, as I think, be a ground for reversal. As I construe point 23 of the syllabus in *Vinal v. Core*, supra, it places the ban on a remittitur in all cases based on tort, for it says that in all cases where there are no settled rules by which to measure damages, and the verdict is so large as to justify its being set aside, it must be unconditionally set aside. It applies the qualification above mentioned,—that where passion, prejudice, or corruption appear, no remittitur can be allowed; and as, under point 22, a verdict cannot be set aside for excess unless so enormous as to furnish evidence of those bad influences, it amounts to saying there cannot, in tort cases, be any remittitur. I have doubt about *Vinal v. Core* and *Unfried v. Railroad Co.* in this respect. My opinion is that it does not follow because a court sets aside a verdict in a case in tort because the damages are so excessive as to be attributable to partiality, prejudice, passion, or corruption, that those vices taint the finding on other matters so as to exclude a remittitur, but it is still within the discretion of the court to receive the release. If the court is satisfied with the case on other issues, it may allow it. I think the *Ohio* case of *Railroad Co. v. Rahman*, 22 Ohio St. 446, states the rule well as follows: "Where the damages assessed by a jury are excessive, but not in a degree to necessarily imply the influence of passion or prejudice in their finding, the court, in the exercise of a sound discretion, may make the remittitur of the excess the condition of refusing to grant a new trial." Affirmed.

MILLER v. COX et al.

(Supreme Court of Appeals of West Virginia.
Jan. 27, 1894.)

FRAUDULENT CONVEYANCES—DEED OF TRUST FOR WIFE — EVIDENCE OF VALIDITY — STATUTE OF LIMITATIONS—POWERS OF REFERENCE.

1. Where during the pendency of a suit against an insolvent husband, instituted for the purpose of obtaining a judgment on a note executed by him, said husband executes a deed of trust on his real estate to a trustee, to secure to his wife the payment of a sum of money which he claims she had loaned to him, which he had used in his business, and which sum was barred by the statute of limitations when said trust was executed, and amounted to nearly the value of the real estate, such trust deed cannot, as a lien, take precedence over judgments obtained by the bona fide creditors of said husband on debts created before said trust was executed, on the unsupported testimony of the husband and wife as to its validity.

2. Where money belonging to the wife as her separate estate is delivered to her husband, and used by him in his business, the law presumes it was intended as a gift, and not as a loan; and, in order to constitute such delivery a loan as against the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift.

3. Where the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony, of the husband and wife, of a private understanding between themselves that the transaction was by them considered or intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift.

4. In taking an account the commissioner may take the depositions of witnesses to enable him to act upon the subject, under his general notice, and a special notice is not necessary.

5. If, at the date of said deed of trust, the claim thereby sought to be secured is barred by the statute of limitations, that fact has a strong tendency to defeat said trust deed as a lien in favor of the wife against bona fide creditors of her husband.

(Syllabus by the Court.)

Appeal from circuit court, Roane county: V. S. Armstrong, Judge.

Action by C. C. Miller against James S. Cox and others to cancel a trust deed, and for other relief. From the judgment rendered, plaintiff appeals. Reversed.

Chas. E. Hogg, for appellant. Wells & Pendleton and Wm. A. Parsons, for appellees.

ENGLISH, J. On the 28th day of November, 1888, J. S. Cox, a resident of Roane county, W. Va., executed his note for \$100, payable to Charles E. Hogg six months after date, for value received, at the Merchants' National Bank of West Virginia, at Point Pleasant, which note was indorsed by said Charles E. Hogg, and delivered to W. H. T. Spencer, and was also indorsed by W. H. T. Spencer, and delivered to Rankin Wiley, Jr., and by Rankin Wiley, Jr., was indorsed and delivered to C. C. Miller. On the 3d day of September, 1889, said C. C. Miller obtained a judgment in the circuit court of Mason county upon said note against said J. S. Cox,

Charles E. Hogg, and W. H. T. Spencer for \$101.60 and costs. At the time said note was executed, said J. S. Cox was the owner of a tract of land situated on Reedy creek, in Roane county, W. Va., containing 125 acres, and on the 19th day of August, 1889, said J. S. Cox conveyed said tract of land to one George C. Brown, as trustee, to secure to his wife, Margaret J. Cox, the payment of a note for the sum of \$1,000, payable one year after date, which deed of trust was recorded on the 19th day of August, 1889, about 14 days before said judgment was obtained upon said note. At the February rules for the circuit court of Roane county, said C. C. Miller filed his bill in equity against said James S. Cox, George C. Brown, trustee, and Margaret J. Cox, praying that said deed of trust might be declared voluntary and void, alleging that it was made with intent to hinder, delay, and defraud the creditors of said defendant James S. Cox, and because the same was without any consideration whatever deemed valuable in law; that the same might be set aside; and that the said tract of land might be sold to satisfy said judgment and costs, etc. The defendant Margaret J. Cox demurred to the plaintiff's bill, which demurrer was sustained. The bill was amended at bar, and thereupon said Margaret J. Cox filed her answer. Subsequent to the amendment of said bill, no demurrer seems to have been interposed by the defendants, or either of them. It is, however, contended by counsel for the appellees, that Charles E. Hogg and W. H. T. Spencer, against whom the judgment was obtained, jointly with J. S. Cox, were necessary parties to the suit. This question was, however, fairly presented in the cause of Howard v. Stephenson, 83 W. Va. 116, 10 S. E. 66, and it was in that case held that where a judgment had been obtained against R. and S., and a chancery suit was brought to enforce the lien of said judgment against the lands of S., it was unnecessary to make R. a defendant in said chancery suit, as in it the plaintiff sought no redress against him or his property. Green, J., in delivering the opinion of the court, says: "It is also claimed that the necessary parties defendant to this suit were never made parties defendant. First, it is claimed, as the exhibits filed with the bill show that the judgments which the plaintiff seeks to enforce were judgments, not against the defendants only, but also jointly against others, these others were necessary parties to this suit. The question, as stated by Barton in his Chancery Practice, (pages 133-138,) is: 'No one should be made a defendant against whom there can be no decree or relief granted in the suit;' and Sanders, in his Suit in Equity, (page 191,) and this court, in Hill v. Proctor, 10 W. Va. 60, lay down the rule as follows: 'All persons materially interested in the subject of the controversy ought to be made parties in equity.' See page 78. But, as Sanders says on page 191: 'This rule,

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however, is restricted to those who are interested in the property which is involved in the issue, and does not extend to persons who have an interest in the point or question litigated.' As in this suit the only decree asked for, or which could have been rendered, was a decision against the land of Stephenson the defendant and appellant, to pay this plaintiff's two judgments, no decree was entered, or could have been obtained, in this suit, against any of the other defendants in these judgments, in favor of the plaintiff in the chancery suit, and it was therefore unnecessary to make any of them defendants." This ruling was followed and approved in the recent case, decided by this court, of State v. Bowen, (which has not yet been officially reported,) 18 S. E. 875, and we see no cause for departing from said ruling in this case.

The questions raised by the first and second assignments of error raise the question as to the correctness of the ruling of the circuit court in holding the deed of trust given by James S. Cox to George C. Brown, trustee, dated on the 19th day of August, 1889, to secure Margaret J. Cox, his wife, the payment of \$1,000, a valid lien, and giving it priority over the judgment lien of C. C. Miller for \$101.60; and these assignments of error may be considered together. In determining the bona fides of this transaction, and determining whether said deed of trust was executed with intent to hinder, delay, and defraud the appellant, we are allowed to look at the circumstances which appear in the record. So far as appears therefrom, this tract of land, which the defendant J. S. Cox testifies was worth about \$1,200, was all of the property, real or personal, possessed by the defendant J. S. Cox. An execution sued out upon the appellant's judgment had been returned by the sheriff "No property found." At the time the deed of trust was executed by said Cox to secure his wife the payment of \$1,000, suit was pending in the name of said C. C. Miller against him, which resulted in the judgment sought to be enforced in this case, about 14 days after said deed of trust was recorded. A judgment had been rendered against him on the 22d day of March, 1889, for \$50, and costs amounting to \$8, in favor of W. A. Parsons; and another judgment in favor of W. H. Wolfe, cashier, was rendered against him in the circuit court of Jackson county on the 13th day of November, 1889, for the sum of \$102.87, and costs amounting to \$11.01,—all of which debts existed at the date of said trust deed. The fact that the notes executed by said J. S. Cox to C. E. Hogg were causing trouble and apprehension in the mind of said Cox is apparent from the fact that said Cox told C. P. Adams that the note held by him would have to be paid, and that he was making arrangements to sell two horses to pay the Hogg notes; that he would pay them as soon as he could, and, if he had to have the money

when it became due, requested him to be as lenient with him as possible; that he did not obtain judgment enough against Ball; that he had expected to pay Hogg. And E. M. Riddle in his testimony, when asked what, if anything, he heard said Cox say about the payment of the Hogg notes, and what his intentions were with reference to the payment of them, (this deposition was taken the 10th day of July, 1891,) answered: "As to dates, I don't remember, but it's been a year, probably. In company with Mr. Cox, he asked me if I knew he had made an assignment, and I told him I had not heard it. He said it was reported he had made an assignment, but that he had not, but by way of a deed of trust to his wife to secure her in some money that he had used of hers. He first stated that he did not do this to defraud any of his creditors out of his honest debts, but that he had executed two notes to C. E. Hogg for attorney's fees that he considered unjust, and that he did not think he had any right to, and would not, pay them; that there were other agreements between him and Hogg that Hogg had not complied with." The plain and unmistakable inference to be drawn from this conversation with E. M. Riddle is that said Cox did not regard the debt evidenced by the notes executed to C. E. Hogg as a just debt, and that he had executed the deed of trust for the purpose of avoiding the payment of the same. "He did not think he had any right to, and would not, pay them." He did not wish to defraud any of his creditors out of his honest debts, but he had given the deed of trust, and he did not intend to pay these unjust notes. And while it is true that, in his deposition, said Cox denies that the said note and trust deed were executed for the purpose, or with the intention, of hindering, delaying, or defrauding the plaintiff, or any of his other creditors, or any other person, yet he does not deny the conversation detailed in the deposition of said E. M. Riddle, as above set forth. In this conversation with the witness Riddle he indicates the motive which induced the execution of the trust deed; and, while it is true that the declarations of the grantor made subsequent to the conveyance are not admissible to affect the title of the grantee, (see *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799,) yet in cases of this character they may be considered as a circumstance to show the motive which actuated the grantor in making a voluntary conveyance. She says in her deposition: "He would repay to me amounts. He would borrow it back again after awhile. The last money he borrowed was about 1882, and was something over \$1,000, some of which he used in buying cattle and horses, and some in lawsuits." Seven years had elapsed since the last money was loaned to her husband, according to her own statement, and he had used the same in his business transactions; but when suit has been instituted against him upon a claim which he

regards as unjust, and judgment is about to be obtained against him, he seeks to shelter his property from the impending judgment, which he regards as unjust, and which he tells Mr. Riddle he will not pay, by executing a note to his wife for money she had given him to use in his business more than seven years before, and executes a deed of trust on his land to secure the same. In answer to the question why, after waiting so long, it occurred to said J. S. Cox that it was his duty to execute this deed of trust for the benefit of his wife, the conversation detailed by Mr. Riddle with said Cox clearly indicates the motive and supplies the answer.

In the case of *Zinn v. Law*, 32 W. Va. 447, 9 S. E. 871, this court held that: (1) "Where a wife delivers money or property of her own to her husband, which he uses in his business, the presumption is that such delivery was intended as a gift; and, in order to constitute such delivery a loan as against the creditors of the husband, the wife must prove an express promise of the husband to repay, or establish by the circumstances that it was a loan, and not a gift." (2) "When the facts and circumstances tend to show that a gift was intended, and that the husband used and dealt with the property as his own, the mere parol testimony of the husband and wife of a private understanding between themselves that the transaction was by them considered or intended as a loan to the husband by the wife, and not a gift, will not, as against the creditors of an insolvent husband, rebut the presumption of a gift." And this ruling, as I think, propounds correctly the law upon the facts stated. In the case of *Crawford v. Carper*, 4 W. Va. 56, a father-in-law appears to have advanced to his son-in-law, at different times, a considerable amount of money. The son-in-law afterwards, becoming insolvent, executed his note to his father-in-law for the amounts so advanced, and immediately confessed judgment in favor of his father-in-law for the amount of said note, with the manifest intent of giving his father-in-law the first lien on his land. The debt for which said note was executed, and judgment confessed, was barred by the statute of limitations; and *Brown, P.*, in delivering the opinion of the court, said: "While it was all very right, if the debt was just and real, that it should be acknowledged and paid by the debtor, as between the parties, yet still the important question remains whether, under the circumstances of the case, it could be so done as above stated, so as to intercept the other bona fide creditors whose debts were not so barred; and I am free to say I think it could not, because it comes clearly within the first section of chapter 118, Code 1860, and is just such a case as it was the intention of the statute to prohibit." This section corresponds precisely with section 1 of chapter 74 of our Code. The ruling in the case of *Crawford v. Carper*, *supra*, was approved

and reaffirmed in the case of Knight v. Capito, 23 W. Va. 651. So, also, in the case of Bank v. Atkinson, 32 W. Va. 203, 9 S. E. 175, in which it appeared that the wife allowed the proceeds of her real estate to go into the hands of her husband, which money was used by him in his business, and after several years the husband purchased real estate in the name of his wife, which purchase he claimed was made with such proceeds, it was held that "if, when such purchase is made, any claim which she may have on him for such proceeds of her real estate is barred by limitation, that circumstance tends strongly to repel the wife's claim to exempt the land against creditors." And in the same case it was held that the law will not, from the mere delivery by the wife of her money to the husband, or from the permitted receipt by him of her separate estate, imply a promise by him to repay her, but will require more,—either an express promise, or circumstances to prove that in such matters they dealt with each other as debtor and creditor. To thus raise a debt against him to the prejudice of creditors, the proof must be clear, full, and above suspicion. Both J. S. Cox and his wife state that the last money he borrowed from her was in 1882, which must have been about seven years before the note for \$1,000 was executed which was secured by said deed of trust. They both state that a memorandum book was kept in her drawer by said Margaret J. Cox, in which the amounts she loaned him and the amounts he repaid her were set down; but that this memorandum book had been lost about two years before said note was executed, and that for that reason they could not ascertain the exact amount, and she agreed to take the note for \$1,000 secured by said trust deed. The cause was referred to a commissioner, who was directed to ascertain the liens existing against said land, their nature and priority, and in whose favor they existed, who ascertained and reported said trust deed of \$1,000 to be the second lien upon said land, if the court should hold that said trust deed was valid; a judgment in favor of W. H. Parsons for \$50, with interest and costs, the first lien, and the judgment of plaintiff for \$101.60, with interest and costs, the third lien, upon said land; and the judgment of W. H. Wolfe, cashier, for \$102.87, with interest and costs, the fourth lien binding upon said land. The court, in acting upon said report, excluded the depositions which had been taken before the commissioner by the plaintiff because no special notice had been given by the plaintiff of the time and place of taking the same, decreed that said trust deed was a valid and binding lien upon said land, confirmed the report of the commissioner as to the order and priority of said liens, and directed a sale of said land to satisfy the same, in accordance with the priority so ascertained; and from this decree this appeal was taken.

It is assigned as error that the court sustained the exception to the plaintiff's depositions for the reasons above stated, which point I regard as well taken, as it has for years been the practice in Virginia and in this state to take depositions before a commissioner, in reference to a matter referred to him, without giving any notice other than the general notice of the time and place of taking the account. Sanders, in his Suit in Equity, (page 627, § 536,) says: "Under the general notice given by the master commissioner when the order or decree is placed in his hands, the master or commissioner may take the depositions of witnesses without giving special notice to the parties of their being taken. See, also, the case of McCandlish v. Edloe, 3 Gratt. 330, where it is held (third point of syllabus) that "in taking an account the commissioner may take the depositions of witnesses, to enable him to act upon the subject, under his general notice, and a special notice is not necessary." See, also, 2 Bart. Ch. Pr. p. 641.

Returning again to the question as to the validity of the trust deed executed by said J. S. Cox to secure his wife the note for \$1,000, we call attention to the case of Maxwell v. Hanshaw, 24 W. Va. 405, where this court held that "a transfer of property, either directly or indirectly, by an insolvent husband to his wife during coverture, is justly regarded with suspicion, and, unless it clearly appears that it was entirely free from any wrong intent or purpose to withdraw the property from the husband's creditors, it will not be sustained. In such transfer there is a presumption against the wife in favor of the husband's creditors, which she must overcome by affirmative proof." In the case under consideration the circumstances which lead us to the conclusion that said deed of trust was executed with intent to hinder, delay, and defraud the creditors of said J. S. Cox may be summed up as follows: First. The intimate relation of husband and wife existed between the grantor and the cestui que trust. Second. The claim was barred by the statute of limitations at the time said note and deed of trust were executed. In support of this proposition see Wells, Mar. Wom. § 662, where it is said: "If the husband receives moneys of his wife under an agreement to refund them, it seems, in New York, that the statute runs at the time of the agreement, in the absence of any specified time of repayment;" citing Fletcher v. Updike, 3 Hun, 350, where the same is clearly held. And our statute expressly provides (section 15 of chapter 66 of the Code) that a married woman may sue without joining her husband, where the action is between herself and husband, and where it concerns her separate property. As to this she is under no disability, and the statute of limitations does not apply. See section 16 of chapter 104, which expressly excepts suits in regard to her separate es-

tate. Third. The declaration of said grantor to E. M. Riddle that he had not executed said trust to defraud any of his creditors out of his honest debts, but that he had executed two notes to C. E. Hogg for attorney's fees that he considered unjust, and that he did not think he had any right to, and would not, pay them; that there were other agreements between him and Hogg that Hogg had not complied with. Fourth. The deed of trust was executed during the pendency of the suit on one of said notes he had executed to said Hogg, and said trust was recorded only 14 days before the judgment was obtained. Fifth. Although said J. S. Cox and his wife both state that an account was kept between them of the amounts loaned to her husband and returned to her by him at different times, said memorandum book was not produced. Sixth. Said money was used by the husband in trading in stock and in lawsuits, and the law would presume a gift instead of a loan. Applying to these facts and circumstances the legal principles announced in the authorities above cited, my conclusion is that, while said deed of trust must be regarded as good enough between the parties thereto, it cannot be allowed to take precedence over the claim of the plaintiff or the other bona fide creditors of said J. S. Cox, and must be held void as to the judgment of the plaintiff, C. C. Miller. The decree complained of must be reversed, and the cause remanded, with costs to the appellant.

ALLEN v. BOLEN et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

DEEDS—RECORDING.

Under Act 1885, c. 147, providing that no unregistered conveyance of land shall pass any property as against purchasers for value, a prior registered deed takes precedence of a junior registered deed, though the latter was executed first.

Appeal from superior court, Rutherford county; R. F. Armfield, Judge.

Ejectment by J. W. Allen against Maggie Bolen and another. There was judgment for defendants, and plaintiff appeals. Reversed.

Justice & Justice, for appellant.

CLARK, J. No question affecting the homestead is involved in this case, though that view was strenuously pressed on the argument. The father of the defendant had his homestead, embracing three tracts of land, allotted to him in 1879. The defendant put in evidence that her father executed to her, on June 18, 1883, a deed for the locus in quo, which is one of said three tracts. This deed was registered March 13, 1891. The father's homestead was reallocated in 1890, other land being put in place of that conveyed to defendant. The interesting question whether a homesteader can have a sec-

ond homestead allotted to him when he has conveyed away the whole or part of his allotted homestead is not before us, as there is nothing here calling in question the validity of the homestead of 1890. The homesteader was expressly empowered to convey the homestead land by Const. art. 10, § 8, in the manner there provided. Having legally conveyed his homestead in the constitutional mode, the homesteader cannot now claim the locus in quo as part of such homestead, nor does he do so. The plaintiff bought at execution sale (September, 1890) under a judgment against the grantor in said deed, which judgment was docketed May 6, 1889. The sheriff executed a deed to plaintiff December 22, 1890, and it was registered January 21, 1891.

There is no question arising here as to what estate was conveyed by the father to his daughter, if the registration laws were complied with, for the conveyance to the daughter, made in 1883, prior to the lien of the judgment docketed in 1889, carried as to the plaintiff a fee simple, although the land had previously been allowed as a part of the grantor's homestead. The question is solely between the grantee in the deed and the purchaser under execution against the grantor. The defendant claims under a deed from her father, which was registered March 13, 1891. The plaintiff claims under a sheriff's deed, under an execution against the grantor, which was registered January 21, 1891. The grantor (homesteader) is barred by his deed. He has no interest in the locus in quo, and is asserting none. This case comes under the provisions of chapter 147, Acts 1885.¹ Though the deed purports to have been executed prior to the passage of the act, it does not come within the proviso thereof; for there was no actual notice at the sheriff's sale that the defendant was in possession, nor constructive notice, for upon the evidence the grantor, not his daughter, remained in possession after execution of the deed in 1883, receiving all the time the rents and profits, and listing the land for taxes in his own name, and at first the grantor seemed disposed to object to the assignment of the homestead of 1890, but afterwards assented. This would indicate, if anything, that he was apparently in possession for himself. There was certainly neither actual nor constructive notice that the defendant was in possession or had any deed. Under the act of 1885 the plaintiff's prior registered deed takes the property in preference to the junior registered deed, though executed first. This is the rule as between mortgages under Code, § 1254, of which the act of 1885 is a copy verbatim et literatim; thus applying to the registration of deeds the same rule applicable to the registration of mortgages. These words, having been construed as to the registration of mortgages,

¹ Acts 1885, c. 147, provides that no unregistered conveyance of land shall pass any property as against purchasers for value.

when they are copied and used by the legislature as to the registration of deeds must bear identically the same meaning. It cannot be said that the plaintiff, who purchased at an execution sale, took the land subject to the rights of the grantee under the unregistered deed. The principle that such a purchaser stands in the place of the judgment debtor is excluded by the statute in so far as it relates to unregistered conveyances, a judgment creditor and a purchaser under execution being within the terms of the act. The grantor is barred by his deed. He cannot claim the land as his homestead, and is not doing so. The defendant cannot avail herself of the unregistered deed to keep off the grantor's creditors. The locus in quo was therefore, as to the creditors, simply former homestead land, as to which the grantor had waived his homestead in the constitutional mode, by deed with the prescribed formalities. The grantee not having made her deed available by registration, as the statute requires, the land remained subject to execution for the grantor's debts, and the sheriff's deed gave the same title to the plaintiff as if the grantor had himself executed a deed, instead of the sheriff, on December 22, 1890, and the plaintiff had registered it on January 21, 1891, as he did the sheriff's deed, prior to the registration of defendant's deed, on March 13, 1891. The plaintiff (purchaser at execution sale) had no notice that this land had ever been embraced in a homestead, as the allotment of 1879 was not recorded as required by Code, § 504. He had no notice, by registration or otherwise, that the defendant held a deed for it, nor any notice, actual or constructive, that she was in possession. There was no objection made at the sale. The homesteader was in possession of another duly allotted and registered homestead, to which he had filed no exceptions. He made no claim then nor since to this tract as part of his homestead. In fact, he had solemnly waived all claim to the land by deed. If, under these circumstances, the plaintiff did not get a good title, no purchaser at an execution sale would ever be safe. The policy of our law is to encourage bidders at such sales, so that property may bring a fair price. Error.

SHEPHERD, C. J., (concurring.) As the purchaser under the execution sale seems, in the opinion, to be assimilated to a mortgagee under the act of 1885, I desire to express my disapproval of any inference which may possibly be made to the effect that the said act was intended to abrogate the well-known principle that the rights of such a purchaser or of a judgment creditor shall not prevail over any equities existing against the judgment debtor. This principle occupies too important a place in our jurisprudence to be repealed by implication. The act simply provides that no unregistered conveyances, contracts to convey, or leases for more than

three years "shall be valid to pass any property" as against creditors (that is, docketed judgment creditors) and purchasers for value; and it clearly has no application to defenses not based alone upon such unregistered conveyances, etc., and which attached to the property while in the hands of the judgment debtor.

ROWLAND v. OLD DOMINION BUILDING & LOAN ASS'N et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGE—CREDIT FOR PAYMENTS ON STOCK.

1. A contract by which the stock taken out by a borrower, and assigned to the association, when the mortgage is executed, is forfeited to the association on default, without allowance of credit on the mortgage for the payments made on the stock, is unconscionable, and, though upheld by the laws of the association's own state, will not be enforced in North Carolina.

2. When the foreclosure has realized enough to pay the sum borrowed, with interest at the rate stipulated on the face of the mortgage, and expenses, and the association has allowed nothing for payments made by the borrower on his stock, which he assigned to the association when he made the mortgage, such assignment is to be treated as merely a pledge of additional security for the loan, and the borrower is entitled to a return of the stock.

3. When the mortgagor and his land were in North Carolina, and he there applied for a loan to a Virginia association having a local board of managers and treasurer, and there executed the mortgage, the North Carolina usury laws apply, though the application was sent to the home office, and the money remitted from there, and the bond is payable there, and the local board and treasurer are styled agents, not of the association, but of the local members.

Appeal from superior court, Vance county; Bryan, Judge.

Action by W. H. Rowland against the Old Dominion Building & Loan Association, a Virginia corporation, and T. M. Pittman, for an accounting. From the judgment on report of referee, Pittman appeals. Modified.

Pittman & Shaw, for appellant. H. T. Watkins, for appellee.

BURWELL, J. The defendant association is a corporation of the state of Virginia. Its home or principal office is in Richmond, in that state. It organized a branch of its business at Henderson, in this state, and there had what is styled a "local board" of officers or managers. One Noell, of Vance county, applied, through the local board, to the home office, for a loan of \$1,000, on May 31, 1890, "upon bond and mortgage of the property" mentioned and described in his application. He stated in his said application that he understood he was to pay, if he secured the loan, the necessary expenses of securing the repayment of the money, including the charges of counsel for examining title and preparing securities, and that he would furnish an abstract of title. This application was accompanied by a certificate of the local

board that the property offered as security was worth \$1,500, and that the loan was one which it was desirable for the association to make. In order that he might have the privilege of borrowing money from this association, it was necessary that he should become one of its stockholders; and it seems that, at this stage of the business, it was required of those who would be borrowers that they should subscribe for stock whose par value was double the sum proposed to be borrowed. And so Noell subscribed for 20 shares of the stock, par value \$2,000, in order to get a loan of \$1,000. He then received the sum loaned him, (\$1,000,) and secured its repayment to the association, with 6 per cent. interest thereon, and also the payment of installments due on the stock subscribed for, (60 cents per share each month till the stock was worth par,) by a deed of trust on his property mentioned in his aforesaid application, and worth \$1,500. At the same time, and as a part of the same transaction, he executed the following paper: "For value received, I hereby assign to Old Dominion Building and Loan Association twenty shares capital stock therein, this day redeemed at \$50 per share. Witness my hand this 7th day of July, 1890. [Signed] T. A. Noell."

We gather from the record that this Virginia corporation insists that, by virtue of these contracts and this conveyance in trust, it has the right to exact from this borrower, in return for the \$1,000 loaned him, payments on 20 shares of stock, at \$12 per month, until the stock reached the par value of \$2,000, and also \$5 per month interest on the sum borrowed until the same time, and also fines for lack of the promptness prescribed in the by-laws of the association for the payment of these dues. Considered apart from all questions about expected profits, the contention of this association is that this borrower has agreed to pay back the money borrowed, with 6 per cent. interest, and then to give it, in addition, a bonus of \$1,000 for making the loan, and when this is done it will call the game over, and quit. Upon such a settlement, the account would stand thus: The association loans \$1,000. It receives entrance fees, \$20; appraiser's and attorney's fees, \$15; interest on \$1,000 at 6 per cent., \$5 per month for 166½ months, \$833.33; dues at 60 cents per share per month till they amount to \$1 per share, \$2,000; total receipts, \$2,868.33; to which should be added as a proper debit, 6 per cent. interest on \$2,000 for one-half of 166½ months, \$833.33; grand total, \$3,701.66. In other words, the borrower assumed, it says, a liability to pay \$3,701.66 for \$1,000 and its use for 166½ months, or about 20 per cent. for money. And against this liability is held up the hope that the business of the association will be immensely profitable, so that by reason of such profits the shares will arrive at their par value in a much shorter period than

166½ months. The foundation of such a hope is not easily discerned. Profits, if any come, must come from the pockets of the members alone. They must feed upon one another,—the borrowing members on the non-borrowing members, or vice versa,—for no other victims are in reach. Expenses must be met. Losses, inevitable in every business, will occur. And expenses and losses may not only destroy all hope of profits, but may bring the deluded borrower to the necessity of paying back for the benefit of creditors of the association the money he borrowed after he had settled the debt, as he thought, by the payment of his monthly dues through all the tedious years of his bondage to the association, for, however valid between the borrowing members or stockholders and the association may be their agreement that his debt shall be considered extinguished when he has paid in \$100 per share, creditors of the association might rise up, and object to the consummation of this arrangement, upon the very plausible theory that the assets of a corporation should not be applied to the use of the stockholders until the creditors are paid in full. This would be a rude awakening from the pleasant dream that he had borrowed money at 6 per cent. and knew an easy way to pay it back. But it is an awakening that may come to all those who have entered into contracts such as that set out in this record, if the contention of the association is sustained.

We have examined the charter of this association to ascertain from what source it obtains capital to be thus invested. Section 7 provides that "paid-up stock may be issued and sold at the price of fifty dollars per share," and that a dividend of \$1.50 per share shall be paid semiannually on such stock and that when the favored stock matures the holders shall be entitled to draw out \$100 per share. Thus, it appears that what it takes from one stockholder, under the pretense that it is lending money at 6 per cent., it gives to another with lavish hand. It is both a taker and a giver of usury. It appears that the trustees named in the deed of trust have sold the property thereby conveyed to them, and out of the proceeds of that sale there has been repaid to the association all of the debt—principal and interest—due from Noell on account of money borrowed by him. In the settlement made, the borrower got no credit for what dues he had paid in on his stock. According to the rules which govern the making of such settlements, as prescribed by the decisions of this court in *Mills v. Association*, 75 N. C. 292, and other cases, if credit had been allowed for those payments no complaint could be made by the borrowing stockholder or his assignee. *Overby v. Association*, 81 N. C. 56. Such a settlement would have justly and equitably adjusted the account between the association and the borrowing stockholder, and would have terminated his connection with it. But.

when the association chose not to give such credit, it decided to maintain Noell's relation to it as a stockholder. Indeed, in its answer, which was filed after the sale of the mortgaged property, it expressly alleged that he "is a stockholder in the defendant association for twenty shares of stock," and "claims the right to enforce a fine of ten cents on each share of stock, if monthly payments are not made when due." This allegation would seem to put an end to the controversy, if coupled with the fact that it is now conceded by all parties that out of the proceeds of the sale the debt for borrowed money was paid in full. If a "stockholder for twenty shares of stock," he must own that stock. If he owes the association nothing, it has no lien on the stock. If he owned it, as appears to be granted, he assigned it to the defendant Pittman, who here claims it, and is entitled to take it, with its privileges and burdens. But, apart from this allegation of the defendant that Noell is a stockholder, we think that a careful consideration of all the various transactions between the parties will lead to the conclusion that the legal effect of the assignment of the stock heretofore set out was merely to place it in the hands of the association as additional collateral security for the loan that day made to the stockholder. The sole consideration for that assignment was the loan. The only charge for that loan was interest at 6 per cent. It was clearly expressed. The association has received back its loan, and all the interest it charged. To give it the stock now would be to allow it to keep what it has paid nothing for, and what it has no warrant to claim as a gift.

It has been strenuously argued before us that the decisions of the court of appeals of the state of Virginia must be allowed to control us in our construction of the contract between this association and its borrowing stockholder, and our determination of his rights thereunder. It was said by that court in the case of *White v. Association*, 22 Grat. 233, when considering an arrangement between the parties then before it, similar to that we are here considering, that "if the transactions and dealings of this association with its members are warranted by the statute, and that statute is warranted by the constitution, though they may operate harshly and oppressively, it is not the province of the court to relieve. The fault is in the law, which the legislature alone can alter, or in the improvidence of the party, which neither the court nor the legislature can relieve." We feel no such constraint. We cannot allow such a bargain as this association says it made with the borrowing stockholder to be enforced in the courts of this state. It is unconscionable. It violates the law of this commonwealth, as construed by repeated decisions of this court. The rights of the parties must be settled here, where the contract was made. It is in no true sense a Virginia

contract. The labored efforts of the association to make it so appear but add to the conviction that it is not so in fact. Where a party litigant in the courts of this state asserts that his rights are to be adjudicated, not by the laws of this state, but by those of another; that a contract illegal here shall be enforced because it is legal under the laws of another forum,—he must be able to show clearly and conclusively that his case is one that entitles him to make such a demand. In this case the borrower was in this state; he applied for the loan here; there was a local board of managers here; it had a treasurer; the money was paid to the borrower here; he secured its repayment by a mortgage on land situated here; and the mortgage was executed here. Calling it a Virginia contract does not make it one. Sending the application to the "home office," as it is called; remitting the money from Richmond; calling the local board and its treasurer the agents, not of the corporation, but of the members who live in that locality; providing in the bond that it shall be paid in Virginia,—all these things cannot enable the foreign corporation to evade the usury laws of this state.

Under the laws of this state and the decisions of this court, what a borrowing stockholder of a building and loan association pays into the treasury of the association on stock account is a fund to be applied to the extinguishment of his debt. He has drawn out money in bulk. He pays back by littles. *Mills v. Association*, supra. The proper method of stating the account between the borrower, Noell, and the association, would require that the former should have had credit for what he had paid in on his stock. Had this been done, the stock would have been extinguished. It was not done. The stock, therefore, by the act of the corporation, still exists, and belongs, we think, to the assignee, Pittman. The judgment should be modified in conformity to this opinion. Modified.

HOLT et al. v. HOLT et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

WILLS—BEQUEST IN TRUST — DISPOSAL BY WILL OF CESTUI QUE TRUST.

Testator provided for his widow, and made equal distribution of his estate among all his children but A., a bachelor of mature years and intemperate habits, and bequeathed to trustees a certain sum, "to be by them held in trust for my son A.; and this I intend as A.'s full share of my estate; and they shall from time to time use so much interest, as it accrues, for his decent support, but not for his excessive indulgence. Any balance of interest is to be invested." The residuary clause named several sources from which the residue would arise, but did not specify this fund. *Held*, that A. had not merely a life estate therein, but the entire beneficial interest, and could dispose of the fund by will.

Appeal from superior court, Alamance county; Bryan, Judge.

Action by W. L. and E. C. Holt, executors of the will of Alexander Holt, deceased, against Thomas M. Holt and others, trustees and executors under the will of E. M. Holt, deceased, to construe a clause in the latter will. Judgment for plaintiffs. Defendants appeal. Affirmed.

Haywood & Haywood and Strong & Strong, for appellants. J. W. & P. C. Graham and E. S. & Junius Parker, for appellees.

MacRAE, J. The object of this action is to obtain a construction of item 13 of the will of E. M. Holt, deceased, as to the disposition to be made by the trustees named therein (the defendants in this action) of the fund bequeathed to them in trust, it being left in doubt whether the bequest in said item was intended to be limited to the beneficiary during his life, or was simply restrained by a provision limiting his power of disposal thereof. The said beneficiary having, by his last will, treated the bequest to himself as an absolute one, and in his turn disposed of the same, it was necessary, for the protection of the trustees, that the question should be submitted to the court, and it is properly presented in this proceeding. "Item 13. I give and bequeath to the trustees hereinafter appointed the sum of thirty thousand dollars, to be by them held in trust for my son Alexander Holt; and this I intend as Alexander's full share of my estate." So far there can be no question of construction. The above language plainly gives an absolute equitable estate in the whole fund to the cestui que trust. But there is added to the foregoing this further clause: "And they shall from time to time use so much of the interest, as it accrues, for his decent support, but not for his excessive indulgence. Any balance of interest is to be invested in good securities." The question arises, upon the last-quoted portion of the said item, whether it does not so qualify and limit the bequest as to give to the said Alexander only a right during his life to such part of the interest accruing upon the principal as might be set apart to him by the trustees "for his decent support." The elementary principle regarding the construction of wills, for which it is no longer necessary to cite authorities or to give reasons, is that the intent of the testator is to govern, and that this intent is to be ascertained from a consideration of the whole will, in the light of the surrounding circumstances. As, by law, a will like that we have before us must be in writing, it cannot permit parol evidence to be adduced either to contradict, add to, or explain the contents of such will. 1 Jarm. Wills, § 349; Kinsey v. Rhem, 2 Ired. 192. "But though it is the will itself, and not the intention as elsewhere collected, which constitutes the real and only subject to be expounded, yet in performing this office a court of

construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator." 1 Jarm. Wills, § 363. It will be observed that there are no admissions in the pleadings bearing upon the question, nor is there any testimony offered to aid us in our investigation. In this case we are strictly confined to the will,—not the item itself to be construed, but to the whole will,—and to the circumstances of the case, to be gathered from a careful reading of the will. As no two cases are precisely alike, we can derive but little aid from the application of recognized principles under other and different circumstances. The will was evidently drawn with great care, by a skilled hand, and under intelligent direction. We find no difficulty in reaching the conclusion that the great object of the testator, a man of large wealth and with a numerous family, was to make abundant provision for his widow during her life, and to provide for some of his grandchildren, and of the residue of his estate to make a just and equal distribution among all his children except Alexander, and he was to have a liberal provision in full of his share in the estate. It appears upon the face of the item under consideration that with regard to this son there was an apprehension in the mind of the testator that this share, if placed in his own hands, might be dissipated in excessive indulgence. It was suggested on the argument, as a reason why the intention of the testator was to give only a life estate in the fund, or such part of the interest upon it as the trustees might deem just and necessary for his support, to this son, that he was unmarried, and that he had reached that period of life when it was not probable he would ever marry, and therefore that he could have no family to be cared for. However true this may be, we are not at liberty to give it consideration, because it does not appear by the will, nor by the admissions of the pleadings, nor by any evidence to that effect. In a disposition by will, no words are necessary to enlarge an estate devised or bequeathed from one for life into one absolute or in fee. Indeed, it is generally necessary that restraining expressions should be used to confine the gift to the life of the legatee or devisee. If there had been no residuary clause in this will, under the principle that one will not be presumed to die intestate as to any part of his property when, by a reasonable construction of the will, such presumption can be avoided, it would have been conclusive that the testator intended an absolute gift for the benefit of his son Alexander, though limited as to his enjoyment thereof. *McMichael v. Hunt*, 83 N. C. 344. The provisions for the disposition of the residuum are found in items 20 and 21, and it will be found that the sources from which this residuum might be derived are referred to as

(1) all stocks and bonds not heretofore disposed of; (2) all property, both real and personal, not heretofore disposed of; (3) the proceeds of property in Charlotte and Lexington hereinbefore directed to be sold; (4) all the residue of my estate arising from the collection of debts, (5) or otherwise. None of these, unless it be the last, would embrace the remainder in the fund bequeathed to his son Alexander, and the care with which the will was drawn would prevent us from determining that the words "or otherwise" were intended to control the character of the bequest in item 13. We find that in the other items of the will where life interests were devised or bequeathed the intention is plainly expressed, and words of disposition equally explicit are used as to the remainders. See items 2, 3, 4, and 5. Instances of absolute gifts of personalty may be found in items 11 and 12, without any express words to show the extension of the bounty to the distributees or assigns of the beneficiaries. The words "and their heirs" are used where real estate is the subject of disposition, as in item 9, and where it was desired to provide a right of survivorship among certain beneficiaries, as in item 10; and when the proceeds of sales of stocks and bonds were to be divided among his sons and daughters, those shares given to married daughters were to be held by trustees, for them and their heirs. Items 13 and 17 are in their nature very similar, the evident object being to restrain the disposition by the beneficiaries in such manner as to do them injury rather than good. In neither of these items are there plain words restraining the gifts to the lives of the legatees. Indeed, in item 17 it appears that it was in the contemplation of the testator that in a certain event the legatees therein named should take an absolute estate freed from the interposition of trustees.

It was suggested on the argument, by the learned counsel for the defendants, that if the bequest was intended to have been an absolute one, and not merely for the life of the beneficiary, his power of disposition was necessarily such that he might defeat the purpose of the testator by an assignment or transfer of his interest in the fund bequeathed to him; but it is plain to us that the trustees in item 13 held the legal title to the fund for the purpose of the administration of the trust, the payment of the interest to the cestui que trust according to his necessities, and not for his excessive indulgence. The cestui que trust had no control over the fund, not even of the accumulation of interest over what may have been paid to him by the trustees; therefore, he had no power nor equitable right to dispose of principal or of any part of the interest which was not paid over to him, and he could not defeat the object of the testator by any conveyance of his interest to take effect during his lifetime. If there might have been such a conveyance, by deed or will, of the fund, to take effect after his

death, as to have enabled him to partially defeat the object of the testator, the difficulties in the way of such conveyance made it a remote possibility. A general rule of construction is that in a bequest of the interest, no express disposition having been made of the principal, it goes to the legatee of the interest, unless, indeed, it appears from the nature of the subject or the context of the will that the interest, only, was intended for the legatees. *McMichael v. Hunt*, supra. Without doubt, prior words in a will may be controlled and modified as to their meaning by subsequent expressions, and, as we have before said, the intent of the testator is to be reached from the whole will. If, by the context, it appeared that the intention of the testator was to give to his son Alexander a life interest only, there would be no difficulty in controlling the general words in the first clause of the item, the effect of which, without modification, would have been to have given an absolute title; but, taking the will for our guide, and examining its every provision to enable us to reach the true intent of the testator, we are of the opinion that for satisfactory reasons he gave to his son Alexander, in full of his share in the estate, the sum of \$30,000, and that he placed this sum in the hands of trustees, with power and discretion to pay over to his said son so much of the interest as was necessary for his decent support, and the balance to hold for his benefit, and subject to such disposition as he might make thereof by will, or, in case of his intestacy, to go, in course of distribution, to his next of kin according to law. There is no error. Affirmed.

DUNNING et al. v. BURDEN et ux.

(Supreme Court of North Carolina. Feb. 20, 1894.)

DEVISE OF LAND—CONSTRUCTION—CONDITIONAL LIMITATION.

A will devised a life estate in a part of his land to testator's wife, with remainder to the two children of a deceased son, provided that, if said children should die "leaving no lawful heir (either or each of them) of their body," the remainder should go to the children of another son and of a daughter. The children of the second son and daughter were provided for in succeeding paragraphs of the will. *Held*, that the remainder should go to the children of the second son and daughter only on condition that both the children of the first son should die without issue. *Clark, J., dissenting.*

Appeal from superior court, Bertie county; Bynum, Judge.

Action by W. D. Burden and Ella C. Burden, his wife, against R. J. Dunning and others. From the judgment, defendants appeal. Reversed.

F. D. Winston and Peebles & Martin, for appellants. St. Leon Scull, for appellees.

AVERY, J. Our attention is called—for the purposes of construing the devise of the

home place after the death of the testator's wife, and especially the contingent limitation over to the children of his son Abram and his daughter Sarah—to the second item of the will, which provides as follows: "After the death of my beloved wife, Cilvia Harmon, I give and bequeath the said lands and plantation whereon I now reside to the children of my deceased son Moses R. Harmon, to them and their lawful heirs forever: provided, however, if the said Ella C. Harmon and Walter M. P. Harmon should depart this life leaving no lawful heir (either or each of them) of their own body, I give and bequeath the said lands and plantation above named to the children of my son Abram T. Harmon and the children of my daughter Sarah Dunning, wife of Andrew J. Dunning, to them severally and their heirs forever." We think that the language is clearly susceptible of the interpretation that the testator intended the share of his realty, set apart to the two children of his son Moses, as a provision, primarily, for each of them at all events during their lives, and, in case both should leave issue then surviving, then to vest a moiety in the issue of each, but if only one should die, leaving a child or children, that such surviving issue would take the whole. If the words in parentheses, "either or each of them," had followed the name of Walter Harmon, or the word "life," the meaning would manifestly have been that, if either should die without lawful issue, the limitation over should take effect immediately, and the survivor, though blessed with numerous offspring, should forfeit forthwith his or her interest for life, and abandon all claim to the executory devise for such children, because of the barrenness or celibacy of the other. Such an arrangement of the words would have impelled us to adopt the construction contended for by the plaintiff. However unnatural or unreasonable the purpose to make his bounty to one branch of his family depend upon such a contingency might have seemed, we would have been controlled by the unmistakable meaning of the language used. But the purpose of the testator, apparent from a fair construction of his words, was that if either or each (in the sense of both) should leave surviving them issue, ("lawful heirs of their own body,") then the limitation over to the children of Abram T. Harmon and Sarah Dunning would be defeated, and the fee would vest,—an undivided moiety in the issue of each, if both should leave issue surviving them, or if only one should leave a child or children surviving them, then the whole in such issue. By this interpretation we not only give to the language employed its natural and obvious meaning, but we arrive at an interpretation consistent with the purpose on the part of the testator, which the law imputes to him in all cases where the words used are ambiguous, to provide equally for those who are nearest to him, and especially for his lineal

descendants. Schouler, Wills, § 479 et seq. Looking to the whole of the will to determine whether we can discover any general intent or leading purpose which is either in harmony with or repugnant to the interpretation we have given to the clause in question, we find that in the two succeeding paragraphs the testator provides for the plaintiffs,—children of his daughter Sarah Dunning and of his son Abram Harmon,—by a sale of two tracts of land named and of all other property, real and personal, not specifically devised, and a division of the proceeds of such sales between the children representing the two. The leading purpose of the testator seemed to be to make his grandchildren, issue of his three children, the objects of his bounty. If either or both of the children of Moses should leave issue, it seemed to be his wish that they should represent Moses, just as though they were inheriting the land, devised by the greatgrandfather, from the grandfather per stirpes. To make the issue of Ella forfeit all claim to a share in the ancestor's bounty, because Walter failed to leave lawful issue, neither harmonizes with the terms of the particular item which gives rise to the controversy, nor is in accord with the purpose pervading the whole will. The evident intention of the testator was to do what the parental instinct would naturally prompt him to do,—provide by any limitation not too remote for the lawful lineal heirs of either or both of the two children of Moses; but if (by a second marriage of their mother, for instance) there should be in esse, at the time of the death of either or both without lawful issue, any person, not a descendant of the testator, who might inherit from such descendant, then, in that event, it was the testator's purpose that the land should certainly vest in the surviving brother or sister and the issue of such survivor, or, on failure of issue, should be limited over to the other lineal descendants of the testator, the children of Abram and Sarah, rather than pass by inheritance or devise to some person not of his blood.

Entertaining the view that we do, we think that none of the authorities cited, either to sustain the contention that the fee would vest on the death of the testator's wife, or of his grandson Walter, have any bearing upon the question of interpretation which gives rise to the controversy as to the title of the "home place." There is no such analogy to any of those cases as would make them controlling authorities in our interpretation of the will now before us. The contingency in which the plaintiffs would become the owners and entitled to the possession of this land has not arisen, and will not arise unless Mrs. Ella Burden should die without issue surviving her,—an event altogether possible, but not now probable. There being nothing in the will which discloses a general intent inconsistent with the particular intent expressed in item 2. and the particular

intent being in accord with the natural feeling which, as a rule, governs a testator in disposing of his property, we think that the judgment should be reversed. Judgment must be entered below on the case agreed for the defendants for costs. Reversed.

CLARK, J., (dissenting.) The clause is artificially drawn, but it would seem that the plain meaning of the testator is this: He gave the property to Ella and Walter, the children of his deceased son Moses, and their heirs, with a defeasance that if either should die without heirs of the body, that share should go over to the parties named, and if each of them should die without heirs of the body, then the whole should go over. The defeasance, with remainder over, applied to "either" of them who should die without heirs of the body, and to "each of them" if both should die without heirs of the body. I think the result below was correct.

STATE v. HILL.

(Supreme Court of North Carolina. Feb. 20, 1894.)

LARCENY—FELONIOUS INTENT—SECRECY—ARGUMENT OF COUNSEL.

1. Secrecy is not such an essential accompaniment of larceny that an attempt to conceal the taking must be shown.

2. The remark by a prosecuting attorney, in reply to that of defendant's counsel that defendant was a respectable white man, that he himself was a colored man, and that if defendant was a colored man the jury would convict him in five minutes on the evidence, if error, is cured by an instruction that the question was not whether defendant was a white man or a colored man, but whether the evidence satisfied them that defendant, just as he appeared before them, was guilty.

Appeal from superior court, Bertie county; Bynum, Judge.

John Hill was convicted of larceny, and appeals. Affirmed.

Defendant took some meat from a store to his wagon, and claimed that Charles Godwin told him to do so and said that it was his. Defendant's counsel, in addressing the jury, alluded to defendant as a respectable white man, and that it was unreasonable to suppose that a man of such appearance would steal the meat. Counsel for the state, in reply, said: "Now, gentlemen of the jury, I am a colored man; you are white men. If the defendant was a colored man, you would convict him in five minutes on this evidence." On objection of defendant's counsel, the court held it legitimate argument in reply to what had been said for defendant. The court afterwards charged: "The question for you is, not whether the defendant is a white man or a colored man,—not whether the evidence is sufficient for you to convict a colored man on, or a white man,—but it is for you to consider whether the evidence is sufficient, and does satisfy you be-

yond a reasonable doubt that this defendant, just as he appears before you, is guilty."

F. D. Winston, for appellant. The Attorney General, for the State.

AVERY, J. Secrecy is usually a part of the evidence of a felonious intent, but it is not an essential accompaniment, so as to make it incumbent on the state to show an attempt to conceal the taking in every instance. *State v. Powell*, 103 N. C. 424, 9 S. E. 627; *State v. Fisher*, 70 N. C. 78. In the most favorable aspect of the testimony as to the manner of taking and carrying the meat out of the store, the question of the intent of the defendant was one for the jury; and, whether he went out of the store carrying it in front of him, or under his overcoat, it was proper for the court below to leave the jury to determine whether it was taken to the wagon at the request of Charles Godwin, and under the belief that Godwin had bought it, or whether it was the purpose of the defendant to deprive the true owner of it and convert it to his own use. If the solicitor abused his privilege, as counsel for the state, in his comments in reference to the color of the defendant, it was not such an extreme case as to take it out of the general and well-established rule that the court may either stop counsel at the time, or caution the jury in its charge not to be influenced by the remarks complained of. *Greenlee v. Greenlee*, 93 N. C. 278; *State v. Bryan*, 89 N. C. 531; *Kerchner v. McRae*, 80 N. C. 219; *State v. Weddington*, 103 N. C. 364, 9 S. E. 577; *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029. We must not be understood as holding that, as a reply to what had been said by the defendant's counsel, the remarks of the solicitor upon this subject were not within the line of fair and legitimate debate. There was no error.

AYDLETT v. PENDLETON et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

LEASE—CONSTRUCTION—NOTICE OF TERMINATION—RES JUDICATA.

1. A lease permitted the lessee to erect a building on the land. The lease stipulated that the lessee should remove the building on 30 days' notice, and that it should continue till lessors sold the land, and that the lessee should have 30 days after the sale to remove the building. Held, that a sale of the land by the lessors ipso facto terminated the lease, and the lessee had 30 days in which to remove the building.

2. Where the owner of the land conveyed a life estate to his wife, with remainder to others, and the wife conveyed her life estate, there was a "sale," within the meaning of the lease.

3. The purchaser from the wife was a proper person to give notice that the lease was ended, and the failure of the remainder-men to join was immaterial.

4. A notice by said purchaser that he had bought the land, that the lease was ended, and demanding possession, was sufficient, though it

did not expressly require the removal of the building.

5. In an action by the wife, before her conveyance, to recover possession from the lessee, a decree that the lessee had not forfeited the lease is not binding on the wife's grantee in a suit by him to recover possession from the lessee.

Appeal from superior court, Pasquotank county; Graves, Judge.

Action by E. F. Aydtlett against A. L. Pendleton and others to recover land. From a judgment for defendants, plaintiff appeals. Reversed.

Grandy & Aydtlett, for appellant. W. J. Griffin, for appellees.

BURWELL, J. In this action to recover possession of land, the defendant A. L. Pendleton, Jr., alleges in his answer that he holds the premises as assignee of a lease thereof made by A. L. Pendleton, Sr., and his wife, Jane R. Pendleton, in 1878, to one Kramer; and he avers that the plaintiff is the owner of an estate in said land for the life of Mrs. Jane R. Pendleton, who is now living; but he insists that, notwithstanding plaintiff's title, he should not be required to surrender possession to him, for the reason that the lease mentioned above has not been determined. That lease was made, as was therein expressed, "for the purpose of permitting D. S. Kramer to erect a building on said lot," the rents of which were to be collected by the lessee, and one-third thereof was to be paid to the lessors A. L. Pendleton and wife, Jane R. Pendleton, "for the use and occupation of said land." This lease contained the further stipulation: "That the said D. S. Kramer and his assigns are to have entire control and management of said building after the same shall have been erected, and remove the same off the land of said Pendleton and wife after thirty days' notice, in writing, from them to do so. A. L. Pendleton and wife further agree with said Kramer and his executors, administrators, and assigns that the lease of said land shall continue until they sell said lot, and after sale they agree to give Kramer and his assigns thirty days' notice to remove said building, and to place the same on their land adjoining said lot, provided they own the same at the time, upon the same terms and conditions as are provided in this lease. It is further agreed by the parties to this instrument that the lease shall be determined only on the sale of the land and the giving of thirty days' notice, as hereinafter mentioned; and the said Pendleton and wife shall have a lien on said building for one-third of the rent actually received, and not paid to them or their assigns. It is further agreed between the parties that the one-third rent for said building so received shall be paid to Pendleton and wife within five days after the receipt of the same." We construe these provisions to mean that the term of this lease was to end whenever the lessors, A. L. Pendleton and his wife, Jane

R. Pendleton, should dispose of all their interest in the land so leased. It was to continue in force, they stipulated, until they sold the lot; but they agreed that after its determination, by that act of theirs, the lessees should be allowed to remove the building to be erected by them, at any time within 30 days after notice. The expression "that the lease shall be determined only on the sale of the land and the giving of thirty days' notice" must be considered in connection with what precedes it. The act of selling the lot, when consummated by the lessors, the parties agreed, should work a determination of the relation of landlord and tenant, created by the contract; but the lessees had the right, as we have said, within the period prescribed, to enter upon the premises to remove the building put thereon by them under the terms of the lease.

We come, therefore, to the inquiry, had the lessors sold the lot before this action was begun? The defendants, in their answer, make the following allegation: "On or about the 1st day of March, 1883, the said A. L. Pendleton, Sr., executed a deed for the land in question in this suit, wherein he conveyed an estate in the same to his wife, the said Jane R. Pendleton, for her life, with the remainder as follows: One-third thereof in fee to one Robert Williams, one-third thereof for life to one George Pendleton, and the remaining third to one Kate Pendleton, for life, with contingent remainders over." And upon the trial the plaintiff introduced in evidence the deed referred to, and thus fully established the fact that A. L. Pendleton, Sr., one of the lessors, parted with all his interest in the premises at the date of that deed. The defendants, in their answer, also allege, as we have said, that the plaintiff holds the life estate of Mrs. Jane R. Pendleton, which she acquired under the aforesaid deed of her husband, to whom, it appears, the land belonged at the date of the lease to Kramer; and upon the trial the plaintiff established his ownership of that life estate, by proving that the tenant for life had conveyed her estate in the premises to a trustee, with power of sale, which power had been lawfully exercised, and at the sale so made he had purchased, and the estate of Jane R. Pendleton had been conveyed to him. Having thus shown that both A. L. Pendleton, Sr., and Jane R. Pendleton had sold the land, and no longer had any claim thereto or interest therein, the plaintiff had thereby established that the term of the lease had been determined; for, as we construe the contract, the lease was to terminate whenever such sale was consummated.

We think that the plaintiff, who had thus become the owner of the estate for the life of Jane R. Pendleton, was the proper person to give to the occupants of the lot (the assignees of the original lessee) notice that the lease was ended, and that they must take notice of that fact, and conform to the terms

of the agreement under which they held the premises. He was entitled to the possession of his property,—the lot. The defendant had the right, at any time within the prescribed period, to remove his property,—the building. In this there was nothing that concerned any right of the remainder-men, and their failure or refusal to join the tenant for life in the giving of the notice cannot affect his rights. He acquired the property, not subject to the provisions of the lease, but fully relieved of them. The plaintiff, upon the trial, showed that on April 22, 1892, he gave the defendants notice that he had purchased the premises, and that the lease was ended, and that the date of his purchase was February 20, 1892. This suit was begun on July 6, 1892. Hence, if we concede that the lease was not to be determined until 30 days after notice of the sale by the lessors, there would still have been a determination of the lease before the beginning of the action. The notice was sufficient. It did not, it is true, specially require the removal of the building. It did distinctly notify them that the plaintiff insisted upon his right to take possession of his land. This was ample notification, we think, that they should remove from the land the fixtures that, under the terms of the lease, they had the right to take away. To hold otherwise would be to stick in the bark. From what has been said, it follows that his honor erred when he told the jury that "the lease had not been determined." We think that the allegations of the answer, and the evidence introduced by the plaintiff, and not controverted, abundantly established the fact that it had been determined.

We deem it unnecessary to consider the exceptions taken by the plaintiff to evidence introduced by defendants to show that A. L. Pendleton, Jr., one of the defendants, was the assignee of the lessee, Kramer. As the case is presented here, it seems to us that the fact that the defendant A. L. Pendleton, Jr., (whose tenant the other defendant was,) claimed the land in controversy as assignee of the lease to Kramer, was insisted upon by both plaintiff and defendants; hence it seems to have been a work of supererogation to prove it, and entirely unnecessary to examine the evidence by which it was sought to establish what each party insisted was true.

The answer contained the following allegation: "In the year 1884 the said Jane R. Pendleton, believing that the sale to her had worked a termination of the lease, instituted a suit against the parties in possession, one T. B. Wilson and one R. W. Berry, for recovery of possession; and, the said suit coming on for trial at fall term, 1884, the following judgment was made: 'This action having been brought for the possession of a certain tract of land situated in the town of Elizabeth City, bounded as follows, viz. situated on the corner of Main and Water streets, 16 feet wide on Water St., and 39 feet on Main

St., it is ordered and adjudged that the defendants have not forfeited the lease in this cause pleaded, and that they are still entitled to the possession under said lease, and that defendants recover costs.'" Assuming that this judgment was rendered as alleged, it does not in any view, we think, affect the plaintiff's right. It was then properly adjudged, perhaps, that the lease had not been determined, for Mrs. Jane R. Pendleton had not then sold her interest in the leased premises. Since the rendition of that judgment, she has done so, and upon that sale the plaintiff founds his right. New trial.

AYDLETT v. NEAL et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

Appeal from superior court, Pasquotank county; Graves, Judge.

Action by E. F. Aydlett against Alethia Neal and A. S. Neal to recover land. Judgment for defendants. Plaintiff appeals. Reversed.

Grandy & Aydlett, for appellant. W. J. Griffin, for appellees.

BURWELL, J. The matters involved in this appeal are substantially the same as those considered by us in the case of Aydlett v. Pendleton, (decided at this term,) 18 S. E. 971. For the reasons stated in the opinion filed in that cause, there must be a new trial; and it is so ordered. New trial.

GODWIN v. EARLY et al.

(Supreme Court of North Carolina. Feb. 20, 1894.)

PARTITION BY TENANT IN COMMON—PLEADING.

In a special proceeding under Laws 1887, c. 276, to sell land in partition, a complaint which fails to allege that plaintiff is in possession is defective merely, and the court is not without jurisdiction to grant an amendment.

Appeal from superior court, Hertford county; Graves, Judge.

Special proceeding by John W. Godwin against B. F. Early and others to sell land for partition. The court dismissed the petition, because it failed to allege that plaintiff was in possession, and afterwards denied plaintiff's motion to amend. Plaintiff appeals. Reversed.

B. B. Winborne, for appellant.

MacRAE, J. The special proceeding begun before the clerk having been transferred to term for trial of issues raised by the pleadings, the judge had jurisdiction of the same, by virtue of chapter 276, Laws 1887. It seems to be now settled by repeated adjudications that the petition is defective unless it sets forth that the petitioners are tenants in common and in possession, the general rule being that possession of one tenant in common is possession of all, where there has been no actual ouster. *Alsbrook v. Reid*, 89

N. C. 151; Wood v. Sugg, 91 N. C. 93; Osborne v. Mull, Id. 203; McGill v. Buie, 106 N. C. 242, 11 S. E. 284. We think, however, that the failure to allege possession did not deprive the clerk or the judge of jurisdiction; it simply constituted a defective statement of a cause of action. Garrett v. Trotter, 65 N. C. 430. Of the proceeding for partition the clerk had jurisdiction, and, by virtue of the statute above, this jurisdiction was transferred to the judge. When his honor then denied the motion for leave to amend the petition in this respect, upon the ground of want of power to grant it, there was error. The reasoning is the same as that upon section 908 of the Code concerning amendment of process or other proceeding begun before a justice of the peace. To apply it to the case before us, we may use the language of Merimon, J., in *Manufacturing Co. v. Barrett*, 95 N. C. 38: "The superior court cannot create and supply its jurisdiction, but it can amend a process or pleading to make the jurisdiction appear properly, when in fact it did exist, but did not so appear; thus rendering effectual a large and important class of judicial proceedings that otherwise would very frequently entirely fail, to the injury of individuals and the prejudice of the public." Reversed.

DAVIS v. AUGUSTA FACTORY.

(Supreme Court of Georgia. Nov. 27, 1898.)

INJURIES TO EMPLOYE — NEGLIGENCE — EVIDENCE.

It appearing from the plaintiff's evidence that the machinery of the defendant from which the plaintiff's daughter received injuries resulting in her death, though not of the latest, safest, and most-improved design, was nevertheless safe when properly operated; and, it not appearing that the defendant failed to give the deceased warning of the dangers incident to its operation, (if, with reference to the character of this machinery, the age, capacity, and experience of the deceased, and all the surrounding facts and circumstances, it was the duty of the defendant to give her such warning,) the plaintiff was not entitled to recover, and there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Irena Davis against the Augusta Factory to recover for the death of plaintiff's daughter. From a judgment of nonsuit, both parties bring error. Affirmed.

C. Snead and E. F. Verdery, for plaintiff in error. J. B. Cumming and B. Cumming, for defendant in error.

LUMPKIN, J. This was an action by Irena Davis against the Augusta Factory for the homicide of a minor daughter. According to the evidence, fairly construed, the machine of the defendant from which the daughter received injuries resulting in her death was, though to some extent dangerous, entirely safe when properly operated.

It is true that this machine was not of the latest, safest, or most-improved design, but it was entirely suitable for the purposes for which it was made, and, relatively to others used within a recent period, it was improved machinery, and of a kind still manufactured by the best machine works, and employed in first-class factories. It is not incumbent upon persons or corporations using machinery in the prosecution of their business to procure the very best and safest machinery which can possibly be made. It is sufficient if the machinery is of a kind in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. "No manufacturing or business establishment of any kind is bound at its peril to make use only of the best implements and the best machinery and the safest methods." Cooley, J., in *Railroad Co. v. Smithson*, (Mich.) 7 N. W. 791. The machine in the present case undoubtedly came up to the required standard, and there was no evidence at all that it was in any particular out of repair; the testimony of all the witnesses showing, on the contrary, clearly and unequivocally, that it was in perfect order and condition. In *Black's Proof and Pleadings in Accident Cases* (page 28) we find the following: "In an action by an employee to recover damages for an injury received from a machine which the employee had to operate, the employee, to recover, must affirmatively establish: First, that the machine or appliance was defective; second, that the master had knowledge or notice or ought to have known such fact; third, that the employee did not know, and had not equal means with the master of knowing, such fact." The master is "bound to exercise reasonable care in the choice of the instrumentalities of his business, and the specific degree of care that he must exercise is measured by the nature and character of the business, the appliances used, and the risks therefrom to those employed." Wood, *Mast. & Serv.* §§ 345, 346, and cases cited under both sections. To the general rule as stated by these text writers, there are some exceptions, for the law undoubtedly "recognizes some distinction between the duty which a master owes his adult servant or employee, and that which he owes to an employee who, from his youth or inexperience, or other mental immaturity or infirmity, is not able, without instruction, to understand the perils to which he is exposed in the course of his employment. This distinction, as near as we can express it, is this: that, as to the latter class of servants, the master must give them full instructions with respect to the dangerous character of the machinery with or about which they are employed, and of the means necessary to be used to avoid those dangers." See note to *Fisk v. Railroad Co.*, (Cal.) 13 Pac. 144, and cases there cited. In this connection it may also be profitable to examine *Sullivan v. Manufacturing Co.*, 113 Mass. 398, and the

comments thereon in Wood, Mast. & Serv. § 351. And see 14 Am. & Eng. Enc. Law, 897, under title "Master's Duty to Instruct Inexperienced and Minor Servants." It is impossible, however, to lay down any inflexible rule applicable alike to all cases where minors are employed, as to what warning will be requisite; and, without doubt, in some cases even minors are not necessarily entitled to any warning at all as to the character of the machinery about which they are at work, or as to the proper method of operating it and avoiding obvious dangers. Much depends upon the nature of the machinery, the age, capacity, intelligence, and experience of the employe, as well as all the surrounding facts and circumstances.

It appears that in the present case the plaintiff's daughter was 15 years of age. It may be that the danger connected with the running of the machine by which she was injured, and the proper method of operating it so as to insure safety, were so obvious that there was no real duty devolving upon the defendant to give her any special warning or instructions at all. We do not so decide, nor is there occasion for so doing, because, even if she was entitled to such warning, there was no evidence showing that the defendant failed to give her ample warning of the dangers incident to the operation of the machine in question. The declaration alleges such failure, but there was no proof to sustain this allegation. The only evidence upon the subject was to the effect that when asked by her mother, shortly after the injury, whether she knew the danger to which she had exposed herself, the daughter replied that her aunt Ellen, who had been previously employed at the factory in operating this same machine, had never told her of the danger. Even if this evidence was properly received, it entirely fails to show that the deceased had not received full and ample instructions concerning the proper way in which to operate the machine so as to avoid danger, either from the superintendent, or some other employe of the defendant whose duty it was to give such warning. There is no reason whatever for presuming that this duty devolved upon the aunt of the deceased. In order to authorize a recovery by the plaintiff, it was certainly necessary to allege a failure to give such warning; and, in our opinion, the burden of proof was upon the plaintiff to prove this fact, there being no presumption that, if it was the duty of the defendant to give any warning at all, it had failed to do so. See 2 Am. & Eng. Enc. Law, 654, 655, tit. "Burden of Proof." As the plaintiff signally failed to establish this fact, she did not make out a prima facie case, and the judgment of nonsuit was right. Judgment on main bill of exceptions affirmed. Cross bill of exceptions dismissed.

GITHENS et al. v. MURRAY et al.

(Supreme Court of Georgia. Jan. 8, 1894.)

PRINCIPAL AND AGENT—NOTICE TO AGENT—PARTNERSHIP.

Under the rule that notice to an agent is notice to his principal, merchants employing a broker to take orders for them for the sale of goods, which orders they fill, or decline to fill, according to their own discretion, are chargeable with actual notice received by such broker that a member of a partnership, with whom they have previously dealt only through that broker, has withdrawn from the firm, and that a new partner has been admitted; and if, after such notice, the new partnership orders goods through the same broker, it is his duty to inform his principals of the change, and his omission to do so will not render the retired partner liable upon such orders, though the merchants fill them in ignorance on their part of the previous dissolution. It is within the scope of a broker's agency to ascertain the persons, whether members of a partnership or not, by whom goods are ordered of or through him; and his principals can have no right to bind any person who, to his knowledge, has neither ordered nor received their goods.

(Syllabus by the Court.)

Error from superior court, Bibb county; C. L. Bartlett, Judge.

Action by Githens, Rexsamer & Co. against R. B. Murray and another. There was judgment for plaintiffs for a part, only, of their claim, and, a new trial having been denied, they bring error. Affirmed.

Lanier, Anderson & Anderson, for plaintiffs in error. S. A. Reid and Hardeman, Davis & Turner, for defendants in error.

LUMPKIN, J. Githens, Rexsamer & Co. brought, in a justice's court, two suits upon open accounts against Murray & Co., a firm composed of R. P. Murray and R. C. Keen. The cases were taken by appeal to the superior court, there consolidated, and resulted in a verdict for the plaintiffs for \$37. Being dissatisfied with the amount of their recovery, they moved for a new trial, to the overruling of which they except.

It affirmatively appears that the firm of Murray & Co. was actually dissolved on the 15th day of October, 1891, and that the verdict in the plaintiffs' favor covers the price of all goods sold to the firm before the dissolution. It also appears that J. C. Edwards, the plaintiffs' broker, had actual knowledge of the dissolution about the time it occurred, and that there had never, prior to that time, been any dealings whatever between the plaintiffs and Murray & Co., except through this broker. The goods for which the plaintiffs further seek to hold R. C. Keen liable were sold and delivered upon orders placed through Edwards after he had actual knowledge that Keen had retired from the firm. The only point of difference between the parties arises upon the question as to whether or not the knowledge of Edwards regarding the dissolution was binding upon the plaintiffs, so as to prevent Keen from becoming

liable to pay for goods sold after he had ceased in fact to be a member of the firm. The relation which Edwards sustained to the parties will appear from the following extract from his testimony, the truth of which was not disputed: "My duties with reference to Githens, Rexsamer & Co. were, that I sold their goods, on a brokerage basis, for commission for everything that I sold. I had no special duties at all. I did not handle the goods at all. I simply sold them. I did not pass upon the responsibility of the parties dealt with. I did not determine who were the members of any firm that I sold to. That was not a part of my business. I was expected, however, only to sell to good parties. To a certain extent, they relied upon my determination. They expected me to go to work, and sell to a man that was good, and if they looked him up, and found him reported badly, they would not ship the goods; but I have never had them turn down any order I sent in. In these cases, Mr. Murray gave me the orders. I sold every one of them to him, himself. I cannot name the date when I first knew of Mr. Keen's withdrawal. Mr. Taylor came to me, and said he was going to buy them out, and asked me if it was a good scheme, and I told him that I thought so; and about a week after that he came to me, and told me he had bought him [Keen] out, and I went on selling goods. I did not know how the firm was going to be styled, and I put it down as I did before."

It will thus be seen that Edwards knew, not only that the firm of Murray & Co. had been dissolved by the retirement of Keen, but that a new firm had been formed, of which Taylor was a member. Whatever may have been the extent of Edwards' agency in representing the plaintiffs, we entertain no doubt that it was his duty to inform his principals of this change in the firm; and we are quite certain that his failure to do so would not render Keen, the retired partner, liable upon orders for goods given by Murray for the new partnership to the plaintiffs through this same broker, notwithstanding the plaintiffs had no personal knowledge of the dissolution, and filled these orders in entire ignorance of that fact. When a broker undertakes to sell goods for another, it is certainly within the scope of his agency to ascertain to whom he is selling. Indeed, it would be utter nonsense for any broker to undertake to sell the goods of other persons without knowing who were the purchasers; and of course, if he deals with a partnership, he must know who compose it. As to all goods sold by the plaintiffs to Murray's firm on orders placed by him through Edwards after October 15, 1891, Edwards undoubtedly knew that the firm was then composed of Murray and Taylor, and that Keen no longer had any connection with it. This being so, there is no principle, either of law, justice, or fair dealing, which would author-

ize the plaintiffs to hold Keen responsible for the value of goods ordered by the new firm. He had nothing to do with ordering them, did not receive them, and derived no benefit from their purchase. Moreover, he had never in any manner dealt with the plaintiffs, other than through Edwards, acting as their broker, and consequently did nothing to induce them to believe he had been, or continued to be, Murray's partner. All the facts were known to Edwards, and under the circumstances of this case the plaintiffs were chargeable with the knowledge he had. The plaintiffs having recovered from the firm of Murray & Co., composed of Murray and Keen, all they were entitled to recover against that firm, and there being no complaint on their part of any failure to recover, as against Murray, the balance of their accounts sued on, there was no error in overruling their motion for a new trial. In fact, the entire controversy was as to the liability of Keen, and the judgment rendered is for the full amount which he is either legally or morally bound to pay. Judgment affirmed.

In re CONTEMPT BY TWO CLERKS.

(Supreme Court of Georgia. Jan. 6, 1893.)

PER CURIAM. The statute requires that criminal cases be transmitted to this court within, or immediately after the expiration of, 15 days from the date of serving the bill of exceptions. It is the duty of all clerks to know of this requirement, and comply with it; they must comply with it. But as the statute, in its application to criminal cases, is recent, the two clerks who have heretofore been ignorant of it are excused, on that ground, from the pains of contempt for past failures. Hereafter they, as well as all other clerks, must take notice of the statute, and render obedience to its mandates. Rules discharged.

EAST TENNESSEE, V. & G. RY. CO. v. HEAD.

(Supreme Court of Georgia. Dec. 18, 1893.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

It appearing that if the railway company negligently erected the danger signal post, by placing it too near the track of the railway, this fact must have been well known by the deceased engineer, the plaintiff's husband, and it also appearing by uncontradicted evidence that he unnecessarily left his place upon the locomotive, and exposed himself to danger, for the purpose of getting a view of a hot journal, when he could have done so safely without leaving that place, his death was caused, in part at least, by his own negligence, and his widow was not entitled to a recovery from the company.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Action by Ruth Head against the East Tennessee, Virginia & Georgia Railway Company to recover for the death of plaintiff's husband. There was a verdict for plaintiff, and

from an order denying a new trial defendant brings error. Reversed.

Dorsey, Brewster & Howell, for plaintiff in error. W. M. Bray, for defendant in error.

LUMPKIN, J. A post was erected by the defendant near the line of its railway for the purpose of supporting a contrivance commonly called a "telltale," designed to warn employes upon trains of their approach to a bridge. The plaintiff's husband—an engineer in the service of the company—left his seat upon the locomotive for the purpose of looking at a hot journal under the tender. While leaning outward and looking downward for this purpose, the locomotive being in motion, his head came in contact with this post, and he was killed. The plaintiff, his widow, brought an action to recover damages for his homicide, alleging that it resulted from the negligence of the company in placing this post too near the track, and that her husband was without fault and blameless.

As to the distance of the post from the rail at the time of the killing, the evidence was decidedly conflicting. Assuming as true the evidence for the plaintiff, there can be no doubt that the company was negligent in this respect. On the other hand, according to the evidence for the defense, a contrary conclusion might well be reached. In the view we take of this case, however, it is immaterial what may be the truth as to this disputed question. Granting that the post was erected too near the track, the evidence establishes, almost to a certainty, if not absolutely, that this fact must have been known to the deceased. He passed over the road almost daily for a considerable period of time. The post, as already stated, was near a bridge; and, in view of all the evidence, it is almost impossible to conceive that he was ignorant of the existence of the post, or unaware of the distance it stood from the track. Under these circumstances, although it may have been his duty to look after the journals under the tender, and keep himself informed as to their condition, we think he should have exercised some care in selecting the place at which he would attempt to perform this duty. It would have involved only a few seconds' delay to wait till the post was passed; and common prudence, surely, would have suggested the propriety of first looking to see whether there was anything which would render this attempt perilous at the particular point on the line of the road which his train was then passing. Certainly, if he could get a view of the journal without exposing himself to danger at all, he ought to have done so. The evidence is clear, strong, and undisputed that, without leaving his seat in the cab, and without subjecting himself to any peril whatever, he might have seen the hot journal fully as well as from the position he actually assumed.

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To look at the journal from his seat would, it is true, have required a slight inclination of his head outside of the window of the cab, but not enough to bring his head in contact with the post, or in such proximity to it as to be dangerous. Inasmuch, therefore, as there was a way in which he could have performed his duty with respect to the hot journal with absolute safety, and he disregarded the safe method of so doing, and adopted another, which was in the highest degree dangerous, he was certainly guilty of some contributory negligence; and, this being so, his widow had no right to recover from the company. Under the facts appearing in the record, the verdict in her favor was contrary to law, and the court ought to have granted a new trial. Judgment reversed.

SMITH et al. v. CLEVELAND, C., C. & ST. L. RY. CO.

(Supreme Court of Georgia. July 24, 1893.)

NONSUIT—SUFFICIENCY OF EVIDENCE.

According to the evidence produced by the plaintiffs, the witness being the person who had actual knowledge of the fact, the car alleged to have been unreasonably delayed in its passage from East Rome to Rome was sent forward and delivered with as much dispatch as possible under the actual circumstances which existed at the time. This being so, there was no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action in attachment by Smith & Ramey against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of nonsuit, plaintiffs bring error. Affirmed.

The following is the official report:

Smith & Ramey sued the Cleveland, Cincinnati, Chicago & St. Louis Railway Company in a magistrate's court, where there was a decision in favor of plaintiffs. Defendant took the case by appeal to the superior court, and on the first trial thereof there was a verdict for defendant. A motion for new trial was granted, and, upon the second trial, plaintiffs made a motion to dismiss the appeal on the ground that the security on the appeal bond was the same as the security on the replevin bond, (the action having begun by attachment,) and therefore amounted to no security. This motion was overruled, and to this ruling plaintiffs excepted. The same motion had been made on the former trial of the case, and the court had then overruled it, and allowed the bond amended so as to remove the objection, and to these former rulings no exceptions pendente lite were ever filed. At the conclusion of the testimony for plaintiffs, a motion for nonsuit was made, which was granted upon the ground that, under the law and evidence, plaintiffs were not entitled to recover.

For plaintiffs, the following evidence was introduced: On January 15, 1891, Smith & Ramey, who were brokers of Rome, Ga., and agents there of the East St. Louis Packing Company, ordered a car of meat from the packing company, which car they bought on their own account, telegraphing to the packing company that they would accept the car of meat delivered. The car arrived in East Rome January 22, 1891. The bill of lading was made out to "shipper's order, notify Smith & Ramey," and indorsed in blank, and was in the First National Bank of Rome, with draft attached, which draft was drawn on Smith & Ramey. Plaintiffs had the car sold to Hamilton & Co. When it arrived in East Rome, Ramey notified the yard master of the East Tennessee, Virginia & Georgia Railway Company to bring it into Rome immediately, which he promised to do within half an hour. The car was not delivered in Rome until more than 36 hours after it arrived in East Rome, and Hamilton & Co. refused to take it when it arrived in Rome, because of the delay in delivering it, as they had bought elsewhere, and could not afford to wait. Because of the fall in the price of meat, caused by the delay between East Rome and Rome, which were separate stations, about half a mile apart, plaintiffs sold the car at a loss of \$93.75 from what it should have brought, had it been delivered promptly. The car could be brought from East Rome inside of two hours. Even if the track was very much blocked, and a great deal of switching had to be done, two hours would be ample time. Plaintiffs were held responsible by the packing company for any loss on the car, and actually paid it the \$93.75 loss. Plaintiffs were prepared to produce the bill of lading and pay the draft whenever the railway company was ready to deliver the car, and the reason they did not do so was because the railway company did not produce the car. The car of meat was sold to Simpson, Glover & Hight, who paid the face of the draft, less \$93.90. Plaintiffs paid no money on the draft, but sent the \$93.75 direct to the packing company. No meat was ever delivered on the side track in East Rome, and brought to Rome in drays. The freight was paid, but not by plaintiffs. "Shipper's order, notify Smith & Ramey," usually means that the freight is to be delivered on presentation of the bill of lading indorsed by the shipper. Simpson, Glover & Hight, when they paid the drafts, got the bill of lading from the bank, got the meat, and gave up the bill of lading to the East Tennessee, Virginia & Georgia Railway Company. The difference between the \$93.90 and \$93.75 is exchange. The entry of "Canceled" was on the bill of lading when plaintiffs got it, and the entry thereon, "To be delivered only on presentation of bill of lading properly indorsed," was not put on there after plaintiffs got it, Ramey, who was the main witness for plaintiffs, thought.

Ramey did not have the bill of lading when he went to the depot of the East Tennessee, Virginia & Georgia Railway Company, but it was in the bank, with sight draft attached. He had not paid the draft, and did not accept it. Sight drafts are not accepted. It was presented to him, and he refused payment. He was ready to produce the bill of lading in this way: He would have gotten the money from Hamilton & Co., paid the draft, and gotten the bill of lading, if the car had been placed that day. The packing company telegraphed the bank to sell to Simpson, Glover & Hight. Ramey did not receive the money, and never had the bill of lading in his possession until he got it from the East Tennessee, Virginia & Georgia Railway Company, after Simpson, Glover & Hight had paid the draft and gotten the meat. There was no unreasonable delay until the car reached East Rome. Hamilton & Co.'s meat was always delivered on the side track at their warehouse, which was a short distance from the freight depot of the East Tennessee, Virginia & Georgia Railway Company. They never had any meat delivered in East Rome. Meat fell about 40 points while the car was delayed in East Rome. Plaintiffs introduced the checks given by Simpson, Glover & Hight, freight bill, and invoice of the meat. They also introduced the bill of lading. Upon this bill of lading were the entries that it was to be presented by the consignee without alteration or erasure, and the direction, "Shipper's order, notify Smith & Ramey, Rome, Ga." Also, that the goods were to be delivered only on presentation of the bill of lading properly indorsed, and an indorsement in blank by the packing company. The destination of the freight was stated to be Rome, Ga. By the bill of lading, the defendant agreed to transport, with as reasonable dispatch as its general business would permit, to destination, if on its road, or otherwise to the place on its road where delivery was to be made to connecting carrier, and there to deliver to the consignee or connecting carrier upon the conditions: Neither defendant, nor any other carrier receiving the property for carriage to destination, was bound to carry by any particular train, or in time for any particular market; and any carrier, in forwarding the property from the point where it left its line, was to be held as forwarder only. Responsibility of any carrier to cease as soon as the property was ready for delivery to the next carrier or the consignee, and each carrier to be liable only for loss or damage occurring on its own line, etc. The yard master of the East Tennessee, Virginia & Georgia Railway Company at Rome testified that he did promise Ramey to deliver the car of meat in Rome in a short while, but did not do so because of the crowded condition of the railroad yard; that the car was delayed about 36 hours; and that he got the car in as soon as he could.

W. S. Rowell and C. Rowell, for plaintiffs in error. C. A. Thornwell, for defendant in error.

PER CURIAM. Judgment affirmed.

TOLBERT v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

ASSAULT WITH INTENT TO RAPE—IDENTIFICATION OF DEFENDANT.

In view of the evidence, there is ground for grave apprehension that the little girl who was assaulted may have been mistaken in identifying the accused as the guilty person. But this was a question for the jury, and, the presiding judge having approved the finding, this court is constrained by law to recognize the doubt as having been rightly solved against the prisoner.

(Syllabus by the Court.)

Error from superior court, Fulton county; R. H. Clark, Judge.

Tom Tolbert was convicted of assault with intent to rape, and brings error. Affirmed.

The following is the official report:

The plaintiff in error was convicted of assault with intent to commit rape on Nannie Perry, nine years old. He moved on the general grounds for a new trial, which was denied, and he excepted. The testimony of the girl is to the effect that the crime was committed by the defendant between two and three o'clock in the day. He introduced four witnesses whose testimony tends to prove an alibi. It also appears that on the second day after the commission of the offense the defendant went twice to the house of the girl's mother, and told her he had heard he was accused of the crime, and that he could prove where he was that day. The girl was absent at his first visit, but was present at the second, and identified him as the man who assaulted her. One witness testified that he saw the defendant about a block below the house where the assault was said to have occurred, going in the direction of the place where he was located by the proof of alibi, about one o'clock on the same day.

F. R. Walker, for plaintiff in error. C. D. Hill, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed.

WESTERN UNION TEL. CO. v. ROUNTREE.

(Supreme Court of Georgia. Oct. 30, 1893.)

TELEGRAPH COMPANIES—FAILURE TO TRANSMIT MESSAGE ACCURATELY.

Under the act of October 22, 1887, (Acts 1887, p. 111,) an electric telegraph company is not liable for the penalty of \$100 for a verbal, though material, inaccuracy in the transmission of a message. The words, "shall transmit and deliver . . . with impartiality and good faith, and with due diligence," relate, so far as the purposes of this act are concerned, to the time within which the transmission and delivery

must be accomplished, and not to accuracy and correctness in sending and transcribing dispatches.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by Daniel W. Rountree against the Western Union Telegraph Company to recover a penalty. Judgment for plaintiff, and defendant brings error. Reversed.

Bigby, Reed & Berry, and Dorsey, Brewster & Howell, for plaintiff in error. D. W. Rountree, in pro. per.

LUMPKIN, J. The act of 1887, prescribing the duty of electric telegraph companies as to receiving and transmitting dispatches, and fixing penalties for violations thereof, was intended to prevent discriminations, and to secure promptness in the transmission and delivery of telegraphic dispatches. With reference to the latter object, its terms relate to the time within which these companies must perform the services required, and not to the accuracy and correctness with which such services may be rendered. In deciding the question presented by the case at bar, we have given the act a most thorough examination and consideration, and are entirely satisfied with our conclusion that the general assembly did not intend to impose upon telegraph companies a penalty of \$100 for a mere verbal error in the sending of a dispatch, or in the transcribing of it at the receiving office, even though the error be a material one. To hold otherwise than we do on this question would be to give to the act an exceedingly harsh construction. The elements of impartiality and good faith are not involved in this case, but the defendant in error contended that the requirement to transmit with "due diligence" means to transmit accurately as well as promptly. We do not think the words quoted can fairly have this interpretation, especially in view of the rule that penal statutes must be construed strictly, and should not be so enforced as to impose a penalty in a case admitting of doubt. We are fortified in our judgment by the fact that the proviso of the first section of the act distinctly declares that nothing in the act "shall be construed as impairing, or in any way modifying, the right of any person to recover damages for any such breach of contract or duty by any telegraph company, and said penalty and said damages may, if the party so elect, be recovered in the same suit." It will thus be seen that, for any damage resulting from mere verbal mistakes or errors, the complete remedy of the party injured is fully guarded and preserved. The penalty may be recovered where the company fails to transmit and deliver a dispatch with that degree of promptness which due diligence requires, and actual damages may be recovered wherever they are caused by the negligent mistakes or errors of the company, irrespective of the ques-

tion of punctuality. These views, we think, cover, and are in perfect harmony with, the entire scope and purpose of the act, so far as it bears upon the case at bar. Judgment reversed.

WESTERN UNION TEL. CO. v. PATRICK.
(Supreme Court of Georgia. Oct. 24, 1893.)

TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE—SUFFICIENCY OF EVIDENCE.

The sender of a telegraphic message having erroneously given the address of the sendee as a particular street number in a city, and the telegraph company having promptly carried the message to that number, and being unable to deliver it, because the sendee was not to be found there, the sender is not entitled to recover of the company the penalty prescribed by the act of 1887, (Acts 1887, p. 111,) unless it affirmatively appears that the company knew the proper address of the sendee, or could have readily ascertained the same. If, upon examination of the city directory, the initials of the sendee's given name, as contained in the message, were not found, the company would not, in order to escape the penalty, be bound to send the message to a person whose surname in the directory was the same as that of the sendee, although, in point of fact, this person was really the sendee, whose given name, as set out in the directory, corresponded to one of the initials in the address, the other initial not appearing in the directory.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by J. Lee Patrick against the Western Union Telegraph Company for failure to deliver a message. There was judgment for plaintiff, and defendant brings error. Reversed.

Bigby, Reed & Berry, for plaintiff in error. Carter & Barnes, for defendant in error.

SIMMONS, J. In this case the sender of a telegraphic message recovered against the telegraph company the statutory penalty for failure to deliver with due diligence. It appears from the evidence that he gave the wrong address to the company. The message was directed to "Col. O. M. Bergstrom, 47 S. Pryor St., Atlanta, Ga." but the person for whom it was intended did not stay at that number, and could not be found there; and it does not appear that he was known, or had ever before been called, by the title of "Colonel." He was a young man living with his father at another number on South Pryor street, and employed as a bookkeeper by a firm doing business on that street. Nothing was known of him at the telegraph office, and, according to his own testimony, he had never before received a telegraphic message. The name "O. M. Bergstrom" did not appear in the city directory. The name given the sendee in the directory was "Magnus Bergstrom," and he was generally called by that name. At No. 47 South Pryor street, (which was the city police station,) they refused to receive the message, and no one there knew of such a

person as O. M. Bergstrom. Inquiries were made at the jail to ascertain if there was a person of that name among the prisoners, the city directory was consulted, other places in the neighborhood of No. 47 were visited, notice was posted, and another messenger was sent out to continue the search. Finally, the sendee was found by inquiring of another person of the same surname, who, on reading the message, said it was intended for his son. It does not appear that there was any delay in transmitting the message, or in taking it to the place designated by the sender. It was received by the company and taken to that place on Saturday evening, and was delivered on Monday morning; but as the law does not require delivery on Sunday, except in a work of charity or necessity,—*Telegraph Co. v. Hutcheson*, (Ga.) 18 S. E. 297,—and as no such reason appears for requiring it here, the delivery may be treated as made on the next morning after the evening on which the message was received.

Under this state of facts, we do not think the plaintiff was entitled to recover. The taking of a message to the place designated therein, it is true, does not necessarily absolve the telegraph company from making any further effort to find the sendee, if he cannot be found at that place. *Gray, Com. Tel. § 23.* If a wrong address is given, and the company knows, or can readily ascertain, the proper address, or where the sendee can be found, reasonable efforts must be made to find him and deliver the message. But, before a recovery can be had by one who has given a wrong address, he must show that his giving the wrong address was not the cause of the delay. Where the sender has acted in a manner calculated to mislead the company and delay the delivery of the message, there can be no presumption that the delay is the fault of the company, rather than of the sender. In this case there is no showing that the company knew the right address. According to the evidence, it did not. Ought it to have found the right address sooner than it did? The evidence fails to show want of diligence in this respect. On the contrary, the company appears to have exercised all the diligence that could reasonably be expected of it. It is true, the proper address might have been ascertained sooner than it was, if the means which finally proved successful had been sooner adopted, but it does not follow that the company was bound to resort to that means at all. We think, where a telegraph company has promptly taken the message to the place designated by the sender, and has ascertained that the sendee is not to be found there, it is not bound, in order to escape the statutory penalty, to take the message to another address, which it does not know, and has no reason to believe, is the right one. Though it may know that there are persons in the city who have the same surname, or who have both the surname and one of the initials of the name given in the message, yet if their

names are in other respects different, and the company has no further reason for supposing that one of them is the person intended, it is under no duty to go to any of them. If the defendant had known that there was a person named O. M. Bergstrom residing on the street designated in the message, although not at the number designated, there would have been good reason for supposing that the address given in the message was incorrect, and that this was probably the person intended; but the company was not bound, on finding the name "Magnus Bergstrom" in the city directory, to suppose that the person so described was the one intended. To look up every person in the city whose name is in part the same as that given in the message may often prove a good way of finding the proper person, but to do this would in many instances involve an amount of work on the part of the company altogether out of proportion to its compensation for the service of transmission and delivery, and the omission to do so would not show a want of ordinary and reasonable diligence. At any rate, we are satisfied that there was no such delay in this case as would entitle the sender to recover for want of due diligence, impartiality, and good faith on the part of the company. To uphold a recovery under such circumstances would be to put a premium upon carelessness on the part of the senders of messages, not to speak of the inducement it would afford to unscrupulous persons to deliberately mislead the telegraph company for their own profit. Judgment reversed.

STEWART, Tax Collector, v. ATLANTA BEEF CO. SAME v. ARMOUR PACKING CO. SAME v. NELSON et al.

(Supreme Court of Georgia. Oct. 3, 1893.)

PROPERTY SUBJECT TO TAXATION—WRONGFUL COLLECTION OF TAXES—LIABILITY OF COLLECTOR.

1. In the general tax act, approved December 26, 1890, the twenty-second clause of the second section is in these words: "Upon all packing houses doing a cold storage business in this state, whether carried on by the owners thereof, or by their agents, five hundred dollars in each county where said business is carried on." *Held*, that a packing house which uses cold storage for preserving its own commodities alone, and does not receive and store for the public, or any part thereof, is not "doing a cold storage business," within the meaning of this clause, and therefore is not subject to the imposed tax.

2. Neither the evidence of a member of the legislature which passed the act, nor that of the comptroller general, touching the meaning and purpose of the same, was admissible to aid in construing the statute and arriving at the legislative intent. Other rulings complained of, as to the rejection and the admission of evidence, were immaterial to the substantial legal merits of the case, in view of the uncontested facts, and of the correct construction of the law, as above announced.

3. A tax collector who, by issuing an execution for taxes against one not engaged in the business on which the tax in question has been imposed, coerces, through a levy by the sheriff, the payment of such tax, together with the cost

of collection, is personally liable in an action brought against him for such wrongdoing by the party so coerced; and the recovery may extend to the whole amount paid to the sheriff, irrespective of whether it reached the collector's hands or not. In the verdict and judgment, the description of the defendant "as tax collector" will not vitiate; the words quoted being merely descriptive of the person, and having no legal effect otherwise.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Three actions—by the Atlanta Beef Company against A. P. Stewart, tax collector, the Armour Packing Company against the same defendant, and Nelson, Morris & Co. against the same defendant—to recover certain taxes paid. There was a judgment for plaintiff in each case, and defendant brings error. Affirmed.

The following is the official report:

The Atlanta Beef Company, by its petition, alleged that it was a partnership composed of certain citizens of Illinois and Missouri, doing business in Atlanta, Ga., under the firm name of the Atlanta Beef Company, and elsewhere in Georgia under a name made from the location, and doing no other business in Georgia, except to sell dressed meats. As a necessary part of its business, and as a necessary means for carrying on its business, it has a place in Atlanta, Ga., where its fresh meats are put and temporarily held for sale. When shipments of fresh meats from other states to Georgia began, the meats came into Georgia, to the place of sale, in refrigerator cars, and were sold directly from such cars to local butchers and consumers. When the business increased, it became necessary to unload the cars into storehouses containing refrigerators, to keep the meats cool, to avoid spoiling. Petitioner leased a store in Atlanta, in which to keep its fresh meats shipped from Illinois for sale in Atlanta and contiguous territory, and since then has done the business of selling such meats at that store. It has not engaged in any other business in Georgia, and said products have been kept only for preservation temporarily, and for as short a time as possible, while its goods were for sale. It has never done any storage business in Georgia, of any character. There is not, nor has there ever been, any packing house doing a cold-storage business in this state. Among the specific taxes mentioned in the act of December 26, 1890, is one covered by the twenty-second subdivision of section 2: "Upon all packing houses doing a cold storage business in this state, whether carried on by the owners thereof, or by their agents, five hundred dollars in each county where said business is carried on." The same act, in its fourth section, enacted that such specific taxes should be paid, for the fiscal years for which levied, to the tax collectors of the counties where such vocations are carried on at the time of commencing to do the business specified, and further, that, before any person so taxed should

be authorized to carry on the business, they should go before the ordinary of the county, and register, and at the same time pay their taxes to the tax collector, etc., and failure to register, or, after registering, to pay the tax, should subject the offender to a punishment mentioned. Petitioner never was a packing house in Georgia, nor a packing house doing a cold-storage business in Georgia, but has ever been only a seller of fresh meats, and products thereof, sent from Illinois to Georgia in regular interstate commerce, of all which the tax collector of Fulton county, A. P. Stewart, had due notice. A storage business is storing the goods of others for compensation, and cold storage is storing such goods for compensation in receptacles or rooms kept cold to preserve them, and such was the meaning of the words when the tax act was passed. Notwithstanding the facts aforesaid, said Stewart, on January 28, 1891, issued a *fi. fa.* against petitioner, for \$500, for said alleged special tax for 1891, and interest thereon from January 1, 1891, and costs, falsely alleging in the *fi. fa.* that petitioner had a packing house doing a cold storage business in Fulton county, and delivered the *fi. fa.* to the sheriff of the county, with orders to collect it. Whereupon, the sheriff, on January 29, 1891, seized certain property of petitioner, described, over its protest, to sell to pay the *fi. fa.* Petitioner needed all this property to carry on its business, but was compelled to give bond for its forthcoming at such sale. The property was advertised for sale, and petitioner did all it could to prevent the sale, but could not, because no judicial interference could be had with a tax sale. Under compulsion, it paid the sheriff \$536.20 on May 27, 1891, in full of the *fi. fa.*, principal, interest, and costs, of which \$514.70 was paid to said Stewart, tax collector. The declaration then set forth a similar course pursued by Stewart as to tax for 1892, levy, attempt by petitioner to prevent the issuing of the *fi. fa.* and levy, and to prevent the sale thereunder, after advertisement of the sale, similar payment by petitioner of \$507.32 to the sheriff, of which \$503.32 was paid to Stewart. It was further alleged: No demand has been made of any one for such alleged tax of \$500, except of petitioner, Nelson, Morris & Co., and the Armour Packing Company, which two companies, like petitioner, are engaged in the sale of beef sent to this market from other states, though there are many other persons in Atlanta and Georgia so selling fresh meats. Said tax collector claims that none are liable for the tax, except said three companies dealing in western beef. Efforts have been made to levy taxes from, or put burdens on, sellers of western beef, which would not be borne by citizens of Georgia selling beeves raised in Georgia, but such efforts have heretofore not been put in statutes. The section of the tax act of 1890 above quoted was intended solely to accomplish that purpose.

In the issuing of the *fi. fa.*, and levy thereof, the tax collector and sheriff, while claiming to act as officers of Georgia, in pursuance of law, were acting without authority of law, and in defiance of law, which protects petitioner's legal rights; and in his conduct said Stewart did not represent the state of Georgia, in discharging duties imposed upon him by its constitution, or the constitution of the United States, or laws in pursuance thereof. Under the facts aforesaid, petitioner owed no such taxes for 1891 and 1892 as in the *fi. fas.* described, nor under the alleged tax act. The claim of said sum from it for these years is a tax upon interstate commerce, and an unconstitutional interference with one of the necessary instruments of carrying on such commerce; and in so far as the statute of 1890, or any other statute of Georgia, would try to authorize or command the same, it would be contrary to the provisions of the constitution of the United States, and void, because no power but the congress of the United States can "regulate commerce among the several states," and the commerce above mentioned is such commerce. Said act is also unconstitutional because violating the provisions of the constitution of the United States, declaring that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," (Const. art. 4, § 2,) and to "the equal protection of the laws," (Const. Amend. art. 14, § 1.) Under the facts aforesaid, there is by said act, and practice thereunder, a discrimination in favor of the citizens of Georgia vending fresh meats, against petitioners, citizens of other states engaged in the same business. Said section 22, so enforced, is unconstitutional, because contrary to the constitution of Georgia, requiring taxation to be *ad valorem*, and uniform upon every species of property taxed, and "on every class of subjects." Const. art. 1, § 27. As a license tax, such tax is not uniform, but varies, in order to catch some and relieve others of the same class in like business. The failure to register and pay the tax is made a crime for some, but not for all, classes of subjects or business licenses. The issuing of said *fi. fas.*, and causing the property to be levied on was illegal, and a trespass on petitioner's rights, and put it to great expense of attorney's fees and other charges. Damages were laid in the sum of \$50,000. Process was prayed against said Stewart, "tax collector."

To this declaration the defendant demurred upon the grounds that he was not liable in manner and form set forth, and the petition set up no cause of action against him, and that there was no law or equity in the petition. These grounds of demurrer were overruled. The jury found for plaintiff against Stewart, "as tax collector of said Fulton county," \$1,043.52; and, defendant's motion for new trial being overruled, he excepted. The motion contained the general grounds that the verdict was contrary to

law, evidence, etc.; also, that the verdict and judgment following it are illegal, for they should have been, if for plaintiff, for so many dollars, against A. P. Stewart, and not against A. P. Stewart as tax collector; that is, not against the tax collector, because, in no view of the case, is plaintiff entitled to recover of A. P. Stewart as tax collector, the official. Because the verdict and judgment are for \$1,043.52, when the pleadings and evidence show, if at all, that defendant received only \$1,018.02, the balance upon collection by the sheriff being retained by the sheriff as his cost. Because the demurrer was overruled. Because the court admitted, over defendant's objection, the following evidence of one Burbank: "There is in Atlanta some who do a cold-storage business,—take compensation for storage. One concern here, I believe, is the Georgia Ice Company. I don't know how long they have been engaged in the business. I think, perhaps, they have been in the storage business only in the last three or four years. They built a separate establishment. In the last three or four years, there have been other persons doing a cold-storage business here,—the Automatic Refrigerator Company." The objection to this evidence was that the witness could describe the business, but it was for the jury to decide if it were a cold-storage business. Because the court, upon the following question, admitted it and the answer, and overruled defendants' objection: "Suppose, for the sake of the argument, that their (Swift & Company's) house and the Atlanta Beef Company were the same. Did they ever do any cold-storage business, where they got compensation for it?" The witness answered, "None." Defendant objected to the witness' conclusion as to what is a cold-storage business, upon the ground that he must describe the business, and the jury decide if it were a cold-storage business. Because the court, on plaintiff's objection, held the following question immaterial, and excluded it; defendant insisting it was material, and claiming he could show that plaintiff made a profit in making sales, and thereby there was a consideration in keeping its fresh meats on cold storage for sale: "State to the jury whether or not, in making sales, these plaintiffs make a profit or a loss." Because the court, on plaintiff's objection, held the following question, and answer it elicited, immaterial; defendant claiming he could prove that they would practically have no business left, if they did not use a cold-storage feature: "What would the business of the Armour Packing Company and these other two plaintiffs [three cases were tried together] amount to here, if you do not use a cold-storage feature?" Because the court, on plaintiff's objection, refused to permit defendant to prove—he offering to do so—that plaintiff had a packing house plant, and was a packing house. The court held that in the then stage of the case this evidence was im-

material. This was on cross-examination of plaintiff's witness Connally, and before plaintiff had closed its evidence. Because the court refused to permit defendant to show, if a purchaser bought a bill of goods on a certain day, and desired to take part then, and leave the remainder with plaintiff—in plaintiff's cold-storage room—until the next day or two, that plaintiff could not sell him the goods at the market price if he refused to allow part of them to stay there until the next day or day after. Because the court ruled as follows: "I think a man selling his own goods out of an ice box would not make himself amenable to the tax of carrying on the business of cold storage. I will allow you [defendant] to show in any way you can, legally, that he made the sales, and then charged for storage after the sales; but I don't think the mere keeping for a day or two, until the purchaser calls for them, without adding anything to the amount of the price, would make it a cold-storage business." Because the court, over defendant's objection, permitted plaintiff's witness Falvey to testify to what constitutes a cold-storage business in and out of this state, and how they are built and conducted. Defendant's objection was that plaintiff must first show that the witness was an expert in the matter, and he insists that the witness was never qualified as an expert. It appears from the record that Falvey testified that he owned for two years the Automatic Refrigerating Company; that he did no storage, but ran it for his own use; that when he went there he found the Armour Packing Company in there, paying a rental of \$200 a month to the Automatic Refrigerating Company for their rent and the cold air furnished it, having a part of the building; that in the other part of it promiscuous things were stored for different merchants throughout the city; that he knew about cold storage as a business for compensation for the storage, elsewhere than in Atlanta, as a general business; that he went through different concerns; that he had seen houses in Cincinnati, New York, and Chicago running cold-storage houses. The witness described these houses, and the manner in which they were run, etc. Because the court, over defendant's motion to exclude it as hearsay, refused to rule out all or any part of the evidence of Falvey, he swearing: "What I know about these places and this place that I conducted is what I learned on inquiry." Defendant thereupon moved to rule out the witness' entire testimony on the subject, because hearsay. Because the court, over defendant's objection, admitted the following evidence of one Beaty, "as well as all other of his evidence:" "I was in New York in 1890 or 1891, and visited the cold-storage warehouse there. That was on the same principle as this Automatic Refrigerating Company here. I went through the departments, and saw the contents of the different rooms. I looked at the tem-

perature at which the atmosphere was held. I don't know that I inquired particularly after their charge for business, but it was the understanding in all that business that they charged for space or per pound for certain length of time." Defendant objected to this evidence on the same ground as the other,—that witness did not claim and was not shown to be an expert,—and also on the ground that it was out of the state, and going out of the state to get a meaning for the words "doing a cold-storage business." It appears from the record that Beatty's testimony as to his "expertness" was similar to that of Falvey, except that he did not seem to have visited as many cold-storage houses. Because the court, over defendant's objection and on plaintiff's motion as immaterial, refused to admit evidence of Henry, a butcher, "The size of my ice box, and the height, is about three feet," and refused to permit an answer to the following question, "Is the ice box that you have in your place of business sufficient for you to carry on a cold-storage business in it?" Defendant contending that he could show that the ice boxes of Henry and other butchers were not sufficient for that purpose. Because the court, over defendant's objection that it was material, excluded the evidence of Henry that he had seen, he supposed, anywhere from 30 to 40 carcasses in plaintiff's cold-storage room at one time, and because the court ruled: "I don't think it is material, under the instructions I am going to give the jury. It don't amount to anything, how much he keeps. I don't think the magnitude of the business has got anything to do with it. I shall hold that they were not doing a cold-storage business, if they were merely taking care of their own goods." Because, over defendant's objection as material, the court excluded the following evidence which was offered by defendant, to wit: "I offer first to prove by the comptroller general of the state, who is the head of the tax department, as a part of the history of the passage of this act, that it was intended by the legislature that the act bearing the words, 'Upon all packing houses doing a cold storage business in this state,' etc., and that by that act it was intended to lay a tax of \$500 upon all packing houses doing a cold-storage business in this county and others, whether carried on by a citizen of this state or by a nonresident hereof, and that the act meant by its words such parties as are a packing house in or out of this state, who bring their meats here, and put them in their cold-storage rooms,—such rooms as they have described by plaintiff's evidence as theirs,—and keep them there, in a state of preservation by ice, until they find a purchaser, and offer them for sale, and sell them, and that this act was intended to tax that class of people or business." (2) And because the court thereupon ruled: "I cannot allow that, because, if that was the intention of the legislature, they have been quite inapt

in language to convey their intention in statutory law. I cannot hunt for their intention outside of the wording of the statute." (3) Because the court excluded the following evidence which was offered by the defendant, to wit: "Then I offer to prove by Col. Martin, a member of the legislature at that time, the history of the act, and I offer to prove the same things by Col. Martin that I offered to prove by the comptroller general." Upon which the court ruled: "I disallow that. I hold that a legislator cannot enlighten the court as to the intention of the legislature. He may be mistaken. He may have misunderstood the whole concern." Because the court erred in charging: "In view of the evidence, I charge you, gentlemen, that these plaintiffs had the same right that any other citizens of this state had to take ordinary precaution for the preservation of their merchandise until they sold it. If it suited their fancy, or the exigency of the business which they carried on required, that they should have cool receptacles in which to keep their meat in a state of preservation until they sold it, they had a perfect right to keep their meat in this way, and by so doing they did not become amenable to the tax for doing a cold-storage business in this state. The evidence is undisputed that there is a well-recognized business known as 'cold-storage business. It is as specific and identic as the business of a physician or a lawyer. The evidence is undisputed that other persons engaged in that business provide facilities for cold storage for perishable articles, such as meat, and charge a fee or reward for their care and custody by that means of warehousing." Because the court erred in charging: "The words of this statute that I shall now read are to be construed in their ordinary signification. The legislature in 1890 passed an act which, by the twenty-second subdivision of the second section, declares or levies upon all packing houses doing a cold-storage business in this state, whether carried on by the owners thereof or by their agents, \$500 in each county where said business is carried on. These words, 'doing a cold-storage business,' are to be interpreted according to their ordinary signification, as used in the act; and the evidence is undisputed that there is a well-recognized business, known among merchants as a 'cold-storage business,' and the essential ingredient of that business is that the person engaged in it takes goods on storage for the public, charging a reward for keeping them. The legislature must be construed to have intended that business, and not to have intended to levy a tax of \$500 upon a nonresident, who was authorized to transact business in this state, selling his merchandise, who merely provided facilities in the way of cold storage for taking care of his own goods until he could dispose of them." Because the court erred in charging as follows, and in directing a verdict, the general issue being

in, and defendant contending before the jury that he was not liable: "That being the view which the court entertains of the law of this case, and the facts being undisputed, I direct a verdict." Because the court erred in holding and charging: "I hold that the plaintiff cannot recover interest since the payment, inasmuch as the defendant here acted in his official capacity, but that the recovery must be limited to the amount of money which the state has illegally in its custody through the collections made on these *fl. fas.* The exact sum of money that they paid, whether it was paid as principal or cost or interest, is recoverable." Alleged to be error because the charge meant and held, if anything, that the state had illegally in its custody, through the collection made on these *fl. fas.*, the tax, interest, and costs sued for, when it was the jury's province to decide that fact, and because the charge practically directed a finding against the defendant.

The legal questions made in these cases are, in substance, the same as those made in the case of Stewart against the Atlanta Beef Company, (this term,) except that the Armour Packing Company alleged that it was a partnership doing business under that name in Missouri, engaged in preparing and selling meats, and the products thereof, very extensively, in commerce between the states of the United States and with foreign nations; that part of its business was curing and packing meats for commerce, which gave it the name of a packing house, and shipping to other states fresh meats, and the products thereof, to be sold daily to customers calling for same; that as necessary to this department, and as an instrument for carrying on said commerce, it had places where meats were put and temporarily held for sale in various states, one of such places being space in a storehouse in Atlanta, and also space which it leased from the Automatic Refrigerating Company, etc.; other allegations being similar to those made by the Atlanta Beef Company. And Nelson, Morris & Co. made allegations similar to those of the Armour Packing Company.

John W. Cox, for plaintiff in error. N. J. & T. A. Hammond, for defendants in error.

LUMPKIN, J. These three cases involve the same questions. The facts are stated by the reporter.

1. The obvious meaning of the phrase, "doing a cold-storage business," is carrying on the business of storing commodities in a cool place, for hire or reward. It would certainly not be contended that one who, for his own comfort or convenience, kept fruits, meats, or other perishable goods, in a refrigerator, box, or room cooled artificially, would be carrying on a cold-storage business. It would make no difference, in principle, if a person engaged in the sale of such articles kept them, for the purpose of preservation

until sold, in such a room, or other place. The real business thus conducted would be that of a dealer in such commodities, and the method employed for storing and preserving them would be a mere incident to that business. The business of storing for hire the goods of other people is of an entirely distinct character. The difference between the two classes of business indicated is very plain; and the proposition that a dealer in goods of any kind, who merely uses a cold-storage receptacle for preserving his wares until sold, is not engaged in carrying on a cold-storage business, is so manifestly beyond contention that, to our minds, it does not admit of elaboration or discussion; and it is entirely immaterial what may be the size of the receptacle, room, or other place in which the goods are stored. We therefore are fully satisfied that the defendants in error were not liable to the tax imposed by the clause quoted (in the first headnote) from the general tax act passed in 1890; it appearing beyond dispute from the evidence that these parties used the cold-storage process for no other purpose than to preserve their own commodities, and that they did not receive or store, for hire or otherwise, any goods whatever for other persons.

2. While the opinion of a member of the legislature which passed an act, or that of the comptroller general, as to its meaning and purpose, might possibly often be valuable and instructive in construing the act and arriving at the legislative intent, it can not be seriously contended that courts can properly resort to sources of this kind in ascertaining the legislative will as expressed in a statute. These gentlemen might differ as to what an act did mean, which would only increase, rather than relieve, any difficulty a court might have in construing the law. But aside from this, which is only thrown out as a suggestion in passing, this method of arriving at the meaning of a public statute cannot, after careful reflection, receive the sanction of any fair mind. The motion for a new trial complains of various rulings made by the court in rejecting and in admitting evidence. It is unnecessary to state or discuss them more in detail, as they could have had no effect whatsoever upon the proper determination of the cases now under review. The correct result was undoubtedly reached, and it is therefore immaterial whether, in the rulings referred to, the court did or did not err.

3. In view of the construction this court has placed upon the clause of the general tax act in question, the tax collector had no legal authority to issue the executions against the defendants in error, or have the same levied by the sheriff, and thus compel the payment of the taxes to which he supposed they were liable. What he did, and caused the sheriff to do, was entirely unlawful, and his conduct as to these

defendants was therefore that of a mere wrongdoer or trespasser. Accordingly he is personally liable to them, not only for the money collected by the sheriff as taxes on these void executions, but also for the costs of collection which that officer exacted. A tax collector has no authority, *colore officii*, to deprive any citizen of his money or his property, unless expressly authorized so to do by law; and he will not be protected, though apparently proceeding under the forms of law, when there is no law to authorize or justify his action. The verdicts and judgments rendered in the cases before us are valid and binding upon Stewart individually. The words "as tax collector," following his name, neither vitiate these verdicts and judgments, nor render them applicable to the defendant only in his official capacity. These words are merely descriptive of the person, and otherwise they have no legal effect whatever. Judgment affirmed.

CENTRAL RAILROAD & BANKING CO. v. ROBERTSON.

(Supreme Court of Georgia. Jan. 8, 1894.)

APPEAL—RECORD—STATEMENT OF EVIDENCE.

Under sections 4696a and 4696c of the Code, the presiding judge may require the official stenographer, not only to take stenographic notes of the evidence in civil cases, but to write the same out in longhand for use by the judge, in case he should need the stenographer's report for the purpose of aiding him in examining, revising, and approving any brief of evidence which may be presented to him, if there should be further proceedings by motion for a new trial or otherwise. And, where he has not caused the notes to be written out in longhand before a brief is presented, he may do so afterwards, should he deem it necessary in order to test the brief and make it accurate, the expense being subject to his discretion, as provided in section 4696c. The statute gives the judge no power to require the party moving for a new trial, or his counsel, to make up the brief of evidence from the official stenographer's report, or to produce the report, or a copy of it, in verifying the brief.

(Syllabus by the Court.)

Error from superior court, Houston county; A. L. Miller, Judge.

Action by George B. Robertson against the Central Railroad & Banking Company. There was judgment for plaintiff, and defendant brings error. Reversed.

The following is the official report:

Complaint for damages was brought against the railroad company, and after verdict for the plaintiff the defendant moved for a new trial, which motion was dismissed for want of an approved brief of evidence. To this ruling the defendant excepted. The facts on which the ruling was made are as follows: "When the cause came on for trial, the court, as is usual, inquired whether counsel desired the evidence taken down by the official reporter. Counsel for plaintiff stated that he did, but counsel for the company replied that he did not, as he had his own

stenographer present, who would take down the evidence for him. The court, thereupon, acting under section 4696c of the Code, directed the official reporter to report the evidence and charge of the court. When the motion for new trial came on to be heard, movant's counsel presented for revision and approval a brief of the evidence, which he stated was not made up from the report of the official reporter, but which he also stated was a correct brief of the evidence introduced on the trial. The court requested the counsel to present for approval a brief made up from the official report, or at least to furnish the court with the report of the official stenographer of the court, by which the court could revise and correct, if need be, the brief that counsel had presented. The counsel for movant declined to do either, whereupon the court dismissed the motion for want of a brief of evidence that the court could approve. The court stated to counsel at the first presentation of his brief what was true then, and is true now,—that the court did not recollect the evidence, not having charged his mind with it, and relying nearly entirely upon the report of the official stenographer upon which to approve the brief. The court could not, in justice to the other side, accept as correct a brief made up from the stenographic report made by the private clerk and stenographer of counsel for the movant." Before the judgment of dismissal was rendered, counsel for the movant insisted before the court that he was not bound to go to the expense of getting a brief of the official stenographer's report, when he already had a brief of the evidence, which was correct, which had been filed, and which could be tested at the time; that it was the duty of the court to examine the brief as presented, and, if it were not correct, then to reject it, or have it corrected so as to conform to the facts, and, if correct, to approve it as a brief.

R. F. Lyon, Steed & Wimberly, and J. R. Cooper, for plaintiff in error. M. G. Bayne, for defendant in error.

LUMPKIN, J. The facts necessary to an understanding of the rulings made in the present case will be stated by the reporter.

Section 4696a of the Code makes it the duty of the official reporter, "when directed by the judge, as hereinafter set forth, to exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case tried, except the argument of counsel." Section 4696b, as amended by the act of October 12, 1885, provides for the compensation of reporters for services rendered in criminal cases. Section 4696c provides for their compensation for services in civil cases. The last section contemplates that there may be an agreement between counsel for the parties that the evidence shall be recorded, or, in case of disagreement, that the presiding judge may direct the same to be re-

corded. In the absence of such agreement, it is within the power of the judge to fix the reporter's compensation at a rate not exceeding 10 cents per 100 words, and to prescribe the manner in which payment shall be made. Construing together sections 4696a and 4696c, we have no difficulty in reaching the conclusion that the authority of the judge in civil cases is not limited to directing the stenographer merely to take down stenographic notes of the evidence, but we think he undoubtedly has the power to require the stenographer to write the same out in longhand, so that the judge may use the report, if needful, in examining, revising, and approving the brief of the evidence which may be presented to him, should there be a motion for a new trial or other proceedings in the case. Nor is this power of the judge confined to the time when the brief is presented. He may thereafter require the stenographer to write out his report, if this should be necessary in order to enable the judge to test the brief and make it accurate. The report of the testimony and proceedings upon the trial of a case are in no sense a brief of the evidence, and were never so intended. This report may be, and doubtless very often is, quite useful in preparing and verifying a brief of evidence. The parties can, by agreement, have the report made, and arrange between themselves and the stenographer for his compensation. If no agreement is made, the presiding judge may, of his own motion, direct the stenographer to take down in shorthand the testimony and other proceedings; and he may also, as already stated, prescribe by whom, and what amount, the stenographer shall be paid. If there should be no necessity for writing out the notes in longhand, the judge, in fixing the amount of the stenographer's compensation, would of course allow him less than would be allowed in case he should be required to write out his report. It being within the power of the judge to require the testimony and proceedings not only to be taken down, but also to be written out, it is his right to use the stenographer's report in passing upon, correcting, and approving the brief of evidence, and in verifying the motion for a new trial. There is no law, however, which requires a party moving for a new trial, or his counsel, to make up a brief of the evidence from the official stenographer's report. It is simply incumbent upon the movant's counsel to prepare and present to the judge a correct brief of the evidence; and in so preparing it he may resort to his own memory, to notes taken by himself, or to any other source, so that the brief he does present for approval be fair and accurate. The presiding judge has no power or authority to require any party to produce the stenographer's report, or a copy of it, in verifying a brief of evidence. We have already seen that the judge may have the use of such report simply by directing it to be made, without reference to the wishes

of the parties. It follows from the foregoing that the judge erred in declining to examine the brief of evidence tendered by movant's counsel, and consequently in dismissing the motion for a new trial for want of a brief. The principle of the ruling made in this case will also be applicable to the preparation of a brief of evidence to be inserted in a bill of exceptions, where there has been no motion for a new trial, but where, in reviewing the action of the trial court, a consideration of the evidence is necessary. Judgment reversed.

FARMER v. STATE.

(Supreme Court of Georgia. June 12, 1893.)

JUSTIFIABLE HOMICIDE — REMARKS OF COUNSEL — INSTRUCTIONS.

1. The killing of another because of a past attempt by him to debauch the slayer's wife is not justifiable homicide. It is only where there is an absolute necessity that a killing be perpetrated, to prevent adultery, that the case will stand upon the same footing of reason and justice with other cases of justifiable homicide, under section 4334 of the Code. *Jackson v. State*, (Oct. term, 1892,) 18 S. E. 298.

2. The use of grossly improper remarks by counsel for the state in his argument to the jury is not cause for a new trial, when the verdict is fully as favorable to the accused as the evidence would warrant, and when it appears that the presiding judge, upon having his attention called to the misconduct of counsel, promptly ordered him to confine himself to the evidence, which order was obeyed, and counsel for the accused made no motion to have a mistrial declared, nor preferred any request to charge the jury on the subject. The court, however, should have unequivocally rebuked the counsel, and instructed the jury to disregard entirely the improper remarks, even without a request. The omission to do this is attributable alone to inadvertence.

3. On the facts disclosed in the record, there was no error in holding a night session of the court, or in the direction given the next morning by the court to the progress of the trial.

4. There was no error, as against the accused, in the charges complained of. The verdict for voluntary manslaughter was fully as favorable to him as the evidence authorized, and the court properly refused to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Jackson county; N. L. Hutchins, Judge.

Tom Farmer was convicted of manslaughter, and, his motion for new trial having been denied, he brings error. Affirmed.

Following is the official report:

Farmer was indicted for murder, and was found guilty of voluntary manslaughter. His motion for a new trial was overruled, and he excepted. The grounds of the motion are as follows:

(1) That the verdict is contrary to evidence, and without evidence to support it.

(2) That the court erred in refusing to charge as follows: "Where the defendant justifies the killing upon the ground of self-defense, in order to make good the defense,

it must appear that at the time of the killing the danger was so urgent that it was necessary for the defendant to kill, in order to save his own life. But, where the defendant justifies the killing upon the ground that the deceased had attempted to debauch his wife, the doctrine that the danger must be imminent at the time of the killing does not apply. You may consider any evidence of indignities offered wife of defendant by deceased prior to the killing, and say whether or not the homicide was justifiable. The statute is that 'all other instances which stand upon the same footing of reason and justice as those enumerated, shall be justifiable homicide.' You are to consider the evidence, and say whether or not the present case 'stands upon the same footing of reason and justice as the cases of justifiable homicide specified in the Code.' This was not given in the form requested, but the Code section was given in charge, with the judge's explanation of its meaning.

(3, 4) S. J. Tribble, of counsel for the state, in his argument to the jury, said: "This is only one of the many instances where the rich landlord shoots down the poor tenant, and it should be stopped." Also: "Old man Farmer [the father of defendant] said he had enough trouble on his hands. Yes, gentlemen of the jury, he has. This is the second one of his boys who has committed the offense of murder, and the county demands at your hands that these murderers be convicted and hanged." Also: "Two other sons of old man Farmer are murderers." The defendant assigns error, in that the court did not stop such argument and statements, and instruct the jury that they were to pay no heed to them. The court certifies this ground with the qualification that when the attention of the court was called by counsel to the objection that the young associate counsel of the state was indulging in appeals to the jury, not, as counsel considered, authorized by the evidence, (the precise language not recalled,) the court cautioned him, and ordered him to confine himself to the evidence in the case, and he conformed, and there was no further complaint or objection; and, so far as the court heard, some of the statements objected to were founded on evidence admitted without objection.

(5) The trial judge forced counsel to proceed with the case until late in the night of the second day of the trial, when Mr. Thomas, counsel who had prepared the case for trial, and who was leading counsel, and the one the defendant most relied on, was sick, and unable to proceed, and so stated to the judge. The night was bad and rainy, and the ground muddy; and, being forced to go on with the case that night, Mr. Thomas was taken sick, and the next morning was desperately sick, and unable to work, and in consequence thereof could not properly argue the case. He informed the judge that night that he was just out of a sick-bed, where he had

been confined for days, and did not have the physical strength to go on with the case that night, and asked that the court take recess until morning, which the court refused to do. The court makes the following statement as to this ground: Mr. Thomas inquired of the judge, privately, about the usual hour of recess in the afternoon, whether or not the court intended to hold a night session, and was informed that such was the intention, as there were other parties in jail under indictment for felonies, one of them for murder, awaiting trial, and the week's session was drawing to a close. To this Mr. Thomas may have stated that he was not feeling well, but did not ask the court to take recess then because of his sickness or indisposition. When, during the night session, after the argument of two of the counsel in the case had been heard, the court inquired of Mr. Strickland, partner and associate counsel of Mr. Thomas, whether or not Mr. Thomas preferred to go on then, or wait until morning, Mr. Thomas having stated, at the hotel, while at the supper table, during the short recess, that he was not well, and complained that there was to be a night session, Mr. Strickland soon reported that Mr. Thomas had concluded to go on that night, but the jury being weary, and desiring that recess be then taken, it was done. Next morning it was reported that Mr. Thomas was sick, and, after suspending the trial for more than an hour,—it being stated that he would likely be able to appear and proceed within an hour or two,—the court left it to Mr. Strickland, the associate counsel, to proceed with the argument himself, or move a continuance on the ground of Mr. Thomas' sickness. Mr. Strickland decided, after consultation with his other associate counsel and client, not to ask for a continuance. About that time, Mr. Thomas appeared in court, and proceeded to argue the case. Counsel did not make a request, in open court or elsewhere, that the court take recess until morning on account of his sickness.

(6) The court charged the jury: "Having given you in charge the law of justifiable homicide,—that is to say, the doctrine of self-defense, defense of family, property, etc., and of acting under the fears of a reasonable man that a felony is intended to be committed on his person, habitation, or other property, (the instances enumerated by the Code where one may kill another, and be justifiable in doing so),—I am requested to give you in charge section 4334 of the Code, and leave you to determine whether the case is one of justifiable homicide under that section. The language of that section is, 'All other instances which stand on the same footing of reason and justice as those enumerated, shall be justifiable homicide,' and has been considered by the supreme court to mean that the principles of defense, of some sort, standing upon the same reason and justice as those enumerated and given

in the charge, must enter into the transaction, to make the homicide justifiable, and that no case can stand on the same footing of reason and justice as the enumerated cases do, unless defense, of some sort,—the prevention of some impending or pressing wrong,—enters as an element therein. Defense against some urgent and pressing danger must have operated upon the mind of defendant when he shot and killed deceased, or he was not justifiable. An instance of justifiable homicide standing upon the same footing of reason and justice as those above enumerated in the Code, under this section, is the killing of a man to prevent him from attempting or consummating an impending adultery with or seduction of his wife, but not to avenge a past adultery with her, for the killing after the act is done, which would have been justifiable homicide to prevent, would be to kill in a spirit of revenge, which the law would not justify. No words, no matter how opprobrious or offensive or insulting, used to or of the defendant or his wife, would make a case standing on the same footing of reason and justice as the case of homicide enumerated in the Code; for it is expressly declared that provocation by words, threats, menaces, or contemptuous gestures shall [not] be sufficient to free the person killing from guilt of the crime of murder." The errors specified as to this charge are (1) that the jury was restricted in the application of section 4334, whereas they should have been left free to say, without restriction, whether or not the case on trial was an instance which stood upon the same footing of reason and justice as those enumerated; and (2) that the charge confines the jury to the application of that section and cases standing on the law of self-defense and defense of habitation, etc., whereas the defense set up in one of defendant's theories, and the section of the Code under consideration, contemplate cases entirely out of the doctrine of self-defense.

(7) The court charged, in immediate connection with the foregoing: "You will observe that the question we are now on is not the reduction of homicide from murder to manslaughter of some grade, but the absolute and unconditional justification of the killing, under this and other sections of the Code, on the principle of justifiable homicide. If the killing, as above charged, was the result of that sudden impulse of passion supposed to be irresistible, and there was not an interval between the provocation given and the homicide sufficient for the voice of reason and humanity to be heard,—sufficient for the passion aroused by the provocation to cool down,—then the defendant may be guilty, not of murder, but of voluntary manslaughter, depending upon the nature of the provocation given, but would not be justifiable homicide. Whether there was time between the provocation and the homicide for the passions aroused to cool down,

in a reasonable man, is a question to be determined by the jury. In the cases enumerated in the Code as justifiable homicide, each of them contemplates immediate and pressing danger,—the circumstances reasonably believed to be such. It is defense of self; defense of habitation, property, person, or family; defense against one who manifestly intends or endeavors, by violence, to commit a felony on the other; defense against a mob violently intending and endeavoring to enter one's house to assault some person therein. It is defense against real, imminent, and impending danger. The mere fear of any violence, to prevent which the killing is done, shall not justify it; for the circumstances must be such as to excite the fears of a reasonable man, and the person killing must act under the influence of such fears, and not in a spirit of revenge. Not only must it be in defense, but must be absolutely necessary, in reality, or in his belief or fears, as a reasonable man, as the circumstances appear to him, to prevent the attack; and even in the case of self-defense, or in defense of wife or child, the danger must be so urgent and pressing at the time of the killing, or as he, under the fears of a reasonable man, believes it to be, so that, in order to save his own life, he, as a reasonably cool and courageous man, believes the killing was absolutely necessary. Whenever a homicide is committed in a spirit of revenge for a past offense, or for a provocation by words, etc., it is not justifiable. When done under pressing necessity, or under the fears of a reasonable man, to defend life or limb or wife against a felonious attack, it is justifiable. Where the case made is not enumerated in the Code, and is subject to be put upon this section of the Code, it must be shown to stand upon the same reason and justice as those enumerated, and not to be in conflict with them. Unless it so appears, it cannot be justifiable homicide; that is to say, no offense at all." The errors are (1) that the Code section is construed by the judge for the jury, without allowing them to consider it themselves, and they are instructed that it may be reduced from murder to manslaughter, whereas the section itself contemplates only justifiable homicide; and (2) that the court coupled the Code section under consideration with other sections on the subject of self-defense, and made them stand on the same plane, and did not leave the jury to say whether or not they occupied the same or a different plane.

Thomas & Strickland, for plaintiff in error.
R. B. Russell, Sol. Gen., for the State.

BLECKLEY, C. J. 1. The law classifies cases. The jury determine, on the facts in evidence, and on the law as given them in charge by the court, to what class the particular case belongs. With reference to justifiable homicide, the law has specified sev-

eral instances which fall within that class, and has then added a general description of other instances, in these terms: "All other instances which stand upon the same footing of reason and justice as those enumerated shall be justifiable homicide." Code, § 4334. When the enumerated instances to which this general description refers are examined, it is found that in all of them, without exception, one of the elements is present and impending danger, real or apparent. Another suggestion which arises from an examination of these instances is that the killing must be for prevention; and another, that it must be necessary, either really or apparently, as a measure of prevention. Code, §§ 4330-4333. As these several characteristics, either expressly or by plain and manifest implication, mark each and every one of the enumerated instances, and as they are characteristics involving the principle and reason on which justification depends, they must, as matter of law, be present in each and every one of the nonenumerated instances, in order to put the latter on the same footing of reason and justice with the former. These characteristics are the very things which make up the reason and justice of the enumerated instances, for in penal law the distinction between prevention and revenge is fundamental. Aggressive acts perpetrated to avenge a past injury are never justifiable. This is a rule without any exception. On the other hand, acts done to prevent an apprehended injury are sometimes justifiable, and sometimes not. If they are done when the injury is really or apparently about to take place, and if the doing of them is either really or apparently necessary to prevent it from taking place, they are justifiable, provided the gravity of the impending injury be such as to warrant the means used in the given instance to prevent its perpetration. The injury attempted or contemplated may be so slight as that the law would rather it should not be prevented at all, than that it should be prevented at the cost of human life or of great bodily harm. If the line of thought which we have suggested and pursued be sound, it follows that the law itself virtually says—and consequently that the court may instruct the jury, as matter of law—that the killing of a man because of a past attempt by him to debauch the slayer's wife is not justifiable homicide, and that such a killing is not upon the same footing of reason and justice as the instances of justifiable homicide to which section 4334 of the Code refers. Under the evidence, there was really no question for reference to the jury on the subject. But, even had the prevention of a future act of adultery been the occasion of the killing, the danger must have been present and impending, and the killing to prevent it, in order to be justifiable, must have been necessary, or at least apparently necessary. *Jackson v. State*, (Oct. term, 1892,) 18 S. E. 298.

2. The facts of the case touching improper remarks by counsel for the state in his argument to the jury are set forth in the official report. It will be noticed that the cause of complaint, as embodied in the motion for a new trial, is somewhat mitigated by the explanatory note of the presiding judge. But the impropriety was very great, and the court should have unequivocally rebuked the counsel, and instructed the jury to disregard entirely the improper remarks, even without any request to do so. The omission to deal thus with the matter is attributable alone, we think, to inadvertence. The failure of the counsel for the accused either to move to have a mistrial declared, or to request any charge to the jury on the subject, and thus to invoke a ruling by the court, is all that prevents this from being cause for a new trial. Gross impropriety in the argument of cases seems to be a widely prevalent evil in conducting trials, both civil and criminal. It is one which ought speedily to disappear entirely, and for the good of justice, and the honor of its administration by judicial tribunals, we hope it will.

3. Touching the night session of the court, the facts and circumstances are explained by the presiding judge, and, in the light of his explanation, there was no error either in holding that session, or in the direction given the next morning to the progress of the trial.

4. As against the accused, there was certainly no error in any of the charges of the court complained of. The verdict was only for voluntary manslaughter. It was quite as favorable as any that could have been rendered under the evidence and the law applicable thereto. A new trial was properly refused. Judgment affirmed.

HOLLAND v. SPARKS.

(Supreme Court of Georgia. Jan. 8, 1894.)

RAILROAD COMPANIES—DEATH OF PERSONS ON TRACK—NEGLIGENCE.

1. Negligence relatively to the safety of any particular person is the breach of some diligence due to that person. Where no duty of diligence appears relatively to the person injured, there can be no presumption of its breach, notwithstanding the broad language of section 3033 of the Code. That section imposes the burden of proving the observance of such diligence as was due, not the burden of proving that none was due. For a railroad company to be exempt from liability for a personal injury done by the running of its locomotives or cars, it is only necessary for it and its agents to exercise all ordinary and reasonable care and diligence, (if any) due from it and its agents relatively to the person injured. A failure of diligence by these agents towards the company, unless that failure also involves negligence as between the company and such person, will afford the latter no cause of action, and, in case of his death from the injury, would be no cause of action in favor of any person legally interested in his life.

2. Relatively to persons casually near the margin, but outside, of a railroad company's track in the country, where there is no road ex-

pathway in customary use by pedestrians, the company owes no duty or diligence in respect to the speed of its trains; and if, in consequence of very high speed, a train, or some of the cars, leave the track, and thereby a person thus casually exposed be wounded or killed, there is no cause of action, in the absence of evidence disclosing that there was reason for anticipating the presence of some one near the line of the road at the scene of the accident, or that the servants of the company in charge of the train actually saw some person there before the derailment occurred.

(Syllabus by the Court.)

Error from superior court, Bibb county; O. L. Bartlett, Judge.

Action by Lizzie Holland against W. B. Sparks, receiver of the Georgia Southern & Florida Railroad, to recover for the death of plaintiff's son. There was a judgment of nonsuit, and plaintiff brings error. Affirmed.

C. C. Duncan, Owens Johnson, and Willingham & Lane, for plaintiff in error. Gustin, Guerry & Hall, for defendant in error.

LUMPKIN, J. 1. Relatively to one to whom no diligence whatever is due, there can, in legal contemplation, be no negligence at all in causing him a personal injury. Where some degree of diligence is due to another with reference to his personal safety, failure to observe that degree of diligence will be negligence as to that person. In other words, negligence relatively to the safety of any particular person is the breach of some diligence due to him. When an action is brought for a personal injury caused by the running of a locomotive or car of a railroad company, the presumption of negligence does not arise against the company unless it appears that, at the time of the injury, there was due from the company to the person injured some degree of diligence to prevent that injury. The burden of proving it owed no diligence is not upon the company, but the plaintiff must show that, relatively to the safety of the person injured, some diligence was due by the company. As soon as he does this, the presumption immediately arises that the company's negligence caused the injury, and in order to escape liability it must rebut this presumption by showing the observance on its part of such diligence as was due. After much deliberation we are satisfied that nothing, even in the broad language of section 3033 of the Code, relieves the plaintiff, in cases of this character, from the necessity of showing that a duty of diligence, such as we have mentioned, existed, or imposes upon a railroad company the burden of proving, negatively, the contrary. A presumption of negligence is neither more nor less than a presumption that there was a breach of diligence. Such a breach could not, of course, be presumed in a case where it was affirmatively proved, as a matter of fact, that no diligence at all was due. If, therefore, it is incumbent on the plaintiff to make the duty of diligence relatively to the person injured appear, and he fails to do so, the case must stand upon the same footing, for, as to what

a plaintiff is required to show, "that which does not appear does not exist." When the presumption of negligence has once been raised against a railroad company under the section above cited, and the company satisfactorily shows that its agents exercised all ordinary and reasonable care and diligence to prevent the particular injury for which the action was brought, it establishes its observance of the diligence due by it. What will constitute the amount or kind of diligence which will be required as "ordinary and reasonable" must necessarily vary under different circumstances. It cannot be measured or ascertained by any fixed and inflexible standard, because the words just quoted are themselves relative terms, and what, under some conditions, would be ordinary and reasonable diligence, might, under other conditions, amount to even gross negligence. For instance, for most purposes, running a passenger train through the country at a rate of 25 miles an hour would be safe, prudent, and proper, while to run the same train at this rate over a crossing in a crowded city would amount to wantonness. The measure of diligence due, therefore, by a railroad company to any person, is a relative one, and what is, or is not, due diligence must be arrived at in every case with reference to the surrounding circumstances and the relations which, for the time being, the company and the person in question occupied towards each other. A person injured by the running of a railway train must, as we have already indicated, depend for recovery upon the negligent failure of the company, either by itself or through its servants, to observe proper care and caution to prevent inflicting upon him the very injury of which he complains; and it is clear, from what has been said above, that there should be no recovery because of negligent conduct on the part of the company's servants which in no proper sense involved the breach of a duty due to the person injured. The failure of diligence by these servants in respect to any duty they owed to the company itself, unless that failure also involved negligence as between the company and the person injured, would afford the latter no cause of action. See *Bish. Non-Cont. Law*, § 446; 1 *Shear. & R. Neg.* § 8; *O'Donnell v. Railroad Co.*, 6 R. I. 214. Of course, in case of the death of such person in consequence of the injury, such failure would not be a ground of action in favor of any party legally interested in his life. In the present case it was insisted that the servants in charge of the defendant's freight train were running it at a high and dangerous rate of speed, and that this conduct on their part amounted to negligence. Most probably it was a violation of the duty which these servants owed to the company, and to those whose property was being transported by the train, and in this sense their conduct may have been negligent. But we do not think their failure to observe due care and diligence in running

the train was negligence as against one in no way connected therewith, and whose injury by its rapid running and derailment was a consequence so remote as to require almost the gift of prophecy to anticipate it. We are not aware of any statute or rule of law requiring the courts to hold railroad companies liable in a case of this kind.

2. Applying the doctrine above announced to the facts of the present case, we are convinced that the court below was right in granting a nonsuit. The plaintiff's son was walking along or near the track of the railroad company. Being warned by a companion of the rapid approach of a freight train, he stepped aside, and undoubtedly went a sufficient distance from the track to escape injury if all the cars had remained on the rails; but, for some reason unexplained, several of the cars left the track, and he was stricken by one of them and killed, at a distance of about 20 feet from the rail. The place where the tragedy occurred was in the country, where there was no road or pathway in customary use by pedestrians. The deceased was simply walking along or near the track, and there can be no room to doubt that the unfortunate catastrophe which resulted in his death was as totally unexpected to the company's employees in charge of the train as it was to him. It may be that the train was running at a very high and dangerous rate of speed, but certainly the derailment of the cars could not have been foreseen by any one. It was doubtless a complete surprise, not only to the deceased, but to all the persons on the train. The latter had no more reason than did the deceased to suspect what was about to happen. The truth is, it was a mere accident, and nothing more, and we cannot hold that the defendant company is responsible for the consequences. It is certainly the duty of a railroad company to conduct its business with due regard to the safety of all persons to whom it owes any duty of diligence. In running its trains the company must necessarily expect to find people at road crossings, or at other points where they have a right to be or to travel, and hence it becomes its duty to so regulate the speed of trains at such places as to avoid inflicting injuries. On the other hand, as to an unfrequented point in the country, where there is no road or pathway, naturally the company would have no special reason to anticipate coming in contact with any one, and therefore need not keep a train under such perfect control that it could be stopped immediately in case of a sudden and totally unexpected emergency. Of course, if the presence of any person exposed to peril by the running of the train be actually known to those in charge of the train, no matter at what point upon the company's line of railway, it would be the imperative duty of the train employees to use every reasonable effort to avoid inflicting injury upon such person. In the case before us the deceased was at a place where those in charge of the train had

no reason to expect any one, and therefore the company owed him no duty with respect to the speed at which its train approached that point. It does not appear by the evidence that the company's servants saw him, or had any actual knowledge of his presence. Even if this were otherwise, however, there would seem to be no good reason for the employees on the train to anticipate that, if its speed was not checked, injury to him would, or might probably, ensue. He was, when killed, at an apparently safe distance from the rails. Even if he had been seen by the employees of the company, who were on the train, there would have appeared no danger of his being run over or in any manner injured. Indeed, it is certain that, but for the unexpected derailment, he would have been absolutely safe. He evidently, and with good reason, considered his position a safe one. Why should not the same circumstances upon which he relied likewise influence the trainmen in reaching the same conclusion? If the latter were unwarranted in regarding him beyond the reach of all probable danger, and were therefore negligent in failing to take precautions against injuring him, he must have been negligent as well, for doubtless he predicated his erroneous judgment upon precisely the same state of facts. We feel certain that neither he nor the trainmen could even have imagined that the unusual and peculiar disaster which resulted in his death would take place. It would be requiring of him more than ordinary foresight to have foreseen his danger; and, as railroad companies must necessarily depend upon human agencies in discharging the duties devolving upon them, the diligence to be exacted at their hands should likewise be measured by that standard of prevision and sagacity only which is common to mortals. A case based upon somewhat similar facts, and which sustains the ruling now made, is that of *Woolwine v. Railway Co.*, 36 W. Va. 329, 15 S. E. 81. It was insisted for the plaintiff in error that the proof did not affirmatively show that the deceased was upon the company's right of way, and he was therefore not to be regarded as a trespasser. He was upon an embankment artificially constructed by the defendant, and was within 20 feet of the track. In the light of common knowledge, and of these facts, we might safely assume he was in fact upon the right of way; but it is really immaterial whether he was or not. In either view, we are of the opinion that, relatively to him, there was no duty on the part of the company, and consequently no negligence which would make it liable for causing his death. Judgment affirmed.

JENKINS v. STATE.

(Supreme Court of Georgia. Oct. 9, 1893.)

APPOINTMENT OF JUDGE—LARCENY—INTOXICATION AS DEFENSE—SUFFICIENCY OF EVIDENCE.

1. By virtue of the act of October 19, 1891, a city court comes into legal existence as soon

as a recommendation is made by the grand jury; and should this occur during a recess of the senate, and should the governor appoint and commission a judge of the court, who qualifies and enters upon the performance of his duties, he is a judge de facto, if not de jure, although his appointment has not been confirmed by the senate, and the court over which he presides may exercise such jurisdiction as is conferred upon it by law as effectually as if confirmation had taken place.

2. Where drunkenness was set up, not as an excuse for an admitted act, but to show physical inability to do the act at all, there was no error in charging: "While drunkenness is no excuse for crime, it is a fact which may be proven, as any other fact, to throw light on other facts or circumstances in the case."

3. The evidence of guilt was barely sufficient, but, the verdict having been approved by the presiding judge, this court will not reverse the judgment refusing a new trial.

(Syllabus by the Court.)

Error from city court of Carroll county; W. F. Brown, Judge.

Will Jenkins was convicted of larceny, and brings error. Affirmed.

Cobb & Reese, for plaintiff in error. Edgar Watkins, T. A. Atkinson, Sol. Gen., and Atkinson & Hall, for the State.

LUMPKIN, J. 1. The act of October 19, 1891, (Acts 1890-91, vol. 1, p. 96,) declares "that upon the recommendation of the grand jury of any county of this state having a population of fifteen thousand or more, where the same does not now exist, there shall be, and the same is hereby established, a city court for said county; the powers, jurisdiction, officers and mode of selecting them of said court shall be the same as now prescribed by the act creating the city court of the city of Macon, approved August 14, 1885." The act creating the city court of Macon, above referred to, (Acts 1884-85, p. 471,) provides "that there shall be a judge of said city court of Macon, who shall be appointed by the governor, by and with the advice and consent of the senate, whose term of office shall be four years, and all vacancies in the office of judge shall be filled by appointment of the governor for the residue of the unexpired term, such appointment being subject to the approval of the senate which may be then in session, or if the senate be not in session at the time of such appointment, then subject to the approval of the senate at its next session thereafter." It appears from the record that, at the April term, 1893, of the superior court of Carroll county, the grand jury recommended the establishment of a city court for that county, and that soon thereafter the governor appointed Hon. W. F. Brown judge of that court, and issued to him a commission accordingly. At the time this appointment was made the general assembly was not in session, nor had there been any session up to the time of the trial of the accused. The point made by the plea to the jurisdiction filed by the accused was that, there having been no vacancy in the office of judge of the city court,

nor any residue of any unexpired term, the governor had no legal right to appoint and commission a judge of this court. This plea recited that Carroll county had a population of at least 10,000. We are not advised as to why the number 10,000 was used. This was probably done by mistake or inadvertence. At any rate, no objection to the establishment of the city court is raised on the ground that this county had a population of less than 15,000. Indeed, the fact that its population was 15,000 or more seems to have been recognized by both sides. The only position insisted upon, so far as related to the question of jurisdiction, was that, the power of the governor being derived from the terms of the act creating the city court of Macon, adopted by the general city court act of 1891, no appointment made by him could be valid until after its confirmation by the senate, except in case of a vacancy, in which event he could appoint only for the residue of an unexpired term, and that if such an appointment should be made while the senate was in session, it must be at once confirmed, or if not in session, then the appointment would be subject to the approval of the senate at its next session. Accordingly, it was argued that, when the court was established by the recommendation of the grand jury, and there had never been a judge of this court in actual commission, there could be no such vacancy as the act of 1885 contemplated, and certainly no residue of an unexpired term in the judgeship; and the conclusion pressed was that a judge of the city court of Carroll county could not be legally appointed and commissioned for the first time unless the senate was actually in session when the appointment was made. It will be observed that the very individual assuming to act as judge of this court was called upon to decide whether or not he had legal authority to exercise the functions of this office, and his decision holding that he was rightly in office is assigned as error in the bill of exceptions brought to this court. It might, perhaps, be proper to dispose of this branch of the case by ruling that the question of the right of the judge to hold the office could not be thus made. The position of the plaintiff in error being that the person before whom he was tried was not a judge, and therefore that he was not tried in any legal court, and this court having no jurisdiction except upon writs of error from certain specified courts legally constituted and established, it would follow that, if the contention of the plaintiff in error is sound, it could only result in this court's declining to entertain the case. We do not, however, care to dispose in this manner of the question presented, nor is it necessary to a proper disposition of it that we should decide whether or not the Honorable W. F. Brown was, at the time of the trial in question, judge de jure of the city court of Carroll county. One thing is certain beyond question, viz. that the city court of

that county came fully and completely into legal existence, with all the powers and jurisdiction conferred upon it by law, as soon as the grand jury recommended its establishment. The legal existence of the court, as such, did not in the slightest degree depend upon whether it had a judge or not. As soon as the recommendation of the grand jury was made and promulgated, the court came into being as a legal tribunal; and, though it could not proceed with the transaction of business without a judge, it was not for this reason any less a court than is any other court where there may be temporarily a vacancy in the office of judge. The governor, believing it to be his duty, appointed and commissioned Mr. Brown as the judge of this court. Whether this action, in advance of a session of the senate which could confirm the appointment, was premature or not, we are sure that Mr. Brown became at least a judge *de facto*. There was an executive order making the appointment, and a commission was delivered to him which, on its face, authorized him to discharge all the duties of this office; and, in our opinion, until it has been judicially determined, upon proper proceedings for the purpose, that he has no right to exercise the functions of this office and discharge its duties, his acts as judge are valid. At any rate, their validity cannot be called into question collaterally. He stands as any other person exercising the functions of office under a commission from the proper source, until that commission has been declared void. In thus disposing of the plea to the jurisdiction we stand upon safe ground, and no good reason requires us to enter upon a discussion and decision of the question as to whether or not the appointment was absolutely legal and proper. Indeed, as already above intimated, we have gone a step further than the plaintiff in error, from his standpoint, had any right to ask, in entertaining this case at all.

2. The court charged: "While drunkenness is no excuse for crime, it is a fact which may be proven, as any other fact, to throw light upon other facts or circumstances in the case." Error was assigned on this charge upon the ground that there was nothing in the evidence to authorize it. The accused did not admit the alleged act of larceny, and set up drunkenness as an excuse for the same, but insisted that he did not commit the act at all, and endeavored to show that, because of drunkenness, he was physically unable to commit the larceny at the time it was perpetrated. Still, we do not think that giving this charge was error. The accused sought, by endeavoring to prove he was drunk, to show that an inference of his guilt could not fairly be drawn from the evidence introduced by the state; and while he did not set up drunkenness as an excuse, literally, for an admitted act on his part, he did, in the manner stated, set it up as a defense in the case. The court, in referring

to this subject, might, under the circumstances, have used more apt and appropriate language, but we are entirely satisfied the jury were not misled, and that no injury resulted to the accused from this instruction.

3. Upon the merits, this was an exceedingly weak case. The evidence was barely sufficient to authorize a conviction, and the judge might very properly have granted a new trial. Inasmuch as he did not, but, on the contrary, approved the finding, this court will not depart from its established rule in such cases by ordering the verdict to be set aside. Judgment affirmed.

HAINES et ux. v. FORT.

(Supreme Court of Georgia. Nov. 20, 1893.)

COVENANTS OF WARRANTY—BREACH OF—EVICTION.

1. Section 2706a of the Code, as qualified by the constitution and statutes of this state with reference to the separate estates of married women, has no application to a sale by a married woman of land to which she herself has title, in whole or in part. This section applies only in cases of sales by the husband of land belonging to him, in which the wife has an interest because of the marriage relation; as, for instance, the right of dower in land to which the husband derived title by virtue of the marriage.

2. Where a married woman joins her husband in a conveyance of realty, the presumption, in the absence of proof to the contrary, is that she had, or claimed, title to the realty, in whole or in part.

3. Upon the trial of an action for breach of warranty of land, eviction of the plaintiff under paramount title is not sustained by mere proof that he was sued in ejectment, that a verdict and judgment were rendered against him, and that he surrendered possession in obedience to the judgment, there being no evidence that his warrantor had any notice of the ejectment suit, or any opportunity to defend it, and none as to the title under which the plaintiff was ejected, or the time when that title originated.

(Syllabus by the Court.)

Error from superior court, Johnson county; R. L. Gamble, Judge.

Action by Arthur P. Fort against A. I. Haines and wife to recover for breach of warranty. There was verdict for plaintiff, and, from an order denying a new trial, defendants bring error. Reversed.

Harris & Rawlings, W. R. Daley, and J. M. Stubbs, for plaintiffs in error. A. F. Daley and Evans & Evans, for defendant in error.

LUMPKIN, J. Fort brought an action against Haines and wife to recover damages for a breach of warranty in the sale of land by reason of his eviction under an alleged paramount title. There was a verdict for the plaintiff, and, the defendants' motion for a new trial being overruled, they excepted. The first and second grounds of the motion, which complained that the verdict was contrary to law and the evidence, will be dealt with in the last division of this opinion.

1. The third ground of the motion alleges as error the admission in evidence of the deed from Haines and wife to the plaintiff, for the breach of the covenant of warranty in which the action was brought. The objection to the deed was that it was void as to Mrs. Haines, she not having executed it in accordance with the requirements of section 2706a of the Code, which reads as follows: "Where a feme covert has, or may have, any right in part or the whole of any lands and tenements to be conveyed, and the said feme covert willingly consents to part with her right by becoming a party with her husband in the sale of such lands and tenements, in such cases as these the said feme covert shall become a party with her husband in the deed or conveyance, and sign and seal the same, before an officer authorized to attest deeds, declaring before said officer that she has joined with her husband in the alienation of said lands and tenements of her own free will and consent, without any compulsion or force used by her said husband to oblige her to do so; which declaration shall be made in the following words, or words to the like effect, viz.: 'I, A. B., the wife of C. D., do declare that I have freely, and without any compulsion, signed, sealed, and delivered the above instrument of writing, passed between D. E. and C. D., and I do hereby renounce all title or claim of dower that I might claim or be entitled to after the death of C. D., my said husband, to or out of the lands or tenements therein conveyed. In witness whereof, I have hereunto set my hand and seal.' And the said officer shall indorse upon the deed the acknowledgment of the said feme covert made before him, and sign the same." It has already been settled by this court that since the time when, under the constitution and statutes of this state, the property of married women became vested in them as their separate estates, the act of 1760 (embodied in the above-quoted section) has no application to a sale by a married woman of land belonging to her in her own right. See *Brown v. Kimbrough*, 55 Ga. 41, holding that the act in question applies only to such conveyances of real estate by the husband of the feme covert as she may have an interest in, and not to conveyances of her separate property of which she is the owner. The same principle is ruled in *Wynn v. Ficklen*, 54 Ga. 529. Almost the identical question made in the case at bar was decided by this court in *Amos v. Cosby*, 74 Ga. 793, in which it was held that "where a homestead was set apart to a man as the head of a family consisting of his wife and minor children, and the husband and the wife jointly conveyed it by warranty deed, in a subsequent suit on the warranty the wife was not relieved from liability on the ground that she was a married woman." On page 795, Justice Blandford says: "Nor is Mrs. Amos relieved by reason of her being a married

woman. She had the right to make the deed with her husband. There having been a homestead set apart to her husband, under the act of 1868 she was a usee, and was not the surety of her husband, and is equally bound with him." It is not necessary to cite the numerous decisions of this court establishing the general rule that, as to her separate estate, a married woman is to be treated as a feme sole. Nor is it necessary to note here the exceptions to this rule. The act of 1760 is applicable only in cases of sales by the husband of his own lands, in which the wife has an interest because of the marriage relation, but in which she has no title. An example of this kind is presented by the case of *Seabrook v. Brady*, 47 Ga. 650, cited in *Brown v. Kimbrough*, supra, on page 43. It does not, in the present case, appear from the deed of Haines and wife to Fort, or otherwise, that Mrs. Haines had, or claimed, title to the land therein described as the sole owner of the same; but there seems to be no doubt whatever that she undertook to convey as owner of the property, either in whole or in part, and in principle it is entirely immaterial which may be true. An interest, by virtue of the marital relation, in land owned by the husband, is quite a different thing from ownership on the part of the wife, either total or partial. What we mean to hold is that when the wife sells and conveys as owner, whether the property belongs to her alone or to her jointly with another person, the act of 1760 does not apply.

2. The fact that Mrs. Haines joined her husband in the conveyance of the land to Fort certainly raises the presumption that she had, or at least claimed to have, title to the land, in whole or in part; and, in the absence of any proof or explanation to the contrary, this presumption must be accepted as the actual truth of the matter. This proposition is too obvious to require elaboration.

3. Up to this point we have found nothing which would require the granting of a new trial, but, in our opinion, the plaintiff's case broke down upon its actual merits. After showing a conveyance to himself by the defendants, he merely proved that an action of ejectment was brought against him by another claiming the land, that in this action a verdict and judgment were rendered adversely to him, and that he surrendered possession of the property in obedience to this judgment. He utterly failed to show that his warrantors had any notice of this ejectment suit or any opportunity to defend it. There was no positive proof that he was evicted under a title paramount to that he received from Haines and his wife; and, in the absence of notice to them of the ejectment suit, there was no presumption to this effect against them. On the contrary, the burden was upon Fort to show affirmatively that the title under which he was evicted was paramount. The rule is thus stated in

Martindale on Conveyancing. (section 170:) "But if the grantee purchases an outstanding title, or yields to an adverse claimant without standing suit or being sued, (unless, in case of a suit, he give notice to his grantor of the suit, so that he may defend it,) the burden of proof is upon such grantee to show that the adverse title was good, and that the possession was surrendered only after claim or demand thereof." See, also, the cases there cited. *Gragg v. Richardson*, 25 Ga. 566, though not precisely similar to the case before us as to the facts, sustains the principle here announced; and the identical question is ruled in *Clements v. Collins*, 59 Ga. 124. There is absolutely no proof in the record as to the nature of the title under which Fort was evicted, or as to the time that title originated. For aught that appears to the contrary, he may himself, after purchasing the land from Haines and wife, have conveyed it to another, and have been evicted upon suit by the latter, based on his own conveyance. We do not, of course, mean to assert this to be the fact: but the supposition that such might be the case serves most aptly to illustrate the soundness of the rule we have here laid down. On the whole, the plaintiff failed to make out a case entitling him to recover. The verdict was accordingly contrary to law and the evidence, and should be set aside. Judgment reversed.

MATHEWS v. STATE.

(Supreme Court of Georgia. Nov. 20, 1893.)

INTOXICATING LIQUORS—LICENSES—WHO AUTHORIZED TO ISSUE.

1. The act of 1879 (Acts 1878-79, p. 334) which confers upon the commissioners of roads and revenues of Putnam county exclusive jurisdiction in fixing the amount of the license for the sale of spirituous liquors, and which, after conferring powers touching the road laws, declares that the commissioners "shall exercise such other powers as are granted by the Code of the state" to the justices of the inferior court, or to that court, with the restriction that they shall have no jurisdiction save and except such as pertains to county matters, invests the commissioners with power to grant or refuse licenses to retail spirituous liquors in the county specified; the Code referred to being that which was of force when the constitution of 1868 was ratified, and which, in section 1432, (Irwin's Rev. Code,) vested this power in the justices of that court. By the general law of 1890. (Acts 1890-91, vol. 1, p. 128,) a license to sell in any quantity is requisite, and power to grant the same is lodged with the same officer or officers having power to grant licenses to retail.

2. The jurisdiction to grant such licenses in Putnam county being exclusively in the commissioners of roads and revenues, and the authorities of no town or city in that county having any power over the subject, an indictment for unlawfully selling spirituous liquors in that county, which negatives the granting of any license by the commissioners, is sufficient, without making any reference to the corporate authorities of any town or city.

3. The evidence warranted the verdict, and there was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Putnam county; W. F. Jenkins, Judge.

Pomp Mathews was convicted of selling intoxicating liquors unlawfully, and brings error. Affirmed.

H. A. Jenkins and Harrison & Peeples, for plaintiff in error. H. G. Lewis, Sol. Gen., Hines, Shubrick & Felder, and J. S. Turner, for the State.

LUMPKIN, J. 1. The act of 1879 creating a board of commissioners of roads and revenues for Putnam county, and defining its powers and duties, which act is cited in the first headnote, confers upon the commissioners exclusive jurisdiction in "fixing the amount of the license for the sale of spirituous liquors." By section 5 of this act it is also declared "that said commissioners shall have the same power of appointing road commissioners, and enforcing the road laws, the justices of the inferior court had by the Code of this state, prior to the ratification of the constitution of eighteen hundred and sixty-eight of this state, and shall exercise such other powers as are granted by the Code of the state to said justices, or said court, or are indispensable to their jurisdiction; and shall have no jurisdiction, save and except such as pertains to county matters." In order, therefore, to determine whether or not the act in question conferred upon the commissioners of Putnam county the power to grant or refuse licenses to retail spirituous liquors in that county, it is necessary to inquire whether or not, under the Code in force prior to the ratification of the constitution of 1868, the justices of the inferior court, or that court, had this power, and, if so, whether or not the exercise of it pertained to a "county matter." The first inquiry admits of no difficulty. Section 1432 of Irwin's Revised Code, which is the Code above referred to, distinctly provides that "persons, before obtaining license to retail spirituous liquors, must apply to the justices of the inferior court of the county in which they desire to retail, who have the power to grant or refuse such application." The jurisdiction in question, therefore, undoubtedly belonged to the justices of the inferior court. Now, did the subject-matter of that jurisdiction fall within what were termed "county matters?" We think it did. It is true that in section 346 of the Code above mentioned, which conferred upon the inferior court, when sitting for county purposes, jurisdiction over various matters, no reference is made to the subject of granting liquor licenses; but an examination of sections 4052 to 4064, inclusive, with reference to the sessions, adjournments, and proceedings of the inferior court when sitting for county purposes, will show that section 346 is not exhaustive of the powers of this court when thus sitting. Section 4057 provides that the "court may hear and determine all matters over which the law gives the justices jurisdiction." We have al-

ready seen that they had jurisdiction over the question of granting or refusing licenses to retail spirituous liquors, and it requires no argument to prove that this particular matter, as distinguished from the trial of causes and the transaction of business coming before the court when in judicial session, is necessarily a "county matter." Our conclusion, therefore, is that under the act of 1879, first above mentioned, the commissioners of Putnam county had the power to grant or refuse such licenses. Under section 1419 of the present Code the jurisdiction to grant retail liquor licenses is conferred upon the ordinary; and it was contended by the state that by the act of December 22, 1884, (Acts 1884-85, p. 42,) this jurisdiction was conferred upon the board of commissioners of roads and revenues in counties where such boards had been established by law. It was replied that the act last mentioned was unconstitutional because it failed to describe, in the manner required by the constitution, the amendments sought to be made to the section of the Code therein referred to, and that this act was not relieved of this defect because of its recognition by the subsequent act of October 16, 1885, (Id. p. 59.) We deem it unnecessary to enter into any discussion either as to the constitutionality of the first of these acts, or as to their effect, considered together, upon the section of the Code last mentioned, because the act of December 24, 1890, to regulate the sale of spirituous, vinous, and malt liquors in this state, relieves the matter of all difficulty. See Acts 1890-91, vol. 1, p. 128. By the plain terms of this act it is requisite, in order to lawfully sell spirituous liquors in any quantity, to obtain a license, and such license must be obtained "from the authorities now authorized by law to grant licenses for the sale of such liquors by retail." We have seen that the local act for Putnam county, without reference to section 1419 of the Code, or the above-recited acts amendatory of the same, authorized the commissioners of that county to grant retail licenses, and consequently the general law of 1890 confers upon them the authority to grant licenses for the sale of spirituous liquors in any quantity, as this enactment also provides that "the laws now in force in this state with reference to the granting of license to retail dealers in spirituous, vinous and malt liquors, in the several counties, and the penalties attached for the violation of the same, are hereby made applicable to dealers who sell in any quantity whatever." Consequently, it was, at the time Mathews is charged with having sold spirituous liquors in Putnam county, a misdemeanor to do so without a license from the board of commissioners of that county.

2. There is, in Putnam county, no incorporated city, town, or village except Eatonton, and its charter does not confer upon the authorities thereof any jurisdiction to grant liquor licenses. So far, then, as Putnam

county is concerned, this jurisdiction is vested solely and exclusively in the county board of commissioners, and consequently, without a license from them, it would be unlawful and indictable to sell spirituous liquors even in Eatonton. It was therefore sufficient for the indictment against Mathews for unlawfully selling spirituous liquors in Putnam county simply to negative the granting to him of a license by the commissioners, and there was no occasion to make any reference in the indictment to the corporate authorities of any town or city. It would be otherwise if, in the county of Putnam, there was a town or city whose authorities had the power to grant such licenses, because, if that were so, every allegation in the indictment might be true, and yet the accused would be guilty of no offense, provided the selling by him was in such a town or city, and under a proper and regular license from its municipal government. There being, however, no such town or city in Putnam county, the allegations of the indictment before us could not possibly be true without making the accused guilty of the offense charged. Hence, we think the indictment, as to this question, was sufficient.

3. The evidence fully warranted the verdict, and this court is unable to say that the court below erred in overruling the certiorari. Judgment affirmed.

DOSTER v. STATE.

(Supreme Court of Georgia. Nov. 20, 1893.)

INTOXICATING LIQUORS—ILLEGAL SALES—EXAMINATION OF WITNESSES—INSTRUCTIONS.

1. As ruled in *Mathews v. State*, (this term,) 18 S. E. 996, the authority to grant licenses to sell spirituous liquors in Putnam county is vested exclusively in the commissioners of roads and revenues of that county.

2. Delivery, whether made by the seller or his employe, if requisite to complete a sale the contract for which, with payment of the purchase price, was made elsewhere, is contrary to law if the seller has no license authorizing him to sell in the county where the delivery takes place. In such case the sale is to be treated as made, not where the contract was entered into, and the purchase money paid, but where it was completed by delivery.

3. The propounding of a leading question to a witness is no cause for a new trial, especially when the answer is harmless.

4. It is the duty of the presiding judge to instruct the jury substantially in the terms of the statute, touching the prisoner's statement, when he makes a statement, and in no case should this be omitted; but where the statement is entirely silent touching one of the transactions covered by the evidence for the state, and the proof as to that transaction is uncontroverted and sufficient to warrant and uphold the conviction, the omission will not require a new trial. If, after giving the prisoner the full benefit of his statement by allowing it to outweigh all the evidence opposing it, or which it opposes, the verdict is correct, it may be left to stand.

5. There was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Putnam county; W. F. Jenkins, Judge.

J. M. Doster was convicted of selling intoxicating liquors unlawfully, and brings error. Affirmed.

H. A. Jenkins, Calvin George, and Harrison & Peeples, for plaintiff in error. H. G. Lewis, Sol. Gen., Hines, Shubrick & Felder, and J. S. Turner, for the State.

LUMPKIN, J. 1. Under the ruling in *Mathews v. State*, (decided this term,) 18 S. E. 996, there was no error in overruling the demurrer to the indictment. It was held in that case that the authority to grant licenses to sell spirituous liquors in Putnam county was vested exclusively in the board of commissioners of roads and revenues, and that it was a misdemeanor to sell such liquors in any quantity in that county without a license from that board.

2. In one view of the evidence introduced by the state, the jury were warranted in finding that the accused, whose place of business was in Morgan county, had in that county bargained to one Tom Davis a quantity of whisky at a price agreed upon and paid; that the whisky so contracted for was not separated from the general stock of the accused, or delivered to Davis, but it was understood between the parties that the same was to be sent by express to Davis in Eatonton, which place was in Putnam county; that the delivery was not, however, made in the manner contemplated by the parties, but that afterwards one Bob O'Neill, an employe of the accused in his barroom, took the whisky to Putnam county, and there delivered it to Davis in person. Had the whisky been delivered to the express company, which was a common carrier, it would have been a constructive delivery to the purchaser, Davis, and therefore the sale would have been complete in Morgan county; but, as the delivery was not thus made, but in the manner above stated, the sale was never consummated in Morgan county, and only became complete when Davis received the whisky in Eatonton. Therefore, according to the principle laid down in *Bagby v. State*, 82 Ga. 786, 9 S. E. 721, the sale, in contemplation of law, took place in Putnam county. This, in substance, though not in the clearest terms, the trial court charged. In the charge as given we see no error requiring a new trial.

3. The third headnote presents nothing requiring comment.

4. The fourth headnote succinctly, but with sufficient clearness, states the duty of the trial judge in reference to charging concerning the prisoner's statement. In the performance of this duty the judge should never fail to instruct the jury that they may believe the statement in preference to the sworn testimony in the case. The omission to do so, however, will not, in every case, render necessary the grant of a new trial. The present case

affords an instance of this kind. Two witnesses swore positively they had purchased whisky from the accused in Putnam county. In his statement he denied the truth of their testimony. A third witness (his own employe above mentioned) testified concerning the sale to Tom Davis, discussed in a previous division of this opinion. In his statement the accused made no reference whatever to the testimony of this latter witness, which was, of itself, sufficient to warrant a conviction. Therefore, giving the prisoner the full benefit of his statement by allowing it to outweigh and overcome the testimony of both of the two witnesses first above referred to, there would still be left uncontroverted evidence sufficient to sustain a verdict of guilty. On the supposition that the jury utterly rejected the testimony of the first two witnesses, (and this is certainly conceding to the accused all he is entitled to,) enough was left to support a conviction, and we therefore do not feel constrained to set it aside.

5. It appears from the foregoing that the verdict of guilty was warranted by the evidence, and, no error of law having been committed by the trial judge which would authorize the grant of a new trial, his judgment overruling the certiorari must stand. Judgment affirmed.

DAVIS v. STATE.

(Supreme Court of Georgia. Nov. 20, 1893.)

INTOXICATING LIQUORS—SALES BY DRUGGIST.

1. The question raised by the demurrer in this case is ruled in *Mathews v. State*, (this term,) 18 S. E. 997.

2. A druggist who has no license to sell spirituous liquors cannot knowingly sell them for use as a beverage, even after they are compounded with other ingredients into medicines; and where the evidence clearly shows that he must have known the purchasers bought them for consumption as a beverage, and for the sake of their intoxicating property, it was not reversible error for the court to charge the jury that "the party selling must use an ordinary degree of caution and diligence in ascertaining for what purpose they [the medicines] are wanted."

3. The evidence was sufficient to warrant the verdict, and there was no error in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Putnam county; W. F. Jenkins, Judge.

Alf Davis was convicted of selling intoxicating liquors unlawfully, and brings error. Affirmed.

H. A. Jenkins and Harrison & Peeples, for plaintiff in error. H. G. Lewis, Sol. Gen., Hines, Shubrick & Felder, and J. S. Turner, for the State.

LUMPKIN, J. 1. The question raised by the demurrer in this case was discussed and ruled in the case of *Mathews v. State*, (this term,) 18 S. E. 997.

2. A druggist who has no license to sell spirituous liquors certainly cannot knowingly sell them for use as a beverage, notwithstanding they may have been compounded with other ingredients into medicines. To do so is plainly and squarely a violation of our statutes prohibiting the sale of such liquors in certain jurisdictions. It is evident that, in such cases, treating the liquors as medicines is a mere pretense to evade the law. The evidence in this case shows that parties were in the habit of going to the drug store of the accused, and buying "tincture of ginger" and "cherry bitters," composed largely of alcohol, at 10 cents a drink, and also by the bottle, and then treating each other out of the quantity purchased. It must, therefore, have been obvious to the accused that these parties were not purchasing these compounds, in good faith, as medicines. Certainly, it would be a singular coincidence if several persons should become similarly sick at the same time, and require precisely the same treatment for their ailments; and the idea of sick people going to a drug store in crowds, and treating each other to a medicine at 10 cents a drink, is unique in the extreme. Among other things, the court charged the jury that "the party selling must use an ordinary degree of caution and diligence in ascertaining for what purpose they [the medicines] are wanted." Abstractly, this may not be an entirely correct presentation of the law applicable; but, if erroneous, it would not, in the present case, require, or even justify, the granting of a new trial, because it is plainly apparent that the accused, under the pretense of selling medicines, was really selling intoxicating liquors, and it is quite certain that he knew the purchasers were buying and using the liquors, not in good faith for use as medicines, but solely for the sake of their intoxicating properties. This being so, his conduct amounted to an open and inexcusable violation of the law prohibiting the sale of spirituous liquors without a license. The charge complained of was certainly as favorable to him as he had any right to expect under the evidence, and, even if erroneous, did him no injury.

3. The evidence disclosed the above state of facts beyond question. The verdict of guilty was unquestionably proper, and the court below did right in declining to sustain the certiorari. Judgment affirmed.

SIMMONS v. EAST TENNESSEE, V. & G. RY. CO.

(Supreme Court of Georgia. Nov. 6, 1893.)

INJURIES TO EMPLOYE—NEGLIGENCE—QUESTION FOR JURY.

If, by reason of the negligence of a railway company, a collision of its trains becomes imminent, and an employe upon one of them, whose life is consequently exposed, is prompted

by the conductor to run forward over intervening cars to give warning to the engineer, and in so doing, without imprudence or negligence on his own part, falls and is injured, the company is liable to compensate him in damages. In such case the negligence, whatever it may have been, which occasioned the perilous situation, is not too remote, provided a collision of the company's trains was so imminent as to render the conduct of the employe necessary and proper, under all the circumstances of the occasion; and whether it was so or not is a question of fact for the jury.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by C. W. Simmons against the East Tennessee, Virginia & Georgia Railway Company for personal injuries. There was a judgment for defendant, and plaintiff brings error. Reversed.

P. L. Mynatt and Mynatt & Willcoxon, for plaintiff in error. Dorsey, Brewster & Howell, for defendant in error.

SIMMONS, J. It appears from the declaration that the plaintiff, while on the defendant's train, where he was employed as a brakeman, was placed in a position of imminent peril by the conduct of the engineer in not turning the engine into a switch, and in going forward without slackening speed, when another train from an opposite direction was due and about to meet this train; that the conductor of the train the plaintiff was on, becoming alarmed at this, attempted to signal to the engineer with a lantern, and directed the plaintiff to do the same thing, and he did so, but their lanterns went out, and the only means of communicating with the engineer and stopping the train was for some one to run forward on the cars to the engine and tell the engineer to stop; that the conductor shouted excitedly and repeatedly to the plaintiff to run forward and do this, saying, "Go, go! go quick! we will hit before you can get there."—whereupon the plaintiff ran with the greatest possible speed from one car to another towards the engine, in order to avoid the apprehended collision, but while passing over a coal car he lost his footing, and fell over a large lump of coal, injuring himself severely in the manner alleged in the declaration,—all of which, it is alleged, was caused by the negligence and improper conduct of the defendant; the negligence being alleged to consist in the engineer's allowing his train to get behind the schedule time, and in not turning the train into the switch, but passing on, when he knew, or ought to have known, that the other train was due there. We think the court below erred in holding that the declaration does not set forth a cause of action. The case is within the principle of the decisions which authorize a recovery where one jumps from a train to save himself under circumstances of imminent danger, and is injured. According to the declaration the plaintiff found himself in a position of great peril, and this peril was brought

about by the negligence of the engineer, the emergency having been precipitated by the latter's failure to turn the train into the switch when he ought to have done so. The alleged negligence in being behind time counts for nothing, for it cannot be regarded as a direct cause of the emergency. The case must stand or fall upon the allegation of negligence in passing the switch. In this emergency two modes of avoiding the impending danger were before the plaintiff,—one to jump from the train, and the other to run forward to the engine and stop it. The peril of the situation, and the necessity for instant action in the mode adopted, were impressed and urged upon him by the conduct and commands of his superior officer, the conductor in charge of the train. If he had jumped from the train to avoid a collision, and had been injured in so doing, and if the danger which led him to jump was brought about by the negligence of the defendant's engineer, and was so imminent as to render his conduct necessary and proper under all the circumstances of the occasion, he would be entitled to damages. See *Railroad Co. v. Paulk*, 24 Ga. 356; *Railroad Co. v. Crosby*, 74 Ga. 738, 748, et seq.; and see the leading case of *Jones v. Boyce*, 1 Starkie, 493; also, *Beach*, *Contrib. Neg.* (2d Ed.) §§ 40, 42; *Patt. Ry. Acc. Law*, (1st Ed.) 14. And the principle is the same if, for the same reason, instead of jumping to the ground, he jumps, so to speak, to another part of the train, the difference being that in the one case he resorts to flight, and in the other to prevention, as the mode of escape. See *Railroad Co. v. Crosby*, supra, and other authorities cited. It was contended, however, that the proximate cause of the injury was the plaintiff's falling over the lump of coal, and that the alleged negligence did not contribute to his fall; and it is sought to analogize the case to that of *Railway Co. v. Suddeth*, 86 Ga. 388, 12 S. E. 682, where a brakeman in the course of his duty, while passing over cars loaded with ore, stepped upon a piece of ore, which turned his foot, precipitating him from the car. It was there said that, prima facie, such an occurrence is a mere accident, and that such casualties pertain to the risks of the service in which the person injured was engaged. In that case, however, there was no act of negligence on the part of the defendant which led to the plaintiff's passing over the ore. The risks which an employe assumes by entering the service of the railroad company do not embrace the risk of another employe's negligence, which he is not bound to anticipate; and if the negligence of the engineer in this case placed the plaintiff in imminent danger, and it was to escape this that he passed over the coal car, thus encountering a risk which he would not otherwise be compelled to encounter, that negligence was just as much the cause of his injury as it would have been if he had adopted the alternative of jumping to the

ground, and in doing so had fallen on a lump of coal or any other object that might happen to be in the way. The principle which governs in such cases is stated by Judge Thompson, in his work on Negligence, thus: "If the negligence of B. compels A. to adopt a particular course which he would not have adopted but for such negligence, and, in so acting with ordinary prudence, A. is injured, he may recover damages from B." 2 *Thomp. Neg.* (1st Ed.) 1092. The negligence, whatever it may have been, which occasioned the perilous situation, is not too remote if a collision was so imminent as to render the conduct of the plaintiff necessary and proper, under all the circumstances of the occasion; and whether this was so or not was a question for the jury. Judgment reversed.

NAVASSA GUANO CO. v. COMMERCIAL GUANO CO.

(Supreme Court of Georgia. Jan. 8, 1894.)

INTERPRETATION OF CONTRACT.

Where, by the terms of a plain and unambiguous written contract, one party purchased from another a certain and designated pile of fertilizer in bulk, the same being then stored in a named warehouse, and "estimated to be 253½ tons, more or less," the contract stipulating that the purchaser should pay for the same at a specified price per ton, and that if there should be more than 253½ tons the purchaser should pay for the excess at that price, and if less than 253½ tons the seller should refund the shortage at the same rate, the purchaser was bound to pay the contract price for the entire lot, although by actual weight it proved to be 702.7 tons, it not appearing that the seller practiced any actual fraud in the representations made by him as to the quantity, and the evidence showing, as found by the judge, who tried the case without a jury, that the purchaser did not, in fact, act upon any representations made by the seller, but relied upon his own judgment as to the quantity of fertilizer in the pile.

(Syllabus by the Court.)

Error from city court of Savannah; A. H. MacDonnell, Judge.

Action on a contract by the Navassa Guano Company against the Commercial Guano Company. There was judgment for defendant, and plaintiff brings error. Reversed.

Following is the official report:

The facts of this case are sufficiently reported in the decision of Judge MacDonnell, who presided on the trial in the court below. It is as follows:

On November 9, 1891, Coleman & Ray, of Macon, Ga., entered into the following written contract with the Commercial Guano Company:

"Georgia, Bibb County. Know all men by these presents that we, Coleman & Ray, a firm composed of Robert Coleman and Bolivar Ray, of said state and county, for and in consideration of the sum of fifty-seven hundred dollars, cash in hand paid to us by the Commercial Guano Co., existing as a corporate body under the laws of said state,

of the county of Chatham, the receipt of which is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell, unto the said Commercial Guano Co., its successors and assigns, all their ammoniated fertilizers in bulk, and now stored in the guano house in the northwest corner of the warehouse of said Coleman & Ray, in the city of Macon and the county of Bibb,—said ammoniated fertilizers estimated to be 253½ tons, more or less. Should there be more than 253½ tons, the said Commercial Guano Co. to pay for all over said 253½ at the rate of \$22.50 per ton, but should there be less than 253½ tons, then the said Coleman & Ray are to pay back to said Commercial Guano Co., for such shortage, at the rate of \$22.50 per ton; that being the price per ton at which said fertilizer was sold. The title to which said bargained property, to the said Commercial Guano Co., its successors and assigns, we hereby warrant and defend against the claims of all other persons whatsoever, and we do further covenant with and warrant to the said Commercial Guano Co., its successors and assigns, that said bargained property is the same as made up by Coleman & Ray, and called by them "Coleman & Ray's High Grade," and guaranteed by them to run according to the standard required by the laws of this state.

"Witness our hands and seals this 9th day of November, 1891.

"Coleman & Ray. [L. S.]

"Robert Coleman. [L. S.]

"Bollivar H. Ray. [L. S.]

"Signed, sealed, and delivered in presence of

"J. G. Wilburne.

"Isaac Hardeman,

"Not. Pub., Bibb Co., Ga."

The Commercial Guano Company accepted this bill of sale, and had it recorded in the clerk's office of the superior court of Bibb county. They also sacked up and carried away and paid for 265 1/5 tons of said fertilizer, but subsequently declined to accept and pay for any more of it. Coleman & Ray, being financially embarrassed, on November 28, 1891, transferred, in writing, for a valuable consideration, to another creditor, the Navassa Guano Company, all their rights under the contract, and gave it an order on the Commercial Guano Company for any and all surplus funds due for excess of guano over 253½ tons as per the contract of November 9, 1891. On November 28th the Commercial Guano Company notified Coleman & Ray for the first time that it would not accept the remainder of the fertilizer; the "more or less" meaning that there might be a few tons over or under the estimated quantity of 253½ tons. On December 18, 1891, the Navassa Guano Company notified the Commercial Guano Company that it would, after advertising, sell at public sale, on December 30, 1891, the balance of the fertilizer to the highest bidder, and hold it, the de-

fendant, for the difference between the contract price and the market price. The sale took place as advertised, and the fertilizer was sold at \$17 per ton; the agent of the Commercial Guano Company being present and bidding \$16.95 per ton. The balance of fertilizer thus sold was, upon sacking and weighing, found to contain 437½ tons. The contract price having been \$22.50 per ton, and the market price \$17, thus making a difference of \$5.50 per ton, or a total of \$2,406.25, the Navassa Guano Company brought its suit against the Commercial Guano Company for this sum, with interest thereon from January 1, 1892, and also for \$19.80, the cost, paid to the Macon Telegraph, a newspaper, for advertising the resale. The defendants filed their plea, alleging that they were not bound by the contract because they were induced to give their assent to it by the fraudulent misrepresentations of Coleman & Ray that the pile contained only about 250 tons, with possibly a few tons over or under, and not more.

The court was requested to construe the contract. We have experienced some difficulty in arriving at conclusions with which we are entirely satisfied. The goods are sold in bulk, and the pile is completely identified by reference to independent circumstances. The quantity sold is "estimated to be 253½ tons, more or less." Should there be more than 253½ tons, the defendant agrees to pay for all over said 253½ tons at the rate of \$22.50 per ton, but should there be less than 253½ tons, then the said Coleman & Ray are to pay back to defendant, for such shortage, at the rate of \$22.50 per ton. The consideration is thus put on a sliding scale, to adjust itself and keep pace with the possible variations from the estimated quantity; preserving, in any event, equality in this respect between the parties. The contract is clear and unambiguous. The trouble is between the entire pile and the estimated quantity. They are widely at variance. To which term of the contract shall be given the greater importance? Can they be harmonized? If not, which should prevail? The words, "estimated to be 253½ tons, more or less," in the bill of sale, mean that this was the mutual estimate of both parties. It amounted to an express declaration on the part of Coleman & Ray that this was their estimate, they executing the instrument; and the defendant, by accepting the bill of sale, stipulated that it was its estimate. It was thus the intention of both parties, expressed on the face of the contract. It is true that apt words express the intent of both parties, likewise, to convey the entire pile; but this is a case where we think the general intent is restrained by the particular intent. The only intent as to the measure of the quantity intended to be conveyed is contained in the estimate, and on that particular question it should be controlling. According to the great weight of the authorities, the words "more or

less" are put in to allow for accidental variations that are not unreasonable. The Code (section 2642) lays down a rule of construction as to what deficiency the words "more or less," in a sale of lands, will cover. It does not depend solely on the Code. Substantially the same law is recognized in the English and American cases. It applies to sales of personalty as well as realty; to questions of excess as well as deficiency. Briefly stated, it is that a wide variance from the mutual estimate of the parties should not be allowed, but a reasonable latitude should be permitted in the performance. The exact estimate is not warranted, but only a reasonable conformity to it. In this case the mutual estimate was 253 $\frac{1}{2}$ tons, more or less. The actual amount in the pile was afterwards found to be 702 $\frac{7}{10}$ tons. The excess over the estimate amounted to 449 $\frac{1}{2}$ tons. One of the witnesses characterized this as "a horrible excess." We think it is so great that some willful deception or gross mistake is suggested to the mind by a mere comparison of that amount with the estimate. We cannot think that the parties, by the use of the words "more or less," contemplated or intended such a wide variation from the mutual estimate as this. The decision in the case of *Brawley v. U. S.*, 96 U. S. 168, to the effect that, in such cases, the goods being identified by independent circumstances, the contract applies to the specific lot, and the naming of the quantity is not regarded in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it, is high authority, and seems against the views we entertain. But is there no limit to its application? Shall it hold in cases where the excess shocks the reason? To do so would be to violate the rule which looks to the whole contract in arriving at the construction of any part, and which prefers to uphold a contract in whole and in every part. Why deliberately insert an estimate of the quantity in the contract, if no effect is to be given to it? A sale of the pile, identified by independent circumstances, silent as to quantity, would effectuate this intention as well. The more just and liberal rule of construction is that followed by the Code of Georgia where the deficiency is gross. The words "more or less" will not cover such deficiency, or, by like reasoning, such an excess. Even the rule in *Brawley v. U. S.* requires good faith in reference to the estimate of the probable amount from the party making it. Why should not equal good faith be required of them in conforming to the estimate, especially where, as in the present case, it was in the power of Coleman & Ray to do so? We think it bad faith in them to depart from it, and to endeavor to force upon defendant the gross excess over the estimate expressed in the instrument. If these views are correct, we think that the de-

fendant has reasonably complied with its contract in accepting and paying for 265 $\frac{1}{3}$ tons of the fertilizer, and cannot be required to accept or to pay for the balance of the excess, and that the plaintiff is not entitled to recover. We realize, however, that the supreme court, in its wisdom, may adhere more stringently to the rule of construction laid down in the case of *Brawley v. U. S.*, and subordinate the estimated quantity to the other important intention expressed,—that of conveying "all their ammoniated fertilizer in bulk," etc., as identified by reference to the independent circumstances; in which event the defendant would be held bound to take and pay for the contents of the entire pile. If that construction should be followed, it would necessitate an examination into the defense set up in the pleadings; and, in order to facilitate as far as we can the final adjudication of the rights of the parties, we will next consider such defense.

The issue made by the pleadings, that the contract was induced by the fraudulent misrepresentations by Coleman & Ray, raises questions that are to be determined by the evidence. Is it true that such misrepresentations were made, and that they were the considerations which caused the defendant to enter into the written contract? The first intention of defendant undoubtedly was, not to buy fertilizers, but to take from Coleman & Ray, their debtors, so much only of the fertilizers as would pay their debt of \$5,700, at \$22.50 per ton, the agreed value, to do which 253 $\frac{1}{2}$ tons would have been sufficient; Coleman & Ray being in failing circumstances, and these being the only assets in their hands available for such settlement. This proposition was made by Coleman & Ray, and accepted by defendant. Under this agreement it would have been immaterial to defendant how much more the pile contained after taking out their 253 $\frac{1}{2}$ tons. But it must have been apparent that the pile contained more. The debtors being in failing circumstances, other creditors might levy upon the pile to satisfy their debts, and the defendants be put to expense, delay, and annoyance in having to file claims and sustain litigation. After consultation with their legal counsel, in which these contingencies were discussed and considered, defendant, to obviate such difficulties, came to the distinct second intention of acquiring title to the entire pile, and so notified Coleman & Ray that it would buy all or none. The contract was then written, or dictated, by defendant's own attorney. Col. Isaac Hardeman, who remembers that Huger said there was not much more than the 253 $\frac{1}{2}$ tons in it,—there might be a little more or a little less,—and whose understanding was that Huger was buying the entire pile, upon the terms and conditions stated in the bill of sale. It is contended by defendant that it would never have entered into such an agreement if Mr. Coleman had not re-

peatedly asserted that the pile contained only about 250 tons, with possibly a few tons over or a few tons under. In the language of Mr. Battey, "If we had known for one instant that there was such a horrible excess, we would not have made it." It is admitted, in plaintiff's amended declaration, that Coleman "said in his opinion there was about 250 tons, perhaps more and perhaps less, and he did not know how much was there." Coleman, in his testimony, admits that he did tell Battey and Huger repeatedly that there were 250 tons in there, and that he told them to the best of his knowledge; that he did think there were 250 tons there, and that he was honest in that; that he could not tell, as Mr. Wilburne (the bookkeeper) kept the books. These are strong admissions. The statements necessarily conveyed the impression that, in Coleman's opinion, this was about the true amount, and it proceeded from one who ought to have known the truth. Was it an innocent statement? It seems incredible that this debtor could have been in failing circumstances, and had on hand in daily sight such a valuable asset as this,—a mixture which he had himself compiled, worth about \$15,444, or, deducting 250 tons, still worth, at \$22.50 per ton, \$10,162.66,—and yet be in utter ignorance of it; still it is not impossible that such might have been the case. The very fact that they were in failing circumstances might indicate that the business was conducted carelessly. In either event, however, whether the statement was made knowingly and willfully, with intent to deceive, or by mistake and innocently, it would still be a fraud (Code, § 3174) if it was acted on by the opposite party, and would furnish good ground for annulling or apportioning the contract. Nor do we see much in the suggestion that the subsequent statement of Ray, that he thought there was in the neighborhood of 500 tons in the pile, could offset the reiterations of Coleman. They would still have the right to act on Coleman's representations. "All the partners are responsible to innocent third persons for damages arising from the fraud of one partner in matters relating to the partnership." Code, § 1915. Both would be misleading as to the true quantity, and the firm would be bound for that statement which made most strongly against it, provided it was acted upon by the opposite party.

And this brings us to another question. Assuming that there was such misrepresentation, was it, in fact, acted upon? Did it determine the conduct of the defendant in entering into the contract? The Code seems to regard this as essential (sections 2634, 3174) to afford ground of relief. To the same effect, Tied. Sales, § 161: "It is also necessary, to constitute ground for the charge of fraud, that the deceit should be successful, in that the party intended to be influenced actually relied upon the mis-

representation. If the other party did not rely upon the misrepresentation, but was induced by other considerations to make the contract, then he was not deceived, and he could not afterwards secure a release from the contract on the ground of fraud in the negotiation, for he was not defrauded." We have already seen that the defendant desired to get title to the entire pile, to avoid the annoyance and delay of having to contest with the claims of other creditors who might levy upon the pile, and that, after consultation with counsel on the subject, they desired and asked for a sale of all or none. Huger was the secretary, treasurer, and general manager of the defendant, the Commercial Guano Company. Did he rely on his own judgment as to the quantity in making the contract? The evidence is conflicting. He had been in the business of manufacturing fertilizers eight or nine years. Battey had been connected with the business, either as salesman or local agent, for fourteen years. They had considerable experience in fertilizers. Both had examined the pile before the bill of sale was drawn up. Battey and Huger, on the witness stand, assert that they went on what Coleman said; Wilburne and Ray are positive that Huger relied upon his own experience and judgment, even after they had expressed to him their opinion that there was much more than 250 tons in the pile,—Ray claiming that he said he thought there was double that quantity, or in the neighborhood of 500 tons. Battey and Huger deny that they heard any such statement. Col. Hardeman's testimony coincides with that of Ray and Wilburne. We think his testimony is entitled to special weight. He is a disinterested witness, was attorney for defendant in the transaction, dictated the bill of sale, and was present during the negotiations immediately preceding its execution. The other conflicting witnesses are, as far as we know, equally credible and intelligent. It is of course difficult always to read one's mind, and tell with accuracy what influences or controls it in a given action. In this case, Huger says he asked Coleman repeatedly,—he may have asked him 20 times,—how much was in the pile, and he kept on saying there were about 250 tons. A pertinent inquiry would be, why, if Coleman's statement was at all definite and reliable, or in the nature of a warranty, would not one answer have sufficed? Also, he asked Coleman & Ray to get their books and estimate to ascertain how much crude stuff went into the pile, and how much had been taken out; but they would not help him. Why the anxiety to get at the quantity in other ways, if he was relying on Coleman's statement? The plain inference seems to be that Coleman's statements were too indefinite and unsubstantial to be acted upon. Huger's letter of November 28, 1891, to Coleman & Ray confirms this. This letter was written not three weeks after the negotia-

tions, when his recollection of the transaction was fresh. It was the first letter repudiating liability for the excess of fertilizers. His language was probably guarded, and his words weighed, because he had then been notified of the transfer of the contract to plaintiff, and a lawsuit was in prospect. In this letter he writes: "As a matter of fact, you [Coleman & Ray] would not help the writer in any way to estimate the number of tons, stating you knew nothing about it." The conclusions to be drawn from this letter, and which seem inevitable, are—First, that Coleman & Ray did disclaim all knowledge as to the actual number of tons in the pile; second, that whatever representations were in fact made by them, they did not assist Huger in any way, and were not relied upon by him in making up his mind; and, third, having been denied help from them in forming his estimate, he was thrown back upon his own judgment, and he did, in fact, rely and act solely upon his own experience, judgment, and responsibility. This letter, we think, exonerates Coleman & Ray from any responsibility for Huger's conduct. We think that, by the preponderance of the evidence, he appears to have been influenced by other considerations,—by his own estimate, by the necessity for prompt action, by the desire to collect a debt and at the same time avoid complications,—and in the absence of accurate knowledge of the quantity, having sought it from them and failed to get it, but believing it to be in the neighborhood of 253½ tons, he voluntarily took a bill of sale of the entire pile, "estimated to be 253½ tons, more or less," as the best thing to be done under all the circumstances, instead of a bill of sale of the exact amount to settle his debt, as he could have done. We therefore find that the defendant's plea is not sustained. Our views, however, on the whole case are controlled by the construction we have put upon the contract, and the effect to be given to the words "estimated to be 253½ tons, more or less," and we think that the defendant, in accepting and paying for 265½ tons under the contract, has reasonably complied with it, and that more cannot be required of it. Wherefore it is considered, ordered, and decreed by the court that judgment be rendered in favor of the defendant, with costs of suit.

Fleming & Alexander and Erwin, Du Bignon & Chisholm, for plaintiff in error. Charlton, Mackall & Anderson, for defendant in error.

LUMPKIN, J. This case, by consent, was tried by his honor, Judge MacDonnell, without the intervention of a jury. He rendered a judgment in favor of the defendant, and this is the main error complained of in the bill of exceptions. The opinion delivered by the trial judge is set forth in full by the reporter, and it contains all that is necessary

to a clear understanding of the case. We fully agree with the judge that the contract was plain and unambiguous, and shall deal with the case upon the assumption that all his findings upon issues of fact are correct. There can, we think, be no question that this is the proper course for us to pursue. His conclusion that the Commercial Guano Company, in making, through its agents, the purchase from Coleman & Ray, did not act upon any representations made by the sellers, but that these agents relied entirely upon their own judgment as to the quantity of fertilizer in the pile, is clear and unequivocal, and undoubtedly well supported by the evidence. Upon the question whether or not the sellers, or either of them, practiced any actual fraud in the representations made by them as to quantity, the conclusion of the judge is not distinctly stated; but it is certainly fair to say he does not find that any such fraud was practiced. We are therefore authorized in saying that the existence of such fraud was not made to appear, and we think the case should be decided upon the theory that it was not proved at all. Assuming this to be true, we are constrained to hold that the learned judge erred in the conclusion he reached. We adopt as the true law of the case the doctrine laid down in *Brawley v. U. S.*, 96 U. S. 168, cited in the judge's opinion. We do not think the doctrine of section 2642 of the Code, in relation to the sale of land, nor the various decisions of this court construing this section, applicable to the facts of this case. It must not be overlooked that the entire pile of fertilizer was bought not at a fixed total sum, but for a stated price per ton, and enforcing the contract as made gives to the purchaser precisely what he bought, and at the price agreed upon. An express provision was made in the contract for any variation in the estimated quantity; hence, there can be no legal fraud simply because there was, in fact, an excess over the quantity it was supposed the pile contained. That the defendant company did not intend, simply, to take enough fertilizer to settle its debt is conclusively shown by the fact that they agreed to take more than 253½ tons; that being the exact quantity which would have canceled their debt of \$5,700, at the agreed price of \$22.50 per ton. On the whole, we are satisfied that the plaintiff was entitled to a recovery, and that the judge below erred in holding otherwise. Judgment reversed.

CONNOLLY v. THURBER-WHYLAND CO.
et al.

(Supreme Court of Georgia. Nov. 6, 1893.)

GARNISHMENT—CITY OFFICERS NOT SUBJECT TO—
INJUNCTION.

1. For reasons of public policy, neither the chief nor any member of the municipal police of a city or town is subject to garnishment for

effects which come to his hands by color of his official authority, and without the consent of the owner, whether he obtains them lawfully or unlawfully.

2. The pendency of the garnishments against the plaintiff presenting no legal reason for enjoining the action brought against him by Cooper to recover the property taken from him, and it appearing from the pleadings and evidence submitted to the judge below that the plaintiff had a complete and perfect defense by answer to each of the several garnishments, there was no error in denying the prayers for injunction and interpleader.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Petition by A. B. Connolly against the Thurber-Whyland Company and others for an injunction and other relief. There was judgment for defendants, and plaintiff brings error. Affirmed.

From the bill of exceptions, it appears that one George Cooper, having been arrested by a policeman of the city of Atlanta on the charge of violating an ordinance, by being drunk and disorderly, was brought to the station house for keeping until his trial or release on bail; and, in accordance with the law in such case, the valuables on such person were taken in charge by the station-house keeper for safe-keeping until they should be restored to him. The articles were delivered by the station-house keeper to plaintiff, who received them as chief of police. The articles so taken from Cooper and delivered to plaintiff consisted of \$421.95 in money, a promissory note for \$100, a purse, a pistol, and a watch. Afterwards, and while the articles so taken from Cooper were in plaintiff's possession as chief of police, defendants herein other than Cooper, brought separate civil actions against Cooper, as principal defendant, and plaintiff herein, as garnishee. Plaintiff having refused to deliver up the articles on demand, Cooper brought an action against plaintiff for conversion. The action herein was then brought by plaintiff to restrain the action by Cooper, and to require the other defendants to interplead for the determination of the rights of the parties to the property in plaintiff's hands taken from Cooper. Plaintiff's action was dismissed on the ground that he was not liable as garnishee.

J. A. Anderson and Fulton Colville, for plaintiff in error. Culberson & Hunt, Haygood, Lovett & Plyer, Bigby, Reed, Berry & Foote, H. M. Patty, Mayson & Hill, and J. W. Cox, for defendants in error.

LUMPKIN, J. 1. It can scarcely be doubted that, where one charged with drunkenness and disorderly conduct is arrested by a policeman in a city, it is the duty of the officer, if the prisoner is so intoxicated as to be incapable of properly caring for money or other valuables on his person, to take possession of the same, for safe-keeping, and for the purpose of restoring them to the own-

er upon or before his discharge from custody. This duty might also devolve upon the arresting officer, in some cases, when the prisoner was not intoxicated, as, for instance, when he was about to be confined among other prisoners who might steal from him the articles in question. In the view we take of the law applicable to the case before us, however, it is entirely immaterial whether Cooper was or was not intoxicated, or whether he was deprived of his money and other valuables lawfully or unlawfully. In neither event was the officer who first took possession of the property, or his superior officer, to whom it was afterwards delivered, liable to the process of garnishment at the instance of Cooper's creditors. In a case of this kind, the property is in custodia legis; and it is contrary to public policy that an officer of a court or of a municipal corporation be subjected to the process of garnishment, under such circumstances. See Kneel. Attachm. § 410; Mechem, Pub. Off. §§ 875, 876; Drake. Attachm. (7th Ed.) § 509b. The doctrine laid down by these text writers is supported by *Morris v. Penniman*, 14 Gray, 220; *Bank v. McLeod*, 65 Iowa, 665, 19 N. W. 329, and 22 N. W. 919; *Robinson v. Howard*, 7 Cush. 257. And the same conclusion is announced in 8 Am. & Eng. Enc. Law, 1132-1135, under the title "Garnishment." The reason for the rule is that public corporations are created for the public benefit, and public policy demands that such bodies and their officers should not be subjected to such interruptions, inconvenience, and delay as would prevent that prompt and efficient discharge of official duties so necessary to the public welfare. In this connection, attention is called to the apt and appropriate language of Chief Justice Bleckley in *Born v. Williams*, 81 Ga. 798, 7 S. E. 868. A very strong case in point is that of *Davies v. Gallagher*, defendant, and *Cassidy*, garnishee, reported in 17 Phila. 229. We have not quoted from any of the authorities above cited, but any one who will take the pains to examine them cannot fail to be convinced that our judgment in the case at bar is correct. Besides the authorities above mentioned, many others to the same effect could doubtless be found. Exemption from the process of garnishment is not for the benefit of the officer, but for the benefit and protection of the public, whose interest it is that he shall not be subjected to the necessity of leaving his post of duty to answer in a proceeding in which he has no official concern. The present case affords a striking illustration of the necessity of a rule of this kind. It is obvious, without elaboration, that to attend to the numerous lawsuits now pending against Connolly, the chief of police, must necessarily require a very large portion of his time and attention, which should be devoted to the public service; and, if he were liable to garnishment in every case of this kind which might arise, it is easy to perceive that he would be subjected to con-

stant danger of heavy personal loss, or else be forced to seriously neglect his official duties. The former would be a great hardship upon him, and the latter a serious and entirely unwarranted hardship upon the public. The policy of the law forbids that either of these things should occur. It will be observed we have not touched upon the question as to whether or not a policeman would be liable to the process of garnishment in a case where a prisoner voluntarily deposited with him money, or other valuables for safe-keeping. Nor is it necessary, in the present case, to decide this question. It distinctly appears that Cooper's property was taken from his possession without his consent, and that the taking of the same by the officer was under color of his official authority.

2. It follows conclusively from what has been said that Cooper had a plain and undoubted right to maintain the action of trover brought by him for the recovery of his property; and it has also been made apparent that Connolly, by an answer in each case simply setting forth the facts under which he came into possession thereof, had a complete and perfect defense to the several garnishment suits brought against him. Consequently, there was no good reason to enjoin the action brought by Cooper, or to require the several plaintiffs in the garnishment suits to interplead with each other; and the court was therefore right in denying the prayers in Connolly's petition for injunction and interpleader. Judgment affirmed.

FLOWERS v. FLOWERS.

(Supreme Court of Georgia. Nov. 20, 1893.)

ADMINISTRATION—ASSIGNMENT OF DOWER—COMPETENCY OF WITNESS.

1. Where commissioners appointed upon the application of a widow for dower have made their return, assigning dower in certain land, and a traverse is entered by a person who claims the land as his own, and sets up that the husband of the widow was not seised and possessed of it at the time of his death, this person, although he is the executor of the husband's estate, is not incompetent, under the evidence act of 1889, to testify on the trial of the issue thus formed, as a witness in his own behalf, as to transactions and communications with the deceased touching a sale and conveyance of the land by the latter to himself, the traverse being made in his own interest, and not in behalf of his testator's estate. In such case the proceeding is not a suit instituted or defended by the personal representative of the deceased, within the meaning of that act. The estate would not be bound by a judgment rendered in favor of the claimant, the estate being unrepresented as against his alleged title.

2. Inasmuch as the nature and extent of the right of dower was not involved in the litigation, any error of the court in charging on that abstract subject was immaterial.

3. It is error, in charging the jury, to direct their attention specially to the relevancy of a particular portion of the testimony favorable to one side, no special reference being made to any of the evidence favorable to the other side. For this reason the court erred in charging as follows: "I also charge you, in reference to

this case, upon a particular branch of this testimony,—a particular portion of this testimony. As you will observe, I have charged you in reference to the testimony in general. Everything here is evidence for you to consider and to weigh; but I charge you in particular that evidence of family disturbances between the husband and wife, and between her and one or more of his children by a former marriage, is relevant. I mean it is testimony for you to consider and weigh, along with all the other testimony, and see to what conclusion it brings your mind upon the issue here as to whether this lady is entitled to her dower or not."

4. The requests to charge, in so far as they are legal, were covered by the charge of the court; and there was no error in the charge except as stated in the preceding headnote.

(Syllabus by the Court.)

Error from superior court, De Kalb county; R. H. Clark, Judge.

To the report of commissioners appointed to assign dower to Catherine B. Flowers, George N. Flowers filed a traverse. From the judgment rendered, the executor brings error. Reversed.

Candler & Thomson, for plaintiff in error. John A. Wimpy and W. J. Speairs, for defendant in error.

SIMMONS, J. 1. The widow of John Y. Flowers applied for dower, and the commissioners appointed to assign dower made their report, assigning to the applicant certain lands. A traverse was entered by George N. Flowers, upon the ground that John Y. was not seised and possessed, at the time of his death, of the land out of which the dower had been assigned, but that he (George N.) was the owner. George N. claimed the land under a deed made to him by John Y. in August, 1875, the consideration expressed in the deed being \$5,500. Upon the trial of the issue thus made, George N. offered to testify as to the payment to John Y. of the consideration recited in the deed, and of a note made in connection therewith, and as to what was the real transaction evidenced by the deed and the note; but the court, on objection thereto, declined to allow the witness to testify as to these matters, holding that, George N. being a party to the suit, and John Y. being dead, the former was an incompetent witness as to transactions with the latter. We think the court erred in so holding. It was contended that such testimony is rendered incompetent by the evidence act of 1889, § 1, subsec. a, by which it is provided that, "where any suit is instituted or defended by * * * the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against said * * * deceased person, as to transactions or communications with such * * * deceased person." Acts 1889, p. 85. Although this witness was a party to the case on trial, and was the executor of John Y. Flowers, and, as such, his "personal representative," the traverse was not made in his representative character, or in behalf of his testator's estate, but was made solely in his own interest; the ground

of the traverse being that the land was his own, and that John Y. Flowers was not seised and possessed of it at the time of his death. Nor, on the other hand, was the estate represented as against his alleged title. In the claim of dower the widow represented herself only. The estate, therefore, would not be bound by a judgment rendered in his favor. Under these facts it is clear that the proceeding is not a suit "instituted or defended by the personal representative of the deceased," within the meaning of the statute. In the statement of facts, when the case was here before, (89 Ga. 633, 15 S. E. 834,) it was said that the traverse was made by George N. Flowers "as executor of John Y. Flowers and individually," but in the record now before us it does not appear that he either acted, or assumed to act, in this litigation as executor. As between the widow and the estate of her deceased husband, there was no dispute or litigation when the last trial of the case was had. In so far as the executor was concerned in his representative capacity, he had yielded to the widow's claim, and to the action of the commissioners. The sole issue on trial was between the widow, as one party, and George N. Flowers, in his individual capacity, as the other. There is no other provision of the statute under which the testimony offered could be held inadmissible.

2. Inasmuch as the nature and extent of the right of dower was not involved in the litigation, any error of the court in charging on that abstract subject was immaterial.

3. The following instructions of the court to the jury are complained of: "I also charge you, in reference to this case, upon a particular branch of this testimony,—a particular portion of this testimony. As you will observe, I have charged you in reference to the testimony in general. Everything here is evidence for you to consider and to weigh; but I charge you in particular that evidence of family disturbances between the husband and wife, and between her and one or more of his children by a former marriage, is relevant. I mean it is testimony for you to consider and weigh, along with all the other testimony, and see to what conclusion it brings your minds upon the issue here as to whether this lady is entitled to her dower or not." We think this was error. The main issue in the case was whether the conveyance by John Y. Flowers to George N., under which the latter claimed the land in question, was intended to pass the title absolutely and without reservation, or whether it was intended to defeat the right of the grantor's wife to dower without his parting with dominion and real ownership; and, as tending to show that the latter was the real motive and object of the conveyance, testimony was introduced by Mrs. Flowers relating to family disturbances between herself and her husband, and between her and his children by a former marriage. To this testimony the judge directs the attention of the jury specially. He tells them that

he has charged them in reference to the testimony in general, but that he now charges them with reference to a particular portion of the testimony; and then, after charging that they are to consider and weigh all the testimony, he adds, "But I charge you in particular that evidence of family disturbances between husband and wife, and between her and one or more of his children by a former marriage, is relevant." No special reference is made, anywhere in the charge, to any of the evidence favorable to the other side. To single out, in this manner, a portion of the testimony favorable to one side, and give it a degree of prominence not given to any of the other testimony, saying to the jury, in effect, that, while they are to consider all the testimony, they are to consider this particularly, is to discriminate in favor of that evidence, and is calculated to impress the jury that it is of special weight and value. Why should one part of the facts merit more marked attention than other parts equally material? The case is a close one under the evidence, and we cannot say that the stress placed by the court upon this particular part of the evidence did not operate in producing the verdict rendered.

4. The requests to charge, in so far as they are legal, were covered by the charge of the court as given, and there was no error in the charge except as stated in the preceding part of this opinion. Judgment reversed.

SMITH v. OATTS.

(Supreme Court of Georgia. Nov. 20, 1893.)

CONSTITUTIONAL LAW — IMPOUNDING OF ANIMALS.

The general assembly, after having conferred power upon the authorities of an incorporated town to "regulate or prohibit the running at large in said town of any horses, mules, cattle, hogs, dogs or other animals or fowls, and prescribe penalties therefor," may, by a subsequent amendatory statute, curtail these powers by enacting that "the authorities of said town shall not exercise the powers conferred by this section over or upon the property or live stock of such persons as do not reside within the corporate limits of said town." The act of September 7, 1891, amending in this respect the charter of Swainsboro, is not unconstitutional. 2 Acts 1890-91, p. 733.

(Syllabus by the Court.)

Error from superior court, Emanuel county; R. L. Gamble, Judge.

Action in replevin by C. W. Smith against B. F. Oatts. From a judgment for defendant, plaintiff brings error. Reversed.

Warren & Warren, for plaintiff in error. J. F. Haley and Williams & Smith, for defendant in error.

SIMMONS, J. Smith sued Oatts for the recovery of two hogs, and the case was submitted to the court below upon the following agreed state of facts: Oatts bought the hogs at a sale by the marshal of Swainsboro, Ga., under an ordinance passed by the mayor

and council of that town, in pursuance of the powers granted by the charter of the town, authorizing its local authorities to impound hogs, etc., when found running at large on the streets. The plaintiff's hogs were found by the marshal on the streets, and impounded. The plaintiff refused to pay the impounding fees or charges when called upon, claiming that the town authorities could not enforce the ordinance against his property, under an act of the legislature which amended the charter of the town by providing that the powers granted the town in its original charter, relative to the impounding of hogs, etc., should not be exercised against the live stock of those who do not reside within the corporate limits of the town. The plaintiff did not reside within the corporate limits. The marshal, after advertising the hogs, sold them to Oatts, who refused to deliver them to the plaintiff on demand. The court below held that the amendment to the charter (2 Acts 1890-91, p. 733) was unconstitutional, and to this ruling the plaintiff excepted.

The tenth section of the charter declares that the mayor and council "may regulate or prohibit the running at large in said town of any horses, mules, cattle, hogs, dogs or other animals or fowls, and prescribe penalties therefor." Acts 1887, p. 527. To this the amendatory act in question added the following: "Provided, that the authorities of said town shall not exercise the powers conferred by this section over or upon the property or live stock of such persons as do not reside within the corporate limits of said town." And it is enacted "that all laws and parts of laws in conflict with this act be and the same are hereby repealed." It was contended that the amendment is void (1) because it is unreasonable, it being impossible for the town authorities to distinguish between the property of nonresidents and that of residents of the town when found at large on the streets; and (2) because it is class legislation, as it discriminates in favor of nonresidents. Whether it be true or not that the amendment and the section amended cannot stand together for these reasons, it does not follow that the amending act itself is ineffectual. The legislature had the right to curtail, or to take away entirely, the power granted in the original act; and, by adding this proviso and repealing all laws or parts of laws in conflict therewith, it meant that the power granted in the section amended should be exercised only upon the condition stated in the proviso. To hold the amending act void because the power could not be exercised at all, if dependent on this condition, would be to set aside a later, in order to sustain a former, expression of the legislative will; and it is well settled that this cannot be done. As was said by Bleckley, C. J., in *Railroad Co. v. Gibson*, 85 Ga. 19, 11 S. E. 442, in discussing the effect of an amending act which was in the form of a proviso: "We see no reason why an amend-

ing act, passed by a subsequent legislature, or at a subsequent session of the same legislature, could not modify or repeal anything whatsoever in the act amended, and in any form the legislature might choose to adopt. * * * In so far as an act passed by a subsequent legislature, or at a subsequent session of the same legislature, is inconsistent with a prior act on the same subject, a repeal of the prior act is effected; and it seems to us to make no difference that the later act may, in whole or in part, consist of a proviso. The rule, so far as we know, is universal that, where there is an irreconcilable conflict between two statutes, the later of the two must prevail, and the former give way." Here the legislature, in its final expression on the subject, says to the authorities of the town, in effect: "You may continue to regulate or prohibit the running at large of hogs, etc., if you confine the exercise of this power to the property of persons residing in the town, but upon this condition only." Such being the clear intention of the law-making power, the courts cannot set that intention aside, upon the ground that to carry it into effect would prevent any exercise by the town authorities of the power which the legislature made dependent on the condition stated. But non constat that the local officers could not distinguish between the property of residents and that of nonresidents. Doubtless they could in some instances, and in others not. Where they could not, they would simply have to forbear. Another objection to the amending act was that "it is repugnant to that clause of the constitution which inhibits any special legislation that contravenes a general law," inasmuch as section 4065 of the Code empowers the authorities of any town or city to abate and remove nuisances, and as the running at large of hogs, etc., is a nuisance. The act, however, does not seek to limit the powers granted by this general law, but only such as are granted by another special act; and the power to take up and sell hogs found running at large in the streets is not granted by the general law. These being the only objections urged against the validity of the amending act, and no other ground appearing which would require us to hold it invalid, it follows that the court below erred in so holding. Judgment reversed.

STAMEY v. WESTERN UNION TEL. CO.

(Supreme Court of Georgia. Jan. 8, 1894.)

TELEGRAPH COMPANIES — FAILURE TO DELIVER MESSAGE—RULES OF COMPANY.

1. Where a message, intended for transmission over the lines of a telegraph company, was written upon one of the regular blanks prepared and furnished by the company for the use of its customers, and upon the face of the blank, above the space left for the message, the following words were printed in plain type, "Send the following message, subject to the terms

on back hereof, which are hereby agreed to," and below this space, in still plainer type, were printed the following words and signs, "Read the notice and agreement on back." The writer of the message and consequently the contemplated sendee were bound by any reasonable rule or regulation printed on the back of the blank.

2. A regulation so printed, and in the following words, "No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender," was reasonable, and the company is not liable to the proposed sendee of such a message because of the failure of the messenger to whom it was intrusted to deliver it at one of the company's transmitting offices, and the company's consequent failure to transmit and deliver to the person addressed. This is so, notwithstanding the delivery of messages to such a messenger was usual and customary in the regular line of the company's business, and, according to its usage, it paid its messengers for every message delivered, and "for every message so received to be transmitted." By express stipulation, the messenger was, as to the service he undertook, the agent of the sender and not of the company.

(Syllabus by the Court.)

Error from city court, Richmond county; W. F. Eve, Judge.

Action by D. A. Stamey against the Western Union Telegraph Company for failure to deliver a message. From a judgment for defendant, plaintiff brings error. Affirmed.

J. R. Lamar, for plaintiff in error. J. S. & W. T. Davidson, for defendant in error.

LUMPKIN, J. The declaration in this case claims damages for the nontransmission and nondelivery of a telegram which, it is alleged, Gooding & Co., of Charleston, S. C., had written on one of the defendant's day telegraphic blanks and handed to a messenger of the defendant, who had just delivered a telegram to them from the plaintiff, to be carried to the office of the defendant in Charleston for transmission to the plaintiff, at the latter's expense, but which message was never in fact delivered by the messenger at the transmitting office of the defendant in Charleston. The pivotal question is: Was the message delivered to the company for transmission? One of the rules and regulations of the company, printed on the back of the blank upon the face of which the message was written, was in these terms: "No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender." Just above the space left for the written message are the following words, in large type: "Send the following message, subject to the terms on back hereof, which are hereby agreed to." And at the bottom of this space is the following notice, in larger type: "Read the notice and agreement on back." The declaration avers that this rule is not obliga-

tory upon the senders of the message, because it was not read by them or known to them. This position is clearly untenable, for reasonable diligence was all that was necessary to acquaint them with this rule. Therefore, the moment the senders wrote and signed the message on the blank, they became, in legal contemplation, aware of the rule, whether they read it or not, and thereby signified "both their knowledge of it, and their assent to it." *Hill v. Telegraph Co.*, 85 Ga. 425, 428, 429, 11 S. E. 874, and cases cited on the latter page. See, also, *Gray, Com. Tel.* 52, 53; *Scott & J. Tel.* § 149; note in 71 Am. Dec. 406, to case of *Camp v. Telegraph Co.*, beginning on page 461. A telegraph company is not subject to the extraordinary limitations and responsibilities imposed by law on common carriers. *Telegraph Co. v. Fontaine*, 58 Ga. 433; *Telegraph Co. v. Blanchard*, 68 Ga. 307, and note to same case in 45 Am. Rep. 487, 488. It therefore has the undoubted power to make reasonable rules and regulations regarding the conduct of its business with the public; and the reasonableness of such rules and regulations is a question for the courts to decide. *Gray, Com. Tel.* §§ 13, 20; *Scott & J. Tel.* § 104; note in 71 Am. Dec., *supra*. This being true, is the rule in controversy reasonable? We think it is. The work performed by the messenger in carrying the message from the office or residence of the sender to the transmitting office of the company forms no part of the transmission of the message by the company, for which latter purpose alone the company makes a charge. There is nothing onerous or one-sided about the rule. It dictates no terms to the sender, and gives no advantage to the company. It is neither obligatory nor arbitrary. In a word, it gives the sender the alternative of delivering his dispatch to the messenger, to be delivered by him at the office of the company, on the condition prescribed, or of making such delivery either in person or by his own servant. We have been unable to find a direct adjudication upon this rule by any court, and we think this shows, or tends to show, the consensus of public and professional opinion in favor of its reasonableness. The rule is held to be reasonable in the work of *Gray on Communications by Telegraph*, (section 13, top p. 23.) Assuming, then, the reasonableness of the rule, it follows, in the absence of other facts to the contrary, that the message was not delivered to the company, because it was not presented at one of its transmitting offices by the agent of the senders, and was not accepted by the company. Now, is there any fact in this case, not yet mentioned, which should vary the above conclusion? The plaintiff in error alleges in his declaration that a local usage of the defendant at Charleston authorized its messengers, delivering telegrams, to receive answers for delivery at the company's office for transmis-

sion, for which they were paid by the company two cents for each message so received and delivered, (i. e. at the company's office,) and that such local usage made the messengers the agents of the company to receive messages for transmission, and superseded the above-recited rule or stipulation. Taking into view all the allegations of the declaration, and the blank attached, the answers referred to as being within the operation of this alleged usage were, presumably, written upon the company's blanks, similar to the one in question. We cannot accept as correct the plaintiff's position as to the effect of this alleged usage. If the usage was unknown to the senders of the telegram, they did not act, and could not have acted, on it; and if they had known of such usage, and, nevertheless, entered into a written agreement by which the messenger should act as their agent for the sole purpose of carrying the message to the company's office for transmission, they and the plaintiff in error were thereby estopped from showing such usage, because custom or usage, while admissible to explain an ambiguous written agreement, is inadmissible if repugnant to or inconsistent with a clear, express agreement. *Grinnell v. Telegraph Co.*, 113 Mass. 299, 307, and cases there cited. See, also, *Park v. Insurance Co.*, 48 Ga. 601, 606; *Werner v. Footman*, 54 Ga. 128, 137; *Tilley v. Cook County*, 103 U. S. 155, 162; *Moran v. Prather*, 23 Wall. 492, 503; and note to *Insurance Co. v. Munger*, 33 Am. St. Rep., on page 368, (30 Pac. 120,) citing ample authority and saying: "A local usage, inconsistent with an express contract made at the place where such usage prevails, or contradicting its terms, is not a part of such contract, and cannot be given in evidence to contradict or avoid it."

There is nothing in the rule under consideration contrary to public policy. Aside from the reasons already given, others in its favor may be stated: (1) Messengers of a telegraph company are not sent out from the company's office to solicit telegrams, and, being engaged in a most subordinate work of the company's service, it is to be presumed that they are not invested by the company with the powers of receiving the company's charges or fees for the transmission of telegrams, and that they have no powers of rejecting telegrams offered to them, either for the nonpayment in advance of the company's charges for transmission, or for being illegibly written, or for containing matter which would make the company liable, in tort or otherwise, for transmitting an indecent or immoral telegram,—all of which are powers reserved by law to the company for its protection, and with which, it is known to the public, or should be, the receiving agent of the company at its transmitting offices is invested. (2) The carriage of telegrams from the office or residence of the sender to the transmitting office of the

company is not a part of the duty or business of a telegraph company. (3) Neither the sender nor addressee of a message pays anything for such carriage to the transmitting office of the company. (4) The liability against which a telegraph company cannot stipulate, as shown by the adjudications of all courts, is confined to its negligence in connection with the transmission of messages from its transmitting offices, and the delivery of such messages to the sendee; and it has even been held, in *Clement v. Telegraph Co.*, 137 Mass. 463, 466, 467, that there are no principles of public policy which should prevent a telegraph company from stipulating against the negligence of its messenger boys as to the delivery of messages to its patrons. (5) And the transmission of a message "means its transmission from the office or station at which it is received to the one to which it is sent;" and delivery means "the delivery of it to the person to whom it is addressed." *Scott & J. Tel.* § 264.

Therefore, delivery to the messenger, without acceptance by the company, should not fix any liability on the company. If delivery to the messenger were delivery to the company, acceptance by the messenger must be held to be acceptance by the company, and this would take from the company its undoubted right to refuse to transmit a message for any one or more of the reasons above stated. No analogy between such a case as this and that of a life insurance agent can justly be drawn, because none of the reasons which have impelled the courts, in modern decisions, to treat the agent of the insurance company as the agent of the insurer, where a somewhat similar rule or stipulation is printed upon the back of the application or policy of insurance, have any application here. For the reasoning of the courts in such insurance cases, see the opinion of Miller, J., who announced the decision of the court in the case of *Insurance Co. v. Wilkinson*, 13 Wall. 222, 234, 236. The foregoing disposes of the case, and the question raised as to the measure of damages need not be considered. Judgment affirmed.

ATLANTA JOURNAL v. MAYSON.

(Supreme Court of Georgia. Oct. 30, 1893.)

LIBEL AND SLANDER—BURDEN OF PROOF.

Code, § 3749, declares that "in all civil cases the preponderance of testimony is considered sufficient to produce mental conviction." This phraseology includes actions for libel in which a plea of justification presents the issue to be tried, although such plea imputes to the plaintiff the commission of a crime as charged in the publication alleged to be libelous. In order to sustain the plea, it is requisite that the jury shall have a mental conviction of its truth, but they need not be "convinced beyond a reasonable doubt," as this phrase is commonly understood in criminal procedure. This question was not directly presented in *Ransone v. Chris-*

tian, 56 Ga. 351, nor was it directly decided in *Williams v. Gunnels*, 66 Ga. 521.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action for libel by C. C. Mayson against the Atlanta Journal. There was judgment for plaintiff, and defendant brings error. Reversed.

W. P. Andrews and Ellis & Gray, for plaintiff in error. Mayson & Hill, for defendant in error.

SIMMONS, J. This was an action for libel, the alleged libelous matter consisting of publications in the defendant's newspaper charging the plaintiff with the crime of forgery. The defendant admitted the publications, and pleaded justification. There was a verdict for the plaintiff of \$1,000. The main question before us is whether or not the trial court erred in charging that "the burden is on the defendant to sustain the plea of justification by the same degree of evidence that would be required to convict the plaintiff if he were charged with a crime; that is to say, beyond a reasonable doubt." We think this was error. In order to sustain the plea of justification, it is requisite that the jury shall have a mental conviction of its truth, but they need not be "convinced beyond a reasonable doubt," as this phrase is commonly understood in criminal procedure. In respect to the degree of mental conviction required, our Code places all civil cases upon the same footing. Section 3749 declares: "In all civil cases the preponderance of testimony is considered sufficient to produce mental conviction. In criminal cases a greater strength of mental conviction is held necessary to justify a verdict of guilty." The decisions in civil cases cited for the defendant in error, in which it is said that the proof on certain points must be such as to satisfy the jury beyond a reasonable doubt, are explained in the case of *Schnell v. Toomer*, 56 Ga. 169, as meaning simply that the jury must be clearly satisfied. In that case, Judge Bleckley says: "In regard to the evidence of adverse possession, etc., the court was requested to charge the jury, as laid down in *Durham v. Holeman*, 30 Ga. 619, that the plea of the statute must be supported by proof so conclusive as to exclude reasonable doubt. The court declined so to charge, but seems to have given what we think is the true meaning of the cases on the subject, namely, that it is only necessary for the proof to clearly satisfy the minds of the jury of the truth of the plea. In civil cases, as in *Wyche v. Greene*, 11 Ga. 160; *Durham v. Holeman*, 30 Ga. 619; and *Printup v. Mitchell*, 17 Ga. 559,—the exclusion of reasonable doubt means that, and no more, (Code, § 3749;) and as 'reasonable doubt' is a phrase more appropriate to criminal cases, its employment to instruct the jury in civil cases had best be avoided. There is certainly a

difference in the strength of conviction required by the law in the two classes of cases; and, that being so, it is desirable not to confound in language what should be distinguished in thought." Moreover, the cases referred to were decided prior to the adoption of the Code. It was contended, however, that cases in which there is a plea charging the plaintiff with a crime stand upon a different footing in this respect from other civil cases; and in support of this view the cases of *Ransome v. Christian*, 56 Ga. 352, and *Williams v. Gunnels*, 66 Ga. 521, are cited. In *Williams v. Gunnels*, one of the exceptions was that the trial court refused a request to charge that, to support a plea of justification, it requires the same degree of evidence as would be required to convict the plaintiff if he were charged with a criminal offense; but as it appeared from the judge's certificate that this request was not in writing, and no error being assigned on the charge given on this point, the court declined to consider it, and simply "suggest" that the rule as embodied in the request is "seemingly recognized" in *Ransome v. Christian*, supra. Upon looking to *Ransome v. Christian*, we find that nothing is said as to the degree of mental conviction the jury must have, to authorize a verdict in favor of the plea. In that case there was a plea of justification of a libel charging perjury; and the question was whether it was error to instruct the jury that, where but one witness testifies to the truth of the charge, the corroborating circumstances must be sufficient to amount to another witness, or to support the one witness to that extent. It was held that this instruction required too much, and that it is enough if the circumstances corroborate the one witness to the satisfaction of the jury. It was not held that the jury must be satisfied beyond a reasonable doubt. So it will be seen that these cases do not decide the question now before us.

In some of the decisions elsewhere, the distinction is made that, while it is necessary to support the plea with such proof as would be sufficient to convict the plaintiff on an indictment for the offense, yet it is not necessary, as in a criminal prosecution, that it should be of that degree of certainty requisite to remove all reasonable doubt from the minds of the jury. See *Newell, Defam.* (1890,) p. 795. In *Ellis v. Buzzell*, 60 Me. 209, the court, in holding that the proof need not be such as to exclude reasonable doubt, say: "It is worthy of remark that, with a very few unimportant exceptions, the cases in which it has been held that, to sustain a plea of justification, the defendant in an action of slander must adduce such proof as would suffice for the conviction of the plaintiff upon an indictment, have been cases in which the words used imputed perjury to the plaintiff, and in most of them the matter more directly under consideration has been the propriety of regarding the plaintiff's testimony

upon the occasion referred to as evidence in the case, to be overcome by the production of more than one witness to prove its falsity,—the necessity of showing that his testimony was false in intent as well as in fact,—its materiality, or some point affecting the truth of the charge, and not the necessity of proving the commission of the crime beyond a reasonable doubt. We have no occasion to question those decisions, so far as they enforce the necessity of proving all the elements necessary to constitute the crime charged by an amount of evidence sufficient to overbalance the plaintiff's side of the case. It may be and probably is true that the compendious phrase, 'sufficient to convict the plaintiff upon an indictment,' has had reference more frequently to matters which it was necessary to establish than to the degree of assurance upon which the jury should act." See, also, the note of Judge Redfield to this case in 12 Am. Law. Reg. (N. S.) 431. In 2 Greenl. Ev. § 426, after stating that "to support a special plea in justification, where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him," the author adds, "and it is conceived that he would be entitled to the benefit of any reasonable doubt of his guilt, in the minds of the jury, in the same manner as in a criminal trial." But in recent editions of this work it is said, in a note to the paragraph quoted, that while "the evidence to support this justification must include all the elements necessary to prove the accused guilty of the crime in a prosecution therefor, e. g. both the intent and the criminal act, * * * it seems to be the established rule now that a preponderance of the evidence tending to convict him of the crime is enough, and that the statement in the text that he is entitled to a reasonable doubt is not well supported." It is by no means certain that *Chalmers v. Shackell*, (1834,) 6 Car. & P. 475,—the English case cited on this point by the author,—is authority, even in England, for the rule that in such cases the crime charged in the plea must be proved beyond a reasonable doubt. See 10 Am. Law. Rev. 642, where the cases cited by Mr. Greenleaf are reviewed at some length. At any rate, we believe we are safe in saying that no such rule was laid down in any of the English cases prior to the time of our adopting statute. If, however, such was the rule in England, the reason upon which it has been supposed to rest does not exist with us. On this subject we quote from Newell on Defamation, Slander, and Libel (page 795) as follows: "In England there was a substantial reason for requiring a more conclusive degree of certainty of the truth of the charge in a civil action for defamation, which does not apply in this country. There, if the plea of justification, where a felony had been charged, was sustained by the verdict of a jury, the verdict stood as an indictment. Lord Kenyon said: 'Where the de-

fendant justifies words which amount to a charge of felony, and proves his justification, the plaintiff might have been put upon his trial by that verdict without the intervention of a grand jury.' In the United States no such result follows, and the reason for the rule ceases to exist. Neither life nor liberty is in any degree imperiled by such a verdict. No other consequences follow it than follow a verdict in any other civil cause. It does not take the place of an indictment. If the truth of the words published is, by a preponderance of evidence, proved to the satisfaction of the jury, the plea is sustained. The adoption of this rule does not change or modify the presumption of innocence which the law raises in favor of the plaintiff, nor does it waive the necessity of proving every element that enters into the crime charged by evidence of a kind and quantity that, in the minds of the jury, overthrows the case made by the plaintiff." In 2 Whart. Ev. § 1246, it is said: "The doctrine that reasonable doubt should produce an acquittal sprang from the hardship of a system which inflicted capital punishment on all felonies, and is, in any view, defensible only on the ground that where penal judgments are to be inflicted, and where the state, with all its power, prosecutes, then proof of guilt should be strong. * * * The better view is that in civil issues the result should follow the preponderance of evidence, even though the result imputes crime." Judge Cooley, in his work on Torts, (2d Ed., p. 208,) says: "Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence. It is not necessary that the crime be made out beyond a reasonable doubt."

Of the cases cited as opposed to this view, *Polston v. See*, 54 Mo. 291, was expressly overruled in *Edwards v. George Knapp & Co.*, (1888,) 97 Mo. 432, 10 S. W. 54, and *Fountain v. West*, 23 Iowa, 9; and other cases to the same effect were overruled in *Riley v. Norton*, 65 Iowa, 306, 21 N. W. 649. Several Indiana cases cited by counsel for the defendant in error lay down the rule as given in charge by the court below in this case, but the rule thus laid down is disapproved in the recent case of *Fowler v. Wallace*, (1892,) 31 N. E. 53, 131 Ind. 347, though a majority of the court hold that they are required to follow those cases. They say: "We are satisfied that the rule grew out of a misconception of principle, and, if we were not compelled by duty, we should decline to give it our adherence." "It is with reluctance and regret that we yield to the decisions upon this point." A minority of the judges dissented, upon the ground that it was the duty of the court to correct the error, and apply the rule regarded as the proper one; and it was also maintained that the prior decisions referred to had already, in effect, been over-

ruled in *Insurance Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636, and in other cases. The case last cited was an action upon an insurance policy, in which the defense was that the plaintiff had willfully set fire to the premises insured in order to defraud the defendant; and the court held that to establish this defense a preponderance of evidence was sufficient, and an instruction that its truth must be established beyond a reasonable doubt was erroneous. The decisions to this effect in cases of the same class are numerous, (see *May*, Ins. § 583, and note;) and in our opinion there is no substantial reason for the distinction which some of the courts have made between those cases and libel or slander cases, in respect to the strength of mental conviction required to authorize a verdict sustaining the charge contained in the plea. Whether the charge is made in an action of the one kind or the other, the injury to the reputation, if the charge is sustained, must in either case be the same. And undoubtedly the decided weight of authority is opposed to such a distinction. In addition to the authorities already cited, which hold that in this respect no exception exists in libel or slander cases to the general rule in civil actions, see *Peoples v. Evening News*, 51 Mich. 11, 16 N. W. 185, 691; *Sprull v. Cooper*, 16 Ala. 791; *Bell v. McGinness*, 40 Ohio St. 204; *Sloan v. Gilbert*, 12 Bush, 51; *Downing v. Brown*, 3 Colo. 571; *Kidd v. Fleck*, 47 Wis. 443, 2 N. W. 1121; *Barfield v. Britt*, 2 Jones, (N. C.) 41; *Klincade v. Bradshaw*, 3 Hawks, 63; *McBee v. Fulton*, 47 Md. 403; *Currier v. Richardson*, 22 Atl. 625, 63 Vt. 617; *Folsom v. Brawn*, 25 N. H. 114; *Baker v. Kansas City Times*, 18 Am. Law Reg. (N. S.) 101, Fed. Cas. No. 773. Judgment reversed.

LUMPKIN, J., heard the argument, but, being disqualified by relationship to one of the stockholders in the corporation sued, took no part in the decision.

BENTLEY v. CITY OF ATLANTA.

(Supreme Court of Georgia. Oct. 30, 1893.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—LIABILITY TO ABUTTING OWNERS—PLEADINGS.

1. A tenant of premises situated in a city, although he has no estate in the land, is the owner of its use for the term of his rent contract, and can recover damages for any injury to such use occasioned by the erection and maintenance of a public nuisance in the street, adjacent to or in the immediate neighborhood of the premises.

2. The duty, both with respect to the general public and the occupants of premises along the streets of a city, of keeping the streets free from permanent or long-continued nuisances, rests primarily on the municipal government; and this duty cannot be evaded by urging the right and duty of a railway company to bridge its line at street crossings, and maintain the bridges and crossings in proper condition. If the city authorities suffer a railway company

to erect a bridge at a street crossing, and maintain it, together with the approaches thereto, in such manner as to render the same a public nuisance, the city is liable for the consequences, just as it would be if the improper work had been done by the city itself.

3. The declaration set forth a cause of action. The court erred in disallowing the amendments offered, and in sustaining the demurrer. (Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action by Moses H. Bentley against the city of Atlanta. From a judgment for defendant on demurrer to the declaration, plaintiff brings error. Reversed.

The following is the official report:

Action against a municipal corporation for damages resulting from the raising of a bridge in a street. On demurrer the court ruled that the declaration set forth no cause of action, and, on objection by the defendant, disallowed two amendments offered by the plaintiff. Upon these rulings the plaintiff took a bill of exceptions. The declaration alleges the following: The plaintiff had leased a house and lot in the city, fronting 50 feet on Peters street, and running back 100 feet to the right of way of the East Tennessee, Virginia & Georgia Railroad, bounded on the northeast by McDaniel street, and adjoining the McDaniel street bridge. His term of lease will not expire until the 1st of September, 1893. He uses the premises as a dwelling, restaurant, ice-cream factory, and family grocery. At the time he rented the same there was a bridge over the track of the East Tennessee, Virginia & Georgia Railroad on McDaniel street, which was near to and adjoining his premises. It was easily passed over, and was a safe thoroughfare, and used as such by the public. It had been erected by the city, which had and exercised control of the same as a part of the public street. On the 1st of January, 1892, the use of the premises was worth to plaintiff \$50 per month; and a part of this value depended on the free and unobstructed use of McDaniel street, and the bridge over the railroad on that street, as then constructed and in use. He used the rear room of the house as a restaurant and dining room, where he and his family and his customers, many of whom came across the bridge, took their meals, etc. In January, 1892, the city wrongfully permitted the railroad to raise the grade of the street by raising the bridge in the middle thereof five feet, and, with full knowledge of said act of the railroad, has ratified the same. This raising of the grade has resulted in a public nuisance, which result must have been known as a reasonable result by the defendant, which now, after all possible doubt has been removed, continues the wrongful grade. The passage over the bridge is not only difficult, but dangerous, both ascending and descending from the middle of the bridge towards Peters street; and for loaded wagons and other vehicles it is almost impassable, and diverts passage and travel to other

streets. The city has recognized the danger of ascending and descending the bridge as thus raised, and the railroad put the city on notice of its danger by putting strips across the bridge to prevent horses and other animals, as well as pedestrians, from slipping while going over the bridge, and to prevent loaded wagons from running down it, but this device has not prevented the wrong it knew it was doing. Plaintiff has been damaged in the use of said premises, by the wrongful acts of defendant, \$40 per month, from the 1st of January, 1892, and said damage will last until the end of his term, all of which have been caused by the raising of the grade of the street over the bridge. He has been especially injured by the erection of the bridge over McDaniel street, in that shortly after said erection a wagoner undertook to drive over it with a wagon loaded with lumber, coming from Peters street, and started up the same, but, owing to the steepness of the bridge, he was unable to do so; and because of the steepness, alone, his wagon was forced backward down the slope towards plaintiff's house, and ran against the dining room, broke through the wall of said room, forced pieces of lumber therein, injured an organ belonging to him, knocked over a table at which he and his family were eating, and went on further with such force that it struck and knocked down a frame that he had at his front window on Peters street, and tore up the plank of his front veranda, facing Peters street. In passing by his dining room, it struck the wall, and knocked out two planks,—to his actual damage in the sum of \$50. Since that time, three other wagons, from the same cause, have run backward down the bridge against his house, and struck it, and caused great and constant alarm to his family; and the city, well knowing these injuries, takes no steps to protect him,—to his damage \$500. He complained to the officers of the city of these injuries, but they paid no attention to his complaint; and the city, well knowing the dangerous condition of the bridge, a few days ago, loaded up one of its own scavenger carts with all manner of filth gathered up from the streets, and by its driver, well knowing the danger of trying to go over the bridge, and that there was danger of injuring plaintiff, undertook to drive the cart over the bridge, and negligently let it run back against his dining-room door, and empty its contents at his very door, breaking two planks of his wall, and frightening and insulting his family. The amendments offered by the plaintiff set forth that prior to the raising of the bridge his side entrance was easy of access, and used as much as the entrance fronting Peters street, but since the raising of the bridge the access to his side entrance has been so left as to make it accessible alone by the use of a plank from his side door to the street, a distance of three feet, the grade being raised to correspond

with the abutment of the bridge, which is only a few feet from his side door, leaving it in a dangerous condition; that the bridge was negligently and improperly constructed, and amounts to an obstruction of the street; and that the railroad track should have been lowered, instead of interfering with the bridge, as the grade from Whitehall street below McDaniel street to the intersection of or near Fair street by the railroad would have permitted the lowering of the railroad track.

W. A. Tigner and Jordan & Robinson, for plaintiff in error. J. A. Anderson and Fulton Colville, for defendant in error.

SIMMONS, J. Bentley sued the city of Atlanta for damages resulting from the raising of a bridge in a street near to and adjoining his premises. On demurrer the court ruled that the declaration set forth no cause of action, and, on objection by the defendant, disallowed two amendments offered by the plaintiff. The declaration and the amendments are set out in the report prefixed to this opinion.

1. It was contended on behalf of the defendant that the plaintiff had no right of action because he was a mere tenant of the premises alleged to have been damaged. There is no merit in this contention. A tenant, although he has no estate in the land, is the owner of its use for the term of his rent contract; and he can recover damages for any injury to such use occasioned by the erection and maintenance of a public nuisance in the street adjacent to, or in the immediate neighborhood of, the premises. See 12 Am. & Eng. Enc. Law, 719; Crowell v. Railroad Co., 61 Miss. 631.

2. It appears from the declaration that the bridge was raised by a railroad company whose line crossed the street under the bridge; and it was contended that the plaintiff, instead of suing the city, ought to have sued the railroad company. The duty, both with respect to the general public and the occupants of premises along the streets of a city, of keeping the streets free from permanent or long-continued nuisances, rests primarily on the municipal government; and this duty cannot be evaded by urging the right and duty of a railway company to bridge its line at street crossings, and maintain the bridges and crossings in proper condition. If the city authorities suffer a railway company to erect a bridge at a street crossing, and maintain it, together with the approaches thereto, in such manner as to render the same a public nuisance, the city is liable for the consequences, just as it would be if the improper work had been done by the city itself. Certainly, this is so where the law expressly gives the city control of the matter, as was the case here. The charter of the city, after prescribing the duty of railroad companies as to the erection and

repair of bridges across their tracks or roadbeds, where the same cross the streets of the city, declares that the mayor and general council "shall have the authority to regulate the building and repair of such bridges in so far as to declare the general character of such bridge or repairs suitable to be made, and to provide for the drainage, light and comfort of said bridge, and the street adjacent thereto or thereunder, and to provide for the least obstruction by supports and otherwise of any portion of the street practicable and consistent with safety. In case of the failure of any railroad or railroad company, after reasonable notice to do so, to build or repair a bridge or the approaches thereto or otherwise, as provided above, said mayor and general council shall have the authority to do such building, repairing or putting in safe and comfortable condition at the expense, with interest and costs, of such railroad or railroad company," etc. Acts 1889, p. 819. On this subject, see Jones, Neg. Mun. Corp. § 119. And see Elliott, Roads & S. (Ed. 1890,) p. 44 et seq.; Dill. Mun. Corp. (4th Ed.) §§ 1027, 1037.

3. The declaration set forth a cause of action, and the court erred in disallowing the amendments offered, and in sustaining the demurrer. The question of the measure of damages was not made in the court below, and we do not deal with it. The demurrer was a general one, and did not raise the question as to whether all the particular elements of damage alleged were good or bad. As some of them were good, there was enough to withstand such a demurrer. Judgment reversed.

CHATTAHOOCHEE BRICK CO. v. BRASWELL.

(Supreme Court of Georgia. Oct. 30, 1893.)

INJURIES TO EMPLOYEES — ASSUMPTION OF RISK — INSTRUCTIONS—EVIDENCE.

1. In the trial of an action for physical injuries against two defendants, as joint tortfeasors, an instruction by the court that there was no evidence warranting a finding against one of them wrought no injury to the other, it appearing from the record that the defendant discharged by the instruction of the court would not be liable to contribution in favor of the one against whom the verdict was rendered.

2. The rule forbidding a recovery from his master by a servant who subjects himself to injury by going, without objection, into a place known by him to be dangerous is not applicable to a convict, whose movements are controlled and directed by a guard or boss having and exercising the power of compelling the convict to obey his orders.

3. The plaintiff, a convict, having been leased by the state to a penitentiary company, and that company having hired him, with other convicts, to another corporation engaged in the work of constructing a railroad, and he having been put to work under the control of a guard, employed and paid by the latter corporation, and being required to obey the orders of such guard, this corporation is liable to the plaintiff for injuries received in consequence of his having gone, under orders from the guard, into a

place where a dangerous explosive was being used, although all the convicts so hired may have been under the general charge of a "captain," appointed by the governor. This is true whether it was, or was not, lawful for such convicts to be placed under the control and management of the guard.

4. The evidence was conflicting, but taking as true the version of it most favorable to the plaintiff, the verdict was warranted, and there was no error in denying a new trial.

(Syllabus by the Court.)

Error from city court of Atlanta; Howard Van Epps, Judge.

Action for personal injuries by Dock Braswell against the Chattahoochee Brick Company and another. Plaintiff had judgment, and defendant brick company brings error. Affirmed.

Ellis & Gray, for plaintiff in error. Broyles & Son, for defendant in error.

LUMPKIN, J. 1. The plaintiff brought an action for personal injuries against the Chattahoochee Brick Company and Georgia Penitentiary Company No. 2, as joint tortfeasors, which resulted in a verdict in his favor against the company first named. One ground of the motion for a new trial is that the court erred in charging as follows: "There is no evidence warranting a finding against the Penitentiary Company No. 2, and I confine your attention to the case as developed in reference to the Chattahoochee Brick Company." If it appeared from the evidence set forth in the record that the penitentiary company would be liable to contribution to the brick company, the complaint as to the charge quoted might be meritorious; but, under the undisputed facts of this case, it is clear that there is no such liability on the part of the penitentiary company. It did not cause, and was in no way connected with or responsible for, the injuries sustained by the plaintiff; indeed, was guilty of no wrong whatever, unless the hiring by it of the plaintiff, along with other convicts, to the brick company was an unlawful act. It is not necessary to decide whether this hiring was lawful or not, and we do not wish to be understood as making any ruling upon this question. If it was lawful, then the penitentiary company had nothing whatever to do with the infliction of the injuries upon the plaintiff, and most clearly is not, and could not be in any view, liable to the brick company. Even if it was unlawful, still there was no liability by the former to the latter company, because the evidence shows conclusively that, as between themselves, there was no fault or blame attaching to the penitentiary company. While, under certain circumstances,—possibly, in this very case,—both may have been liable to the plaintiff, the corporation which committed the tort and was, so far as the other was concerned, exclusively responsible for it, would not, upon paying the damages, have any right to exact contribution from that other. At common law, joint trespassers were not liable

for contribution to each other. This rule was changed by our Code. See sections 3075, 3076. It must be remembered, however, that in making joint trespassers liable for contribution, the principle of contribution, as stated in section 3132 of the Code, (though that section is not expressly applicable to suits founded on torts,) is to be observed. That principle is that where all are equally bound to bear the common burden, and one has paid more than his share, he is entitled to contribution from the others; but where, as among themselves, one should bear a less portion of the burden than the others, he should be subjected to no more than his fair share, and where, as to his codefendants, one should bear no portion of the burden at all, he should, as to them, contribute nothing. This being so, discharging the penitentiary company was not a matter of which the brick company had any right to complain, and the charge excepted to, therefore, resulted in no injury to the brick company, and is no cause for a new trial.

2. Counsel for the plaintiff in error sought to apply to this case the well-settled rule of law that a servant who voluntarily, and without objection, goes into a place which he knows to be dangerous, cannot hold his master liable for injuries to himself thus sustained. This rule, in our opinion, has no bearing upon a case like the one now under consideration. The plaintiff was a convict, and, according to the evidence, his movements were absolutely controlled and directed by a guard, or "boss," whose orders he was compelled to obey. This guard had and exercised over him the most complete dominion and authority. The plaintiff's position, so far as the power of the guard was concerned, was more that of a slave than a mere servant, and it is apparent that he dared not disobey any of the guard's commands. According to the evidence introduced in the plaintiff's behalf, and which the jury evidently believed, he was forced by the guard to expose himself to the danger resulting from the explosion of the dynamite blast. The evidence for the defense was directly and emphatically to the contrary, but we are constrained to accept as correct the finding of the jury. Ordinarily, where a servant is ordered by his master to engage in a work, or go into a place, which the servant knows to be dangerous, the latter is not bound to obey the order, and if he does so, with full knowledge of the impending peril, the master may not, in law, be liable for the consequences. In the present case, however, the plaintiff had no election. When the guard said "Go," he was obliged to go; and there is no hardship in compelling a corporation of which the guard was an employe to compensate the plaintiff for injuries received because of his obedience to the guard's commands.

3. The record discloses that the convicts hired by Penitentiary Company No. 2 to the

Chattahoochee Brick Company were under the general charge of a "captain," appointed by the governor, but it also discloses that these convicts, including the plaintiff, were put to work under the immediate control and supervision of another person, who was employed and paid by the brick company, and that all the convicts were peremptorily required to obey the orders of this person. This being so, we can conceive of no reason in law or justice why this corporation should not be held liable to the plaintiff for injuries resulting directly from the unlawful conduct of its own employe in forcing the plaintiff to expose himself to mutilation from the dangerous explosive which was being used in the company's service. The mere presence of the "captain" at or near the scene of the calamity, even though he may, in a sense, have been a state official, certainly cannot relieve the brick company of responsibility for the tortious and wrongful conduct of its own servant. It is entirely immaterial whether it was, or was not, lawful for these convicts to be thus placed under the control and management of the brick company and its bosses. This company will surely not be heard to say that, although it injured the plaintiff through the grossly improper conduct of its own employe, it is not liable because it was unlawful to put the plaintiff under this employe's control. To do this would be to allow the company to avail itself of its own misconduct in doing one wrong in order to shield itself from the consequences of another wrong still more grievous and unlawful.

4. As already intimated, the evidence was conflicting. If the jury had believed the testimony of the defendant's witnesses, they could not properly have found for the plaintiff; but if they accepted as the truth of the transaction what was sworn to by the plaintiff and his witnesses, the verdict was well supported. It is not the province of this court to settle disputed issues of fact. The trial judge approved of the verdict, and we will allow it to stand. Judgment affirmed.

VAN PELT v. HURT et al.

(Supreme Court of Georgia. Nov. 6, 1893.)

CONTEMPT—DISCRETION OF COURT.

A tenant having obtained a temporary injunction restraining his landlord from turning him out on a dispossessionary warrant, and, pending the proceeding, having abandoned possession and suffered other parties to enter, and then dismissed the proceeding, the court has no jurisdiction, on summary petition by the landlord, to turn these persons out, and put either the tenant or the landlord in; and, as the landlord could not be put in possession as the result of a proceeding against these persons for contempt, there was no abuse of discretion by the judge in declining to call upon them to answer as for a contempt at the instance of the landlord.

(Syllabus by the Court.)

Error from superior court, Fulton county; M. J. Clarke, Judge.

Petition by F. M. Van Pelt for a rule against Joel Hurt and others to show cause why they should not be attached as for contempt, and for other relief. The petition was denied, and petitioner brings error. Affirmed.

J. A. Wimpy, for plaintiff in error. Glenn & Slaton, for defendants in error.

LUMPKIN, J. Elliott, being in possession, as tenant, of certain premises, was about to be dispossessed under a warrant sued out for the purpose by Van Pelt, who claimed to be the owner. The property was also claimed by Hurt and others. Thereupon Elliott filed an equitable petition setting forth these facts, and praying that further proceedings upon the warrant sued out by Van Pelt be enjoined, and that he and the other claimants of the property be required to interplead for the purpose of having it adjudicated to whom the premises really belonged. The petition was sanctioned, a restraining order granted as prayed, and a day appointed for the hearing. Before the hearing actually took place the plaintiff abandoned the premises, immediate possession of which was taken by Hurt and his associates, and, on the day appointed for the hearing, Elliott, of his own motion, in term time, and without objection by any party, dismissed his petition. Under the order above mentioned, Hurt and his associates were not enjoined from taking possession of the property. After the petition had been dismissed, Van Pelt presented to the judge a petition against Hurt and his associates, praying for a rule nisi requiring them to show cause why they should not be attached for contempt, and why the property described in the petition should not be restored to the condition in which it was when the previous restraining order was passed. The prayer for the rule nisi was denied, and this is the error complained of.

The dismissal of the petition filed by Elliott took that case entirely out of court. Nothing was left upon which the court or the presiding judge could act. Certainly, no valid order could be passed, or valid judgment be rendered, in this cause, the court having, by allowing the dismissal of it, parted with all the jurisdiction it ever had over both the parties and the subject-matter involved. It may be that the court had the power to punish Elliott as for contempt if it had seen proper to do so; but Elliott is not a party to the present proceeding, and, viewing it merely as a remedial procedure, in which sense alone the plaintiff in error can claim to be interested, the relief for which he prays cannot be granted. It is no concern of his whether Hurt and his associates, if themselves in contempt of the court, be punished for contempt or not. The only relief to which Van Pelt,

in any view of the matter, would be entitled, is that he, as the landlord of Elliott, be put in possession of the property. This certainly could not result from a proceeding against Hurt and his associates for an alleged contempt; and, the only case in which such relief could possibly have been granted having been finally disposed of, there was no case pending before the court which would authorize a judgment turning Hurt and his associates out of possession, and putting in possession either Elliott or Van Pelt. It follows inevitably that the trial judge did not abuse his discretion in denying the rule nisi. Judgment affirmed.

ANDREWS v. MITCHELL et al.

(Supreme Court of Georgia. Oct. 30, 1893.)

WRONGFUL EVICTION—PLEADINGS—NEW TRIAL.

1. The declaration, in an action to recover damages for the wrongful and malicious suing out and execution of a warrant to dispossess the plaintiff of certain premises, having attached thereto a copy of the affidavit and warrant, the latter sued out by Manley, as agent of Mitchell, dated February 8, 1892, with an entry by an officer on the same showing the fact of execution on the 2d day of March, 1892, a plea to this action by both defendants, alleging that "the premises were not rented to plaintiff longer than the 1st of December; that it was understood that plaintiff was to move out by that time, as the premises had been rented prior to plaintiff's moving in; that plaintiff's plunder was in the depot, and he urged the defendant Manley to allow him to move it into said house with above understanding as to length of time he was to occupy same; said plaintiff refused to vacate said premises as he agreed, and defendants did what they could to get said plaintiff out without resorting to legal steps, but, failing in this, said Manley swore out a dispossessionary warrant, and still leniency was shown plaintiff several weeks thereafter before the same was executed; that no violence was used on the part of defendants or the officer executing said warrant; the swearing out of the warrant, and having the same executed, was done in the utmost good faith, and without malice and with probable cause,"—was, in substance, a plea of justification, and, in the absence of a special demurrer thereto for want of sufficient fullness and certainty, was rightly so held, and this holding was, therefore, no cause for granting a new trial.

2. The newly-discovered evidence discloses important and material admissions by the plaintiff, inconsistent with his right to recover; and, not being merely cumulative, or of an impeaching character, there was no abuse of discretion in granting a new trial on this ground.

(Syllabus by the Court.)

Error from city court of Atlanta; T. P. Westmoreland, Judge.

Action by William A. Andrews against Mrs. E. J. Mitchell and others. There was a verdict for plaintiff, and from an order granting a new trial he brings error. Affirmed.

W. J. Albert, for plaintiff in error. R. J. Jordan, for defendants in error.

SIMMONS, J. 1. This was an action to recover damages for the wrongful and mali-

cious suing out and execution of a warrant to dispossess the plaintiff of certain premises; and to the declaration filed in the case was attached a copy of the affidavit and warrant, the affidavit being sworn to by Manley as agent of Mrs. Mitchell. The defendants filed a special plea, which is set out in the first headnote. The question is whether this plea is a plea of justification, or a plea of the general issue, or not guilty. At the trial the court below held that it was a plea of justification, but, upon a motion for a new trial, reversed this ruling. We think the court erred in holding the former ruling erroneous. A plea of the general issue, or not guilty, to an action of this kind, is a denial of the allegations in the plaintiff's declaration, and no other evidence is admissible under that plea except such as disproves the plaintiff's cause of action. Code, § 3458. Under such a plea the facts set up by the defendants in this case could not have been proven. In order to introduce these facts it was necessary to file a special plea. A plea of justification admits that the act complained of was done, but sets up that the defendant was authorized by law to do the same. Id. § 3051. In this case the plea admits that a warrant was sued out; that it was executed by dispossessing the plaintiff of the premises in dispute; and also sets out the facts which led to the suing out and execution of the warrant, and claims that the defendants were authorized by law, under these facts, to have a warrant issued and executed, and that they did so in good faith, and without malice, and with probable cause. While the plea does not state, in so many words, that they were justifiable in so doing, yet, from the matter set out, justification is plainly implied or inferable. We therefore think the plea is, in substance, a plea of justification. *Rigden v. Jordan*, 81 Ga. 668, 7 S. E. 857, and cases there cited; *Steph. Pl.* (9th Am. Ed.) p. 109 et seq. If, in the opinion of counsel, the plea was not sufficiently full and certain as to some of the admissions contained therein, he should have demurred specially thereto, so that it could have been amended in those respects; but upon a general demurrer the court was right, in the first instance, in holding it a plea of justification. The case of *Phelps v. Thurman*, 74 Ga. 837, is distinguishable from this case. In that case the plea did not admit that the warrant was executed, but merely stated that the defendant was authorized by law to have it executed, and was justified in taking out the same; and it failed to set out any facts to show upon what the defendant relied as justification. See *Rigden v. Jordan*, 81 Ga. 671, 7 S. E. 857, where the case here referred to is distinguished.

2. One of the grounds of the motion for a new trial was newly-discovered testimony. Some of this testimony disclosed important and material admissions by the plaintiff, inconsistent with his right to recover, and they

were not merely cumulative or of an impeaching character. This being true, the court did not abuse its discretion in granting a new trial on this ground. Judgment affirmed.

ROBINSON v. STATE.

(Supreme Court of Georgia. Dec. 18, 1893.)

HOMICIDE—RESISTING ARREST—JUSTIFICATION—INSTRUCTIONS.

1. Persons orally "deputized" by the sheriff to assist him in making an arrest for felony are neither officers nor mere private persons while co-operating with the sheriff and acting under his orders, but their legal position is that of a posse comitatus.

2. A person summoned by the sheriff to act as one of a posse to aid in the execution of a warrant for felony in the sheriff's hands is protected, in any lawful act done by him to promote or accomplish the arrest of the accused person, to the same extent as he would be were he himself an officer having personal custody of the warrant, and charged with its execution; and, in order for him to have this protection, it is not necessary that he should be and remain in the actual presence of the sheriff, but if the two are in the same neighborhood, and acting in concert, the sheriff giving orders, and the other obeying them, either literally or according to their general spirit and purpose, with a view to effect the arrest in pursuance of the common design, it is sufficient.

3. One other than a known officer, who makes an arrest for felony without having the warrant in his own possession, ought to make it known, on demand, that the warrant exists, where it is, and that he claims to be acting under its authority or by command of the officer who has it in possession; but the omission to do so will not justify the party arrested, or sought to be arrested, in resisting the arrest, if he in fact already knows, or on reasonable and probable grounds believes, that he is under a charge of felony, that a warrant is out for his arrest, and that the arrest attempted is really in consequence of the warrant, and in execution of the same. If, however, the demand for authority be made under real ignorance of these things, and in good faith for the purpose of eliciting information actually wanted and needed, failure to comply with the demand would justify resistance to any reasonable and proper extent; and, even if carried so far as the slaying of the person endeavoring to make the arrest, the homicide might amount to manslaughter only, or, if such person made the first demonstration with a deadly weapon, the killing might be justifiable homicide.

4. The court, in its charge, having made the case turn chiefly on the right and power of the deceased to make the arrest, irrespective of the manner in which the power was executed and of the failure of the deceased to respond fully to the demand made upon him for his authority, and without reference to the good or bad faith with which that demand was made, the charge was erroneous, and the accused is entitled to a new trial.

(Syllabus by the Court.)

Error from superior court, Whitfield county; T. W. Milner, Judge.

George Robinson was convicted of murder, and brings error. Reversed.

W. K. Moore, for plaintiff in error. A. W. Flite, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, J. 1. Where it is the duty of a sheriff to arrest one charged with a felony, we know of no law which authorizes this officer to "deputize" a private citizen either to make, or assist in making, the arrest, and thus constitute the person so "deputized" an officer. Under section 4722 of the Code, every officer charged with the execution of a penal warrant has the authority to summon to his assistance, either in writing or verbally, any citizen of the county. When citizens are thus summoned by the sheriff, they are, while co-operating with him and acting under his orders, not themselves officers, nor are they mere private persons, but their true legal position is that of a posse comitatus. A posse may be summoned under the form of "deputizing" the person or persons composing it. The mode is immaterial, so that the object be to require or command assistance.

2. A member of a posse comitatus summoned by the sheriff to aid in the execution of a warrant for felony in the sheriff's hands is entitled to the same protection in the discharge of his duties as the sheriff himself; and to this end a person so summoned may do any act to promote or accomplish the arrest which he could lawfully do were he himself the sheriff, having personal custody of the warrant, and bound to execute the same. See 13 Cr. Law Mag. p. 198, § 30. In order to have the benefit of this protection it is not essential for a member of the sheriff's posse to be and remain in the actual physical presence of the sheriff. It is sufficient if the two are in the same neighborhood, actually endeavoring to make the arrest, and acting in concert with a view to effect this, their common design. The evidence in the present case shows that the deceased, Powell, had been summoned by the sheriff to aid him in making the arrest of Robinson, under a warrant charging the latter with felony. It is quite likely that the sheriff supposed that by "deputizing" Powell he had, in a sense, been made an officer for this purpose. If the sheriff really entertained this idea, he was, as already stated, mistaken. Be this as it may, however, the sheriff was near the scene where it was expected the arrest would take place, and had given orders to Powell, obedience to which would tend to accomplish the arrest. Powell was obeying these orders, not literally, it is true, but certainly according to their general spirit, and the variance by Powell from the precise instructions given him by the sheriff were evidently necessitated by a change in the movements of the accused which had not been anticipated. Under these circumstances we hold that the conduct of Powell was substantially in obedience to the sheriff's orders, keeping in view the real object of their presence in the vicinity, which was undoubtedly the arrest of Robinson. It was seriously contended by counsel for the plaintiff in error that as the sheriff was not in sight when Powell laid his hand on Robinson to prevent his leaving the

house of his brother, and as the warrant was not then in Powell's possession, the attempted arrest was unauthorized and illegal. The law applicable to this contention is thus aptly stated by Mr. Bishop in the first volume of his work on Criminal Procedure, (section 186:) "To justify the private person who thus assists the officer, the latter must be in some sense present, commanding him. There is no precise distance which the two may be apart; but where a sheriff is endeavoring to make an arrest or preserve the peace, and he has called in others to help him, he is, though absent from the particular place occupied by them, to be deemed constructively present, within this rule, if his absence is in furtherance of the common design." The text of this distinguished author is admirably supported by the case of Coyles v. Hurtin, 10 Johns. 85, as will appear from the following extract from the opinion of Chief Justice Kent: "The sheriff is, quodam modo, present by his authority, if he be actually engaged in efforts to arrest dum fervet opus, and has commanded, and is continuing to command and procure, assistance. When he is calling upon the power of the county, or a requisite portion of it, to enable him to overcome resistance, it would be impossible that he should be actually present in every place where power might be wanting. The law is not so unreasonable as to require the officer to be an eye or ear witness of what passes, and to render all his authority null and void except when he is so present. He could not, upon that construction, use the power of the county with effect, and it would be attended with great inconvenience and danger to the administration of justice. The question in these cases does not turn upon the fact of distance, so long as the sheriff is within his county, and is bona fide and strictly engaged in the business of the arrest." In this connection, see, also, Com. v. Field, 13 Mass. 321, cited by Mr. Bishop. There is an obvious distinction between the officer's calling one to his assistance, and merely attempting to delegate his authority, and accomplish the arrest through the agency of third persons acting alone, as in the case of Rex v. Patience, 7 Car. & P. 775, where a constable, without attempting himself to execute a warrant in his hands, employed his two sons to make the arrest. In Kirbie v. State, 5 Tex. App. 60, it was held that persons called upon by an officer holding a warrant to assist in the arrest of a party charged with crime were protected, whether they had the warrant at the time of the attempted arrest or not. Under the facts as disclosed by the record now before us, we think the sheriff was at least constructively present when Powell was attempting to arrest Robinson, although the officer was not in sight at that time. He was using Powell to accomplish the arrest, just as though he had reached out his own arm, supposing it was physically possible for him to do so, over

the entire distance, and had taken hold of the person of Robinson himself. Powell was really a mere physical agency employed by the sheriff, by means of which the officer was enabled to extend his presence to the scene of action. It was undoubtedly the right of the sheriff to do this, he, of course, being responsible for the consequences of Powell's acts so long as the latter conformed literally or substantially to the sheriff's orders. A sheriff on foot might be unable to overtake a fleeing prisoner who could run faster than the officer; but if he shouted to a bystander to seize the fugitive, and this was done, it would be a seizure by the sheriff; and this, we think, would be undoubtedly true, even though the fugitive ran out of the sheriff's sight before the bystander succeeded in overtaking and catching the escaping prisoner. The case before us is, in principle, within the class covered by this illustration. There is nothing in the case of *Croom v. State*, 85 Ga. 718, 11 S. E. 1035, contrary to what is here ruled. A warrant for the arrest of Croom was in the hands of the marshal of Ty Ty, who, without delivering it to Hamlin, a bailiff, showed it to him, and told him if he would arrest Croom, he (the marshal) would divide with Hamlin a reward of \$25 which the former had been offered for making the arrest. Hamlin, without the warrant, and on his own account, went with a posse summoned by himself to the house of Croom's father, and was there killed by Croom. Under these circumstances, Chief Justice Bleckley very properly said, on page 722, 85 Ga., and page 1036, 11 S. E.: "The warrant, not being in the hands of Hamlin, but in the possession of the marshal of Ty Ty, who was not present, was no authority to Hamlin to make an arrest." Hamlin was in no sense acting as one of a posse summoned by the marshal. Indeed, the latter had nothing whatever to do with the attempted arrest, either in its inauguration or in the method adopted for its execution. Croom's Case, therefore, is similar to that of *Rex v. Patience*, supra; and Hamlin did not bring himself within the rule as stated in *Whart. Hom. § 242*, "that the warrant must be executed by the party named in it, or by some one assisting such party, either actually or constructively;" nor within the principle of *Codd v. Cabe*, 13 Cox, Cr. Cas. 202. There is also a distinction between the authority of an officer to arrest without a warrant in cases of felony and of misdemeanor. Thus, it has been said that "he may arrest any one of whom he has a reasonable suspicion that he has committed a felony, without waiting first to procure a warrant," but without first procuring such warrant "he may not arrest one who has committed . . . a misdemeanor out of his presence." See 13 Cr. Law Mag. pp. 177, 178, and cases cited. On the same line is the case of *Drennan v. People*, 10 Mich. 169, in which it was held that a constable, having knowledge that a warrant had

been issued for the arrest of a person charged with felony, could lawfully make the arrest without having the warrant in his possession. This case will also be referred to in connection with the question discussed in the next division of this opinion. We are fully convinced that the rule announced in the second headnote is both sound in principle and well supported by authority.

3. It appears that, when Powell grasped Robinson by his right arm, the former said, "I am deputized to arrest you," to which Robinson replied, "Show your authority," and the answer which Powell made to this demand was, "It don't make any difference; I have got to take you." Under these circumstances we think it was the duty of Powell to have informed Robinson of the existence of the warrant in the sheriff's hands, and also that he (Powell) was attempting to make the arrest under authority of this warrant, or at least that he had been commanded by the sheriff to do so. As a general rule, a known officer, in making an arrest, is not bound to exhibit his authority. Certainly, he is not absolutely required to do so before the accused person has submitted to the arrest; but after the submission the officer ought to make known the substance of the warrant, and for what cause and whence it issued. Where, however, one not a known officer is specially summoned to make an arrest, he ought, unless prevented by the conduct of the accused from so doing, to show the warrant upon demand, or, if it is not in his possession, it is his duty to state the authority under which he is acting. *State v. Curtis*, 1 Hayw. (N. C.) 471; 1 Bish. Cr. Proc. § 191; *Murfree, Sher.* §§ 152, 153. Accordingly, it was said in *Drennan's Case*, supra, that a constable attempting to make an arrest for a felony without having the warrant in his possession ought to inform the person arrested of the facts, or at least of the offense for which he was apprehended. In this connection, see, also, 13 Cr. Law Mag. 343. Assuming, however, as sound law, that it is the duty of one who has been summoned by an officer to assist in making an arrest for a felony to explain to the person sought to be arrested the cause for which his apprehension is attempted, and the nature of the process under which the arresting party assumes the authority to act, the omission to perform this duty will not necessarily justify the person sought to be arrested in resisting the attempted arrest. If he in fact already knows, or on reasonable and probable grounds believes, that he is under a charge of felony, that a warrant has been issued for his arrest, and that the arrest attempted is really in consequence of the warrant and in execution of the same, he ought to submit peaceably to the arrest. If he refuses to do so under such circumstances, his resistance will be at his peril. "One who is guilty of a felony has no right to kill one who pursues him if he has notice of

the object of the pursuit, whether the pursuer be an officer or a private person, or whether he be with or without a warrant." Kerr, Hom. § 189. See, also, the cases cited under this section. This doctrine is in complete harmony with that announced by this court in *Snelling v. State*, 87 Ga. 50, 13 S. E. 154, where it appeared that the accused killed one who was attempting to arrest him for a felony for which he had been indicted three years; the deceased being in fact an officer, though he did not disclose his character as such, or exhibit or mention the warrant under which he was acting. It was accordingly held in that case that, the circumstances showing that the accused, who was a fugitive from justice, must have apprehended the arrest, and realized the intention of the arresting party, the killing was murder. It was manifest that the accused was not in good faith resisting an attack which he had any right, under the circumstances, to believe was a mere unauthorized assault, it further appearing that before he fired the fatal shot the deceased had said to him, "Consider yourself under arrest." The same principle controlled the case of *Ramsey v. State*, (Ga.) 17 S. E. 614, in which it distinctly appeared that the accused knew the official character of the policeman attempting his arrest, and also that this policeman had been summoned by the wife of the accused to arrest the latter for beating her; and the officer plainly and distinctly announced his purpose to make the arrest for this breach of the peace, which had just taken place in his presence or hearing. If the demand made by Robinson for Powell's authority was a mere pretense, and he really knew, or ought to have known, why Powell was attempting to apprehend him, he had no right whatever to resist the arrest, and his conduct in so doing was totally unauthorized and unlawful. If, however, the demand for authority was made in good faith, and under real ignorance of the facts, for the purpose of eliciting information actually wanted and needed, resistance by Robinson, to any reasonable and proper extent, upon the failure of Powell to comply with this demand, would have been justifiable; and even the slaying of Powell might, under these circumstances, have been manslaughter only. It has been said that, "unless the slayer knows the official character of the deceased, the homicide is only manslaughter, where committed without deliberation; but, if the killing was clearly malicious and premeditated, the fact that the officer was acting under a void process is no mitigation or excuse. The same is true if the defendant had knowledge that the intended arrest was one which the officer had a right to make without a warrant." Kerr, Hom. § 98. The following is a correct and concise statement of the law applicable in such cases: "Notice of the official character of the officer to the person charged with killing him is a material

question in all these inquiries. This notice may be express or implied. If there is no notification, either express or implied, by which we may say if the prisoner has no information of the officer's powers and intentions, or of the character in which the person is acting, the killing will be manslaughter only; otherwise, it will be murder." 13 Cr. Law Mag. p. 516, § 57, citing cases. If Robinson was acting in perfect good faith in making the demand and resisting the arrest, honestly believing Powell was making a totally unauthorized assault upon him, and if Powell made the first demonstration with a deadly weapon, and thus put Robinson in danger of life or limb, the killing by Robinson might have been altogether justifiable. Of course, we do not mean to express, or even intimate, what the real truth was. The killing of Powell by the accused presents a case of murder, voluntary manslaughter, or justifiable homicide, according to the facts as they may be found by the jury, in the light of the principles announced in this opinion.

4. Taking into view the charges of the court complained of and the refusals to charge, in connection with the entire charge of the court as sent up in the record, it is quite clear that the case was made to turn chiefly on the right and power of the deceased to make the arrest, irrespective of the manner in which that power was exercised, and of the failure of the deceased to respond fully to the demand made upon him for his authority, and without reference to the good or bad faith with which that demand was made. The case, therefore, was not properly submitted to the jury, and there should be a new trial. While it is true that the court read to the jury the sections of the Code defining voluntary manslaughter and justifiable homicide, he did not give appropriate instructions for applying either of these sections in conformity to the principles which ought, in view of the issues of fact involved, to have controlled the determination of the case.

Some other questions were made in the motion for a new trial, but, as they cannot possibly arise upon the next hearing, they require no notice at our hands. Judgment reversed.

STATE v. ATKINSON et al.

(Supreme Court of South Carolina. Feb. 17, 1894.)

CRIMINAL LAW—MOTION TO QUASH INDICTMENT—CONSTITUTIONAL LAW—MURDER—EVIDENCE—HARMLESS ERROR—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

1. The hearing of a motion to quash an indictment is not a part of the trial.

2. A principal and an accessory before the fact may be charged jointly in one count of an indictment for murder.

3. Const. U. S. Amends. 4, 5, providing that the rights of the people to be secure in their

persons and effects from unreasonable seizure shall not be violated, and that no person shall be compelled to testify against himself in a criminal case, have no application to the power of the state governments, but apply only to the powers of the federal government.

4. Nor does Const. U. S. Amend. 14, providing that no state shall make any law abridging the privileges and immunities of citizens of the United States, extend the operation of the fourth and fifth amendments to the states.

5. In a murder trial, pieces of a newspaper found in defendant's room, which were apparently a part of the same paper from which gun wadding found at the place of the murder was torn, were competent evidence, where neither defendant was present when the pieces were discovered in the room, and there was no showing that defendants were compelled to furnish them as evidence against themselves.

6. The admission of evidence against themselves furnished by defendants under compulsion is not prejudicial error, where the court directed it to be stricken out, and instructed the jury not to consider it.

7. Circumstantial evidence is sufficient to support a verdict, if the jury believe, beyond a reasonable doubt, from such evidence, that the accused is guilty.

Appeal from general sessions circuit court of Fairfield county; W. H. Wallace, Judge.

Jasper Atkinson and John Atkinson were convicted of murder, and sentenced to be hanged, and they appeal. Affirmed.

The following is the indictment: "Indictment. State of South Carolina, County of Fairfield. At a court of general sessions begun and holden in and for the county of Fairfield, in the state of South Carolina, at Winnsborough, in the county and state aforesaid, on the third Monday of February in the year of our Lord 1893, the jurors of and for the county of Fairfield aforesaid, in the state of South Carolina aforesaid, that is to say, upon their oaths, present that Jasper Atkinson, on the 28th day of January, in the year of our Lord 1893, with force and arms, at Winnsborough, in the county of Fairfield and state aforesaid, in and upon one John H. Clamp, with a certain loaded shotgun, then and there, feloniously, willfully, and of his malice aforethought, did make an assault, and that the said Jasper Atkinson, him, the said John H. Clamp, with the loaded shotgun aforesaid, then and there, feloniously, willfully, and of his malice aforethought, did shoot, strike, penetrate, and wound, giving to the said John H. Clamp, thereby, in and upon the right side of the head of him, the said John H. Clamp, one mortal wound, of which said mortal wound the said John H. Clamp then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Jasper Atkinson, him, the said John H. Clamp, in manner and form and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder. And the jurors aforesaid, upon their oath aforesaid, do further present that John Atkinson, late of the county and state aforesaid, before the said felony and murder was committed in manner and form aforesaid, to wit, on the 28th day of the same month of

January aforesaid, with force and arms, at Winnsborough, in the county and state aforesaid, feloniously, willfully, and of his malice aforethought, did incite, move, procure, and hire, counsel, and command, the said Jasper Atkinson the said felony and murder in manner and form aforesaid to do and commit. Against the form of the act of the general assembly of the said state in such case made and provided, and against the peace and dignity of the same state aforesaid. M. J. Hough, Solicitor."

The exceptions of the defendants are as follows: "(1) Because his honor erred in sending the defendants back to the jail pending the consideration of the motion to quash the indictment; the defendants being thereby deprived of a constitutional right to be fully heard by themselves or their counsel, or by both, as they should elect. (2) Because his honor erred in refusing the defendants' motion to quash the indictment. (3) Because his honor erred in overruling the demurrer entered by the defendants to the said indictment. (4) Because his honor erred in that he should have held that the indictment, as to the defendant Jasper Atkinson, is fatally defective, in that it does not conclude, 'Against the peace and dignity of the state.' (5) Because his honor erred in that he should have held that the indictment as to the defendant John Atkinson, is fatally defective, in that it does not fully, fairly, plainly, substantially, and formally describe the offense for which he was held to answer. (6) Because his honor erred in admitting in evidence at the trial of this cause papers which had been illegally and wrongfully taken from the room of the defendant John Atkinson without a search warrant, and without authority of law, the rights of the said defendant under the constitution of this state, and under the constitution of the United States, being thereby violated. (7) Because his honor erred in admitting incompetent testimony against the defendants, over the objection of the said defendants duly taken. (8) Because his honor erred in admitting testimony against the defendants which was procured by compelling the said defendants to give evidence against themselves. (9) Because his honor erred in admitting testimony that the tracks leading from the place where the body of the deceased was found to the house of the deceased were the tracks of the defendant Jasper Atkinson, after it had been made to appear that the said defendant was forced to place his foot in the said tracks. (10) Because his honor erred in charging the jury as follows: 'By way of illustration, these papers that were picked up there were circumstances. They have been proved before you. It has been argued to you by counsel what they point out, and you are to say what these papers prove; and if they, taken with all the other facts in the case, satisfy you beyond a reasonable doubt, it is good testimony, and sufficient to support

a verdict.' (11) Because his honor erred in charging the jury as follows: 'It has also been suggested that I charge you that the circumstantial evidence must be consistent with the guilt of the defendants, and inconsistent with any other reasonable hypothesis. Of course, that is established law, and that is a question which a jury must determine for itself,'—the defendants imputing error to so much of this as remits a question of law to the jury, and leaves the jury to abide by the rule or not, at discretion.

James G. McCants and Ragsdale & Ragsdale, for appellants. M. J. Hough, for the State.

McIVER, C. J. The defendants were charged in the same indictment—Jasper Atkinson as principal, and John Atkinson as accessory before the fact—with the murder of one John H. Clamp, and the case came on for trial before his honor, Judge Wallace, and a jury. It is stated in the case, as prepared for argument here, that: "The defendants, through their counsel, at the proper time, before the jury was sworn, and before pleading to the indictment, entered a demurrer thereto, and moved to quash the same upon the following grounds: First, that, as to the defendant Jasper Atkinson, the indictment does not conclude, 'Against the peace and dignity of the state.' Secondly, as to the defendant John Atkinson, that the indictment does not state facts sufficient to constitute the offense, inasmuch as it does not fully, fairly, and formally describe the offense with which he is charged." Pending the hearing and consideration of this motion, the defendants were remanded to the jail; and, when the hearing and consideration of the motion were concluded, his honor directed that the prisoners be brought into court, and thereupon announced that the motion be overruled, and that the trial should proceed. During the progress of the trial, testimony was introduced on the part of the state, tending to show that tracks were found at the scene of the homicide, and going in the direction of the house at which the defendants were staying on the night when the deceased was shot and killed, which tracks witnesses undertook to identify as the tracks of the defendant Jasper Atkinson by reason of the fact that, when he placed his foot in one of the tracks, it fitted the same. But when it was made to appear that this defendant had been required by the officer in charge to put his foot in the tracks discovered, and to make other tracks by running, which could be compared with the others originally found, the circuit judge, on the motion of defendants' counsel, ordered the testimony as to the tracks, obtained by compulsion, to be stricken out, adding these words: "I will say to the jury now that no defendant can be compelled to make evidence against himself, just as he cannot be compelled to tes-

tify as to his guilt. If the defendant did anything voluntarily, that is competent.' Testimony was also offered on the part of the state tending to show that certain pieces of paper, parts of a newspaper, which were found in the room occupied by the defendant John Atkinson by some of the witnesses, corresponded with the paper picked up at the scene of the homicide, supposed, from the stains upon it of blood and brains, to have been the wadding of the gun with which the fatal shot was fired, inasmuch as the printing on these papers indicated that they were taken from the same newspaper article. After much other testimony, which need not be adverted to here, the case was submitted to the jury, after hearing the argument of counsel and the charge of the judge, who found both of the defendants guilty, and the defendants appealed upon the several grounds set out in the record, which need not be stated here in totidem verbis, but which should be so set out in the report of this case.

The first exception raises the question whether there was error in depriving the defendants of the alleged right to be present at the hearing of the motion to quash the indictment. The right of the accused to be present during every stage of his trial for a capital felony has long been settled, and is still fully recognized, but the question here is whether the motion to quash the indictment constitutes any part of the trial. As it seems to us, this motion is intended to test the question whether the defendants should be put upon their trial, for there can be no trial, in the legal sense of the term, until a valid indictment is presented. *State v. Ray, Rice*, 1. And hence the hearing of this motion cannot be regarded as any part of the trial, but rather a preliminary inquiry as to whether there should be a trial. Indeed, it cannot properly be said that a trial is commenced until the jury has been sworn and impaneled to try the issues presented by the pleadings, and duly charged therewith. This is shown by the form of proceeding laid down in *Miller's Comp.*, at page 156, (a very useful publication, said to have been prepared under the supervision of one of our most distinguished judges,) where the language used is: " * * * Upon this indictment he hath been arraigned, and upon his arraignment he hath pleaded not guilty, and for trial hath put himself upon God and his country," etc. Then and from that time forward, during every stage of the trial, the accused has the right to be present, under the well-settled doctrine above stated. Of course, this does not preclude the right of the accused to be present while the jury is being impaneled, but that does not rest upon the general doctrine, but upon the necessity of the accused being present, so as to be able to exercise his right of challenge.

But it is urged that the defendants were denied the right secured to them by section

13 of article 1 of the constitution, to wit: "the right to be fully heard in his defense, by himself or by his counsel, or by both, as he may elect." Passing by the very obvious consideration that the accused cannot be assumed to have elected to be heard both by themselves and by their counsel upon a purely legal question, without some evidence to show that they had elected to be heard by themselves as well as by their counsel, it is sufficient to say that they have elected, in this case, to be heard only by their counsel, for the record so shows, as it is there stated "that the defendants, through their counsel, entered a demurrer thereto, and moved to quash the same;" and it is furthermore there stated that the demurrer was interposed and the motion was made "before the jury was sworn, and before pleading to the indictment." It seems to us clear, therefore, that the first ground of appeal cannot be sustained.

The second, third, fourth, and fifth exceptions all relate to the alleged insufficiency of the indictment, and may therefore be considered together. These exceptions proceed upon the unfounded assumption that there are two counts in the indictment; one charging the defendant Jasper as principal, and the other charging John Atkinson as an accessory before the fact. We cannot take this view of the indictment; and, on the contrary, we regard it as an indictment containing but a single count, in which the principal and accessory before the fact are charged jointly in the same count. This is not only approved, but recommended, by standard authorities on criminal law. See 1 Chitty Cr. Law, 272; 1 Russ. Crimes, 40; 2 Bish. Cr. Proc. § 7 et seq. The form of the indictment in this case (which should be incorporated in the report of the case) substantially conforms to the forms prescribed in 2 Chitty Cr. Law, 5; 1 Archb. Cr. Pl. & Pr. 77, (and see note at page 317, 7th Ed.) also, Bish. Cr. Proc. And as is said by Evans, J., in *State v. Rabon*, 4 Rich. Law, at page 263: "There is no doubt that the forms given in books of pleadings afford very strong evidence of legal principles. They are such as have been long used and approved in practice, and have stood the test of legal criticism." We do not think there was any error in overruling the demurrer and refusing the motion to quash the indictment.

The sixth exception imputes error to the circuit judge in admitting in evidence the pieces of paper found in the room of defendant John Atkinson, upon the ground that they were taken without a search warrant, and without authority of law, and in violation of the rights of the defendant, as secured to him by the constitution of this state and of the United States. The provisions of the constitution of the United States relied upon are the fourth, fifth, and fourteenth amendments, and the provisions of the constitution of this state may be found in sections 13 and

22 of article 1. In the fourth amendment of the constitution of the United States, it is declared that "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated," etc. In the fifth amendment, it is declared that no person "shall be compelled in any criminal case to be a witness against himself," etc., while in the fourteenth amendment the declaration is: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," etc. In the first place, we do not understand that the limitations imposed by the fourth and fifth amendments have any application to the powers of the state governments, but apply only to the powers of the federal government. As was said by Waite, C. J., in *Spies v. Illinois*, 123 U. S., at page 166, 8 Sup. Ct. 21: "That the first ten articles of amendment were not intended to limit the powers of the state governments in respect to their own people, but to operate on the national government alone, was decided more than a half century ago, and that decision has been steadily adhered to since;" citing numerous cases. Nor can it be said that the fourteenth amendment has the effect of extending the operation of the fourth and fifth amendments to the states; for, as was held in *Minor v. Happersett*, 21 Wall., at page 171: "The amendment [speaking of the fourteenth] did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." And the same doctrine was held in *U. S. v. Cruikshank*, 92 U. S. 542. Besides, the same rights which are guaranteed by the fourth and fifth amendments to the constitution of the United States are expressly declared by sections 13 and 22 of article 1 of the state constitution; for in the former section the declaration is that no person shall "be compelled to accuse or furnish evidence against himself," while the language in section 22 is: "All persons have a right to be secure from unreasonable searches or seizures of their persons, houses, papers or possessions." The question now presented for our decision is, not whether the persons who found the pieces of paper in the room of the defendant John Atkinson violated any of his legal rights by entering his room without authority, but whether the papers there found could be offered in evidence in this case; for, while it may be possible that it was a technical trespass to enter his room without authority, yet it does not by any means follow that the pieces of paper there found could not be offered in evidence, for, as is said in 1 Greenl. Ev. § 254a: "It may be mentioned, in this place, that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibil-

ity, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question." There was nothing in the evidence tending to show that the defendants, or either of them, were compelled to furnish these papers, or that they were even asked to do so. Indeed, it seems that neither of the defendants were present, or even knew that the papers were found in the room, when they were found; and there can, therefore, be no pretense that the defendants were compelled to furnish these papers as evidence against them. The case of *Boyd v. U. S.*, 118 U. S. 616, 6 Sup. Ct. 524, relied on by appellants, was a case in which the court was called upon to determine the validity of an order issued by the United States circuit court requiring the defendant to produce before the court his books and papers, to be used in evidence against him on the trial of a criminal case; and the court held that the circuit court had no power to issue such an order, as it was equivalent to an order compelling the defendant to testify against himself, in violation of the provisions of the fifth amendment of the constitution of the United States. This case, therefore, while very interesting, as furnishing an able and elaborate discussion of the right of exemption from unreasonable searches and seizures, has no application to the present inquiry. We are of opinion that the sixth exception cannot be sustained.

The seventh exception is too general to warrant any consideration at our hands.

The eighth and ninth exceptions—complaining, as they do, of the reception of evidence obtained by compelling the defendants to testify against themselves—may be considered together. They must be regarded as only relating to the testimony as to the tracks which were required by the officer to be made by the defendant, and putting his foot into one of the tracks. But this testimony, as we have seen, having been stricken out by the order of the circuit judge, together with his express direction to the jury that the testimony obtained by compulsion could not be considered by them, leaves these exceptions without any basis to rest upon, and must therefore be overruled. While, therefore, we do not propose to consider or decide the point, it may not be amiss to say that we find no little conflict among the authorities upon the subject, as may be seen by reference to the following cases: *State v. Garrett*, 71 N. C. 85; *State v. Graham*, 74 N. C. 646; *Stokes v. State*, 5 Baxt. 619; *Walker v. State*, 7 Tex. App. 245; *State v. Ah Chuey*, 14 Nev. 79; *Blackwell v. State*, 67 Ga. 76.

The tenth exception imputes error to the circuit judge in charging upon the facts. But we think this is an entire misconception of the charge. The quotation relied upon to sustain this exception plainly means that circumstantial evidence is quite sufficient to support a verdict, if the jury believe, beyond

a reasonable doubt, from such evidence, that the accused is guilty. The circuit judge, clearly, did not express or even intimate any opinion whatever as to the force and effect of the circumstantial evidence relied upon, but left that to the jury.

The eleventh exception was not urged in the argument, but, as it was not abandoned, it becomes necessary for us to consider it. We are unable to perceive how it can be said, with any propriety, that any question of law was left to the jury, and hence there is no foundation for this exception.

The judgment of this court is that the judgment of the circuit court be affirmed, and that the case be remanded to that court for the purpose of having a new day assigned for the execution of the sentence heretofore imposed.

McGOWAN and POPE, JJ., concur.

STATE v. EZZARD.

(Supreme Court of South Carolina. Feb. 13, 1894.)

BREACH OF TRUST WITH FRAUDULENT INTENT — By AGENT—EVIDENCE—INSTRUCTIONS.

1. Testimony that defendant "told me he had been consulting with some lawyers, and began fixing up some defense," warranted a charge that defendant saw fit, after taking advice, to stand his ground.

2. It was not error for the court to make general observations to the jury, which were insufficient as definitions, showed the advances in the law relating to the crime with which defendant was charged, had no direct bearing on such crime, and were not so intended.

3. Where defendant offered no evidence, and that offered by the state was uncontradicted, and consisted largely of defendant's admissions, the recital of such evidence in the charge was not obnoxious to the constitutional provision which forbids a charge on the facts.

4. A charge that defendant was guilty of a breach of trust if he retained money which belonged to the vendor of land, and which he received as his agent, was warranted by evidence that he received from the vendee \$2,500 and an offer to buy at that price, and that he concealed such facts from the vendor, and induced him to accept \$800 as the whole offer, and to execute to the vendee a deed which recited a consideration of \$2,500.

5. An agent was guilty of breach of trust with fraudulent intent who knowingly received money which belonged to his principal, and converted it to his own use with a purpose to deprive the principal thereof.

6. The agent was guilty though the person who gave him the money did not direct him to deliver it to the principal.

7. On trial of an agent for breach of trust with fraudulent intent, the court properly refused to charge that, before larceny can be committed, the property must have come into the possession of the person from whom it is alleged to have been stolen, without a qualification to show that possession by the agent is possession by the principal.

8. Where a person assumes to act as agent, and both principal and agent act on such relation in the absence of any writing between them, such person is as guilty of breach of trust with fraudulent intent in receiving money

of the principal and converting it to his own use against the principal's consent as though the relation between them arose by deed.

Appeal from general sessions circuit court of Barnwell county; J. H. Hudson, Judge.

T. W. Ezzard was convicted of breach of trust with fraudulent intent, and appeals. Affirmed.

The following are defendant's grounds of appeal: That the judge committed an error: (1) In stating in his charge to the jury that the defendant "saw fit, after taking advice of counsel, to stand his ground," when there is no evidence in the case warranting such a statement. (2) In charging the jury that one might commit a breach of trust by the act of counseling and advising another. (3) In charging the jury that "the heirs of Lewis Hill, owning certain lands in the state of Georgia, desired to get possession of the land, or rather convert the land into money. 'Well, with that view they saw fit and had to employ agents to set in motion certain agencies in order to get the facts in regard to their territory, and to effect the sale. They empowered no one to sell,—that is, to convey. There was no power of attorney. It is not pretended that there was. They employed counsel here. The legal counsel here could not spare the time and expense of going to Georgia and looking up all this land and titles thereto. They corresponded with and secured the services of this firm of gentlemen in Atlanta, and that firm, as one of them has stated to you, could not spare the time away from their office to travel in different portions of Georgia to look up the lands and to negotiate sales, and they called upon the defendant here, who it is said by this witness was probably more universally acquainted with the lands in all parts of the state of Georgia than any one he could pick up. He was engaged for his knowledge in that respect. He was selected therefor as the trusted agent, to search out and ascertain the facts in regard to these lands, and secure bids,'—when it was a material question in the case whether the Hill heirs had ever authorized or empowered any one to sell the land, or intrusted any one with the sale thereof, and there is no evidence in the case to prove that they did, but, on the contrary, the evidence is that they did not. (4) In charging the jury as follows: "He in turn spoke to others,—a Mr. Norman,—and through Mr. Norman this Mr. Perry was spoken to. Perry goes to work and makes a contract, after negotiation with Mr. Pope, who concluded he would pay a certain price for this land, (\$2,500;) and the \$2,500, in the shape of five checks, were intrusted to Mr. Perry by Mr. Pope. Perry engaged with Mr. Ezzard to come and meet him in Augusta. The two met in Augusta, and came on to Blackville; spent a short time there. They conferred together, and conspired to cheat these people out of their money. Now, that is the testimony of Perry. That is the sum and

substance of it." And in so charging his honor charged facts which there was no evidence to support; and, even if the evidence sustained the charge, it was error of law to so charge upon the facts. (5) In charging the jury further as follows: "He had the \$2,500 to pay for this land if the Hills would accept it. They concocted a plan by which they would get the land from the Hills for less—for \$800—if they could, and pocket the balance, and make a division of it. They came over, and so managed their plans,—Ezzard and Perry,—and fooled the other parties by their false statements and false representations. They induced first the attorneys—the legal attorneys—to believe that \$800 was the highest bid, who also impressed that upon the Hills; and, although it was a matter of surprise,—a matter of regret,—yet, confiding in these representations, the Hills made the titles as Perry drew them, and received their little pittance of the money, to wit, \$400, according to the arrangement made with the attorneys here. This is a part of the representation of the facts as described a recital of the substance." And in so charging his honor is not sustained by the evidence, and committed error of law in charging the facts to the jury. (6) In charging the jury as follows: "The testimony of the state is that you have heard, however, the testimony of Mr. Maddox as to what occurred in Atlanta after the accomplishment of this swindle; that Mr. Ezzard gave his note for \$1,500; the testimony of Mr. Perry as to the division of the spoils betwixt them after the \$200 had been carried to the firm of Glenn & Maddox, and \$100 to Ezzard. Perry says he got \$500, and the balance (\$1,000, I believe it was) Ezzard got. Now, these are the facts. And, in so charging, his honor is not sustained by the evidence, and committed an error of law in charging the facts to the jury. (7) In charging the jury as follows: "I instruct you, gentlemen, that any part of that money which he got here in South Carolina, delivered into his hands for the purpose of delivering to the Hills, it was a breach of trust for him not to deliver it to the Hills if they accepted the proposition of Pope,"—when there was no evidence whatever that any money was ever delivered to him to be delivered to the Hills, but, on the contrary, the evidence was that the money in question was not delivered to him for the purpose of delivering it to the Hills, but for a totally different purpose, and he applied it to the purpose for which it was delivered to him. (8) In charging the jury as follows: "It was money that belonged to the Hills, and he and Perry were both the agents of the Hills." (9) In charging the jury as follows: "Now, when Ezzard joined Perry in Augusta, and came with him here to Blackville, and from Blackville to Barnwell, the very time that that money passed into the hands of Ezzard it passed into his hands as agent of the Hills,"—when the evidence does not sustain the

facts charged, and it was error of law to charge the facts, even if the proof sustained him in so doing. (10) In charging the jury as follows: "If you believe from the evidence that that money went into his hands here, and he appropriated it to his own use, and he ought to have given it to the Hills, when he knew he ought to have given it to the Hills, he committed a breach of trust, and committed it with the deliberate intent to defraud the Hills." (11) In charging the jury as follows: "The question for you is that one hundred dollars which Ezzard appropriated here with a view to take up that check here, and Perry had no right to give to that money any other direction than the sacred trust with which it was given to him, and that sacred trust Ezzard knew, and they were united together to defraud these people of their money, and accomplished it to a large extent." And said error consists as well in charging the facts to the jury as in misstating the law on the subject under consideration. (12) In charging as follows: "I instruct you that if you are satisfied from the testimony that that one hundred dollars went into Ezzard's hands here, and it ought to have gone to the Hills, when he knew it ought to have gone to the Hills, that was a breach of trust, and he did it with a view to defraud them here in Barnwell county." (13) In refusing to charge the jury, as requested by defendant's attorney, as follows: "That to make out the crime charged in the indictment, namely, breach of trust with a fraudulent intent, three things must concur: First, a trust must have been reposed in relation to something of which the crime of larceny could be committed; second, there must have been a breach of that trust; third, the breach of trust must have been committed with a fraudulent intent." (14) In refusing to charge the jury, as requested by the defendant's attorney, as follows: "That the indictment charging that the sum of one hundred dollars was delivered by Perry to Ezzard, to be by him delivered to the Hills, and the breach of trust consisted of his failure to deliver it to the Hills, but, on the contrary, he appropriated it to his own use,—that if the jury find from the evidence that the one hundred dollars in question was not delivered to Ezzard to be by him delivered to the Hills, that then and in that event the charge laid in the indictment is not sustained by the evidence, and the defendant should be acquitted." (15) In refusing to charge the jury, as requested by defendant's attorney, as follows: "The statute under which the defendant is indicted did not create any new offense, but only extended the crime of larceny at common law to cases in which the property stolen was in the legal possession of the accused at the time of the conversion." (16) In refusing to charge the jury, as requested by defendant's attorney, as follows: "That before larceny can be committed of any property it must have come into the posses-

sion of the person from whom it is alleged to have been stolen." (17) In refusing to charge the jury, as requested by the defendant's attorney, as follows: "That joint tenants or tenants in common have not an ownership as against each other upon which an indictment for larceny can be sustained." (18) In refusing to charge the jury, as requested by defendant's attorney, as follows: "That, if the Hills never had any legal title to the money—the \$100—in question, the crime charged in the indictment could not have been committed as of their goods, and that they could not have any claim or right to the money until after they conveyed the land of which it is claimed to be a part of the purchase money; and, since they received for the land all that they contracted to take, they never acquired such a title to the balance, of which the \$100 in question formed a part, as will support the charge laid in the indictment, if the jury find from the evidence that such are the facts." (19) In refusing to charge the jury, as requested by defendant's attorney, as follows: "That if the jury find from the evidence that the Hills never authorized the defendant to sell their land, or otherwise constituted him their agent to sell their land, then, and in that event, the defendant did not commit a breach of trust with a fraudulent intent in failing to account to them for any portion of the money for which the land was sold."

Robert Aldrich and W. P. Price, for appellant. Mr. Murphy, for the State.

POPE, J. The appellant was convicted of the crime of breach of trust with fraudulent intent in the court of general sessions for Barnwell county, in this state, at the November term, 1892, of such court, and, after having been duly sentenced, appealed to this court on 19 grounds. These grounds may be thus classified: First, errors in the charge of the circuit judge to the jury; second, errors in the refusal of the circuit judge to charge certain requests to charge made by defendant. The first class contains the first to the twelfth exceptions, inclusive. The second class contains the thirteenth to the nineteenth exceptions, inclusive.

In effect, the first exception imputes error to the circuit judge in stating to the jury that the defendant saw fit, after taking advice of counsel, to stand his ground, when there was nothing in the evidence to warrant such a statement. In this conclusion the appellant is not supported, for in the testimony of the witness C. D. Maddox this appears: "He (Ezzard) told me he had been counseling with some lawyers, and began fixing up some defense" This statement of the witness had been preceded by an explanation as to defendant, Ezzard, having executed a note secured by a mortgage of land for the \$1,700 in question between Ezzard and the Hill heirs. The exception is overruled.

Appellant next assails the charge of the judge when he stated that one might be guilty of breach of trust by counseling and advising another. By reference to the charge of the judge it will be seen that he indulged in some general observations tending to the information of the jury of the different advances in the law looking to the repression of violation of trusts. The expression complained of by the appellant is one of such expressions as is made manifest by reproducing this part of the judge's charge: "Counseling and advising another is breach of trust. Obtaining goods under false pretenses is; and so, likewise, he who sells property under a lien without the permission of the holder of the lien, and who withholds property under levy. The statutes have multiplied so as to cover all species of dishonesty in dealing with our fellow men." While, in some instances, these expressions are not full enough to answer as definitions, still they have no direct bearing upon the offense with which the defendant is charged. They were not so intended by the judge. It will be observed that when the circuit judge undertakes to define the offense of breach of trust with fraudulent intention he is much more careful. This exception, therefore, is not well taken.

The next point raised in this group of exceptions is that set up in appellant's third exception, embracing three-quarters of a printed page of the judge's charges, wherein is set forth a narrative of the matters testified to by the witnesses which were uncontradicted in this case. The appellant suggests, in this connection, that by this course on the part of the judge the question of the employing of any one by the Hill heirs to sell their lands situated in the state of Georgia was practically settled by him in the absence of any testimony to support such employment. The testimony clearly shows that in the absence of any express authority, such as a power of attorney from the Hill heirs, or a written direction, signed by them, the defendant, Ezzard, as the agent of the Hill heirs, did not only attempt to sell their lands by making a bargain therefor, subject, of course, to their ratification of such bargain, but that by his fraudulent representations the Hill heirs did actually sign a deed of conveyance carrying into effect this bargain so made by Ezzard, as their agent, with a Mr. Pope, of Albany, in the state of Georgia. There was no denial of these facts. Under such circumstances we can see no error on the part of the judge in this particular.

In the fourth, fifth, sixth, and ninth exceptions it is suggested that the judge charged upon the facts in the particulars therein enumerated. Let it be remembered that in this case the defendant offered no evidence. It was all offered by the state. No contradiction was attempted. Much of it related to the admissions of the defendant to several persons before his trial, and which were not denied by him. Under such circumstances

the recital by the circuit judge in his charge to the jury of such uncontradicted testimony was not obnoxious to that provision of our constitution forbidding a judge from charging upon the facts. We do not know that we can any more clearly express our meaning in relation to this matter than by quoting the language in the judgment of this court as it is set out in the case of *Moore v. Railroad Co.*, 16 S. E. 791: "What is meant by the judge charging upon the facts? It seems to us it may be said to occur when, in the progress of a trial, the circuit judge conveys by word his opinion of the sufficiency or insufficiency of certain testimony necessary to the determination by the jury of some fact at issue between the parties litigant. * * * This court, in construing this section of the constitution, has held that any expression of the circuit judge in his charge that did not relate to the issues being tried by the jury, that were not pertinent to such issues, did not fall within the interdicted action on the part of the judge. *State v. Sims*, 16 S. C. 495; *State v. Corbin*, Id. 545. * * * But great emphasis is laid on the manner employed by the judge in stating the testimony. This court has decided that, while he may not charge upon the facts, yet he may state the testimony in its logical order, and as bearing upon certain issues. In *Benedict v. Rose*, Id. 630. It was said: 'Accordingly the constitution declares that he has the right to state the testimony and declare the law. What is the proper scope and extent of this power? It has been properly held that stating the testimony means more than repeating it. It includes the idea of stating it in its logical relations to the propositions it is to support or contradict, as well as to the principles of law by which it bearing and force ought to be controlled, or, as it is expressed by the technical phrase, "summing up."'" All difficulty in overruling these objections vanishes when they are carefully considered in the light of these decisions.

The seventh exception imputes error to the circuit judge for having charged that if the defendant, as the agent of the Hill heirs, received any money belonging to his principals it was a breach of trust in the defendant to retain such money, on the ground there was no evidence adduced at the trial to support such a proposition. We take a different view of the testimony relating to this branch of the case from that entertained by the learned counsel of the appellant. No doubt his error arises from the standpoint he occupies, for it is evident he views his client's relation to the Hill heirs to be circumscribed by the \$800 for which they were actually selling their lands in question while their minds were being controlled by the false representations of the defendant; whereas the true position is this: This agent had induced Judge Pope, of Albany, Ga., to send an offer of \$2,500 for said lands, which said sum of \$2,500 actually accompanied said offer, and

was in the power and control of said defendant as the agent of the Hill heirs at the very moment said Hill heirs, ignorant of these last facts, accepted a part thereof (\$800) as the whole of Judge Pope's offer, and the deed, signed by the Hill heirs, to Judge Pope, for their lands, covered in amount, as the consideration therefor, not only \$2,500, but really \$5,000. Thus it is apparent that the purchaser, Pope, had in the hands of Ezzard, as the agent of the heirs of Hill, the sum of \$2,500 of cash, or its equivalent, which became the property of the heirs of Hill the moment they made a deed for the lands in question at or over the sum of \$2,500. There was an abundance of testimony in support of all these facts to avoid the claim of the appellant that such was not the case. Let this exception be overruled.

The eighth exception imputes error in the charge of the judge as to the money in the hands of Ezzard and his accomplice as the agents of the heirs of Hill. The statement we have made in the consideration of the seventh exception, taken in connection with the other evidence in this case, justified the circuit judge in charging this legal proposition if the jury found the facts, sworn to by every witness, and denied or contradicted by no one, to be true. If the facts sworn to were true, the circuit judge was right. Every dollar of the \$2,500 was the property of the heirs of Hill, and the attorneys would have had an equity against these proceeds of sale. This exception must be overruled.

The tenth exception must be overruled because of our views already expressed in treating of seventh and eighth exceptions.

The eleventh exception relates to the unfolding of the law by the circuit judge that the accomplice of Ezzard, and Ezzard himself, both being agents of the heirs of Hill, and as such holding funds that became the property of their principals, the heirs of Hill, the moment they signed the deed for the land in question to Judge Pope, of Albany, Ga., at a consideration in said deed equal to or beyond \$2,500, could not give a direction to said funds by which its legal ownership could be changed, certainly as long as it remained in the hands or control of Ezzard as the agent of the heirs of Hill. It made no possible difference that the accomplice of Ezzard, while on the stand as a witness, stated that he paid no \$100 to Ezzard for him (Ezzard) to pay to the Hill heirs. If the money belonged to the heirs of Hill, which fact was known to Ezzard, and he received it while the agent of such heirs, and converted such money to his own use, with a purpose to defraud and deprive such heirs of Hill of their money, it was a breach of trust with a fraudulent intent. This was no error.

The twelfth exception relates to the judge's charge as to the law provided the jury found a certain state of facts. We think the circuit judge committed no error here. In his charge, as before remarked, he had indicated

to the jury what the law included in the charge of a breach of trust with a fraudulent intent. This language, here complained of, does not militate against such definition.

2. By the case, as agreed upon by both appellant and respondent, it nowhere appears that the circuit judge refused to charge any of the requests of the defendant (appellant.) We are bound by the case, and, if it fails to show any matter, we cannot allow counsel in their argument to bring it to our attention for the first time. It is a dangerous practice. But we will waive this matter.

The fourteenth exception relates to an alleged refusal by the circuit judge to charge defendant's request. The circuit judge was right in not charging this request in the form it was presented. The \$100 paid by the accomplice to Hill as the agent of the heirs of Hill may not have been paid to said Ezzard to be delivered to the Hills, yet, if it came into the hands of Ezzard with a full knowledge that it was the property of his principals, the heirs of Hill, and he deliberately converted said sum of money to his own use, with a fraudulent intent, he would still be guilty. We know the indictment charged that Ezzard committed this breach of trust which consisted in not delivering the sum of \$100 which had been delivered to Ezzard to be delivered to the heirs of Hill. The crime, to exist, even under this indictment, did not need that the accomplice of Ezzard had any purpose or gave any direction that Ezzard would deliver this \$100 so delivered to him to be by him delivered to the heirs of Hill. The duty of delivery of that money existed independent of any will or intent in the accomplice of Ezzard when he turned it over to Ezzard.

The fifteenth exception is not sustained by the charge of the judge, for he did explain that the old crime of larceny had become too narrow to catch some of these latter-day bad men, and that the legislature had in its wisdom extended the boundaries of larceny at the common law.

The sixteenth exception complains that the circuit judge did not hold that before a larceny can be committed of any property it must have come into the possession of the person from whom it is alleged to be stolen. We are very glad the circuit judge did not charge this proposition without ample qualification. What will amount to the owner's possession when he has agents employed to gather in his money or other property? Surely it will not be contended that the owner must first lay his hands on such property, and then from his hands turn it over to the agent, so that thereafter, if he steals such property, he may be found guilty of breach of trust with a fraudulent intent. Would not such agent be just as guilty if he received as the agent of the owner the personal property, and committed a theft of it before it actually ever touched the principal's hands? Or, in other words, is not the possession of the

agent the possession of the principal? If the last be correct law, the circuit judge would have been charging an abstract or speculative question of law if he had followed appellant's suggestion as to this request.

Appellant asked the judge to charge that joint tenants or tenants in common have not an ownership, as against each other, upon which an indictment for larceny would be sustained. The judge very properly refused to charge an abstract proposition of law. No doubt the learned judge realized that it was good law. Unfortunately for appellant, there was no testimony to this effect in the case, and the law implied no such relation. Let the exception be overruled.

Appellant, by his eighteenth exception, imputes error to the circuit judge because of his failure to charge as requested: "That, if the Hills never had any legal title to the money, —the \$100 in question,—the crime charged in the indictment could not have been committed as of their goods, and that they could not have any claim or right to the money until after they conveyed the land of which it is claimed to be a part of the purchase money; and, since they received for the land all that they contracted to take, they never acquired such a title to the balance, of which the \$100 in question formed a part, as will support the charge laid in the indictment, if the jury find from the evidence that such are the facts." The circuit judge very properly refused to charge this request. The facts testified to do not support such a proposition. As before remarked, Judge Pope, of Albany, Ga., agreed to pay, and did pay, the sum of \$2,500 for this land. The deed executed by the heirs of Hill was for \$5,000,—a consideration. In no case did the heirs of Hill recite in their deed \$800 as their consideration therefor to Judge Pope. This \$2,500 was actually received of Judge Pope by Ezzard and his accomplice as the agents of the Hill heirs, and the \$100 in question was a part of such \$2,500, every dollar of which belonged to the Hill heirs.

The nineteenth exception alleges error in the trial judge in refusing to charge "that, if the jury find from the evidence that the Hills never authorized the defendant to sell their land, then, and in that event, the defendant did not commit a breach of trust with a fraudulent intent in failing to account to them for any portion of the money for which the land was sold." This request was too narrow to fit the facts in testimony. Ezzard could get into possession of the money of the Hill heirs without any formal power of attorney. An agency can be created in other ways than that created by deed. If an agency actually exists, if such a relation as principal and agent is recognized and acted upon by both principal and agent, in the absence of any writing between the parties, the consequences are just as fixed in the one case as in the other; and he who, as agent of his principal, receives the property of such prin-

cipal, and, if personal property, converts it to his (the agent's) use, against the consent of the principal, and with a felonious intent, is just as guilty as if the relation of principal and agent arose under a deed.

It follows, therefore, that the exceptions must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, O. J., and McGOWAN, J., concur.

GIVINS et al. v. CARROLL.

(Supreme Court of South Carolina. Feb. 23, 1894.)

SUBROGATION TO LIEN OF MORTGAGE — PARTITION — ACCOUNTING.

1. When a sale under a power is void for irregularity, the purchaser is subrogated to the rights of the mortgagee, which are regarded as assigned to him; and one who buys in the land at a judicial sale under partition proceedings by the purchaser's heirs, though the deed given him is without warranty, acquires all the rights of the heirs at the time of sale.

2. He can only enforce the mortgage, however, to the extent of the amount paid by the purchaser at the illegal sale under the power.

3. Where A. owes B. a debt bearing interest, and B. owes A., for the rent of land, a sum payable annually, but in excess of the annual interest due on the debt to A., on an accounting each year's rent shall be applied, first, to extinguish the interest, and the balance on the principal.

Appeal from common pleas circuit court of Barnwell county; L. B. Fraser, Judge.

Action by I. M. Givins and others against E. D. Carroll for the possession of land and for rents and profits. There was judgment for defendant, and plaintiffs' appeal. Modified.

Patterson & Holman and B. T. Rice, for appellants. Laurie T. Izlar and L. G. Mayfield, for respondent.

POPE, J. On the 16th day of February, 1878, one W. R. Lard executed a mortgage of a plantation of land in Barnwell county in this state, containing 255 acres, to secure a debt of \$1,000, to one Allen J. Weathersbee. The said Lard died in November, 1879, survived by the plaintiffs as his only heirs at law and next of kin. In January, 1880, Allen J. Weathersbee, claiming to act under a power of attorney embodied in the mortgage, sold such lands at public sale, and at the price of \$700 conveyed said lands to one W. D. Bist as the highest bidder. Subsequently, W. D. Bist died, (in the year 1883.) All his heirs at law united in an action of partition, under which such tract of land was sold and conveyed by the master for Barnwell county to the defendant, E. D. Carroll, at the price of \$1,025. The plaintiffs, as the heirs at law of said W. R. Lard, deceased, brought action to recover said lands from the defendant, as well as rents and profits. The defendant contested their right to re-

cover, interposing for his protection his subrogation to all the rights of Allen J. Weathersbee under the mortgage of W. R. Lard to him, (Weathersbee.) The matters came on to be heard before his honor, Judge Fraser, at the spring term of the court of common pleas for Barnwell, on an agreed state of facts and exceptions to the report of the master, Patterson. The decree of the circuit judge sustains the right of defendant, Carroll, to be subrogated to all the rights of Allen J. Weathersbee under his mortgage for \$1,000; that the plaintiffs were entitled to recover the rents and profits from the year 1880, which were fixed at the sum of \$877; but required interest to be paid on the mortgage debt of \$1,000 from 5th January, 1880, to date of decree, with an allowance for improvements and taxes for \$173.35. These items allowed the defendant aggregated \$2,094.24, from which he deducted \$877, before referred to, thus leaving the land liable, when sold, to pay defendant \$1,217.24. The land was ordered to be sold. The plaintiffs contend that such decree was erroneous, and should be reversed, on four grounds, which we will now notice, but not in their order.

First, "Because his honor erred in holding that the sale of the land, mentioned and described in the complaint herein, by the mortgagee, Allen J. Weathersbee, and the conveyance by him to W. D. Bist, and the sale of the land by the master in a partition among the heirs of the said Bist, and the purchase of the same at the said sale by the defendant, Carroll, operated as a transfer of the Weathersbee mortgage to the said Carroll." We have been unable to agree with the appellants in this proposition, and will now give our reasons therefor. It may be proper to observe, at the outset, that the parties to this contention recognized the fact that under the decisions of this court the sale of the lands attempted to be made by Allen J. Weathersbee to W. D. Bist was void for two reasons: First, because the power of sale contained in the mortgage of Lard was revoked by the death of said Lard, (*Johnson v. Johnson*, 27 S. C. 309, 3 S. E. 606;) and, second, the deed executed by Weathersbee, the donee of the power, was executed in the name of the donee, and not in that of his principal, (*Webster v. Brown*, 2 S. C. 429; *De Walt v. Kinard*, 19 S. C. 292; *Dendy v. Waite*, 36 S. C. 569, 15 S. E. 712.) Let us now resume the consideration of this ground of appeal. The intention of Weathersbee, in his attempt to sell the lands in question on the 5th of January, 1880, was to obtain the payment of his mortgage, and when, in furtherance of this intention, he received \$700 in cash from Bist, it was intended by him, in law and in fact, to part with his whole interest in his mortgage, so far as the same was a lien upon this tract of land. That his deed did not operate to convey a legal title to said land was Bist's misfortune, but that deed certainly operated

to assign in equity such mortgage to Bist so far as such land was concerned. In Lard's mortgage to Weathersbee there is a general warranty extending to Weathersbee, his heirs and assigns, forever. Such a covenant extended to Bist. Mr. Jones, in his work on Mortgages, at section 1902 (volume 2) says: "If the sale under the power is subsequently declared void for any irregularity, a purchaser who has paid the purchase money is subrogated to the rights of the mortgagee under the mortgage, which is regarded as assigned to him. * * *" This doctrine has been fully recognized and enforced by this court. *Stoney v. Shultz*, 1 Hill, 465; *Bredenberg v. Landrum*, 32 S. C. 215, 10 S. E. 958. But it is contended by the appellants that however true this may be as to Bist, yet the defendant, Carroll, purchased at a judicial sale, in an action by Bist's heirs at law, and he only holds the deed of the master, which is confessedly without warranty. While all this is true, it must be remembered that the defendant, Carroll, as the purchaser at such judicial sale, became invested with all the rights and equities touching this land that were owned, at the time of its sale, by the heirs of Bist. A very interesting statement of the law in this state on this matter is embodied in the opinion of the present chief justice in the case of *Lowrance v. Robertson*, 10 S. C. 31, where he said: "Now, by what alone do these plaintiffs [*Lowrance* had bought at a sale made by the clerk of court for partition among *Pearse's* heirs at law] bring this action? Certainly, as the assignees of *Pearse*, for, though the deed was not made directly to them by *Pearse*, yet *Miller*, as the clerk, under the order of the court conveyed to the plaintiffs all the right, title, interest, and estate of *Pearse*, including the right of action on *Caldwell's* covenant, upon its breach; as fully and completely as if *Pearse* himself had conveyed directly to the plaintiffs. This was distinctly decided in the case of *McCrady v. Brisbane*, 1 Nott & McC. 104, as to a purchaser at sheriff's sale, and the doctrine has been repeatedly recognized since, down to the case of *McKnight v. Gordon*, 13 Rich. Eq. 222; and, if this be true as to purchasers at an involuntary sale made by the sheriff under execution, how much more true it would be as to a purchaser at a sale made by the proper officer, under an order of the court for partition, or some other purpose necessary to the settlement of an estate, where all the parties in interest are before the court." It follows, therefore, that this difference here suggested does not alter the status of this defendant, Carroll, as to this mortgage.

We will next consider the exception numbered by the appellant as third: "Because his honor should have held, admitting that the doctrine of subrogation could and did apply in Carroll's favor, that he could only hold and enforce the mortgage to the extent of

seven hundred dollars, the amount paid by Bist at the illegal sale made by the said Allen J. Weathersbee, as the said Carroll claimed immediately under the said Bist." We think this exception should be sustained. When Bist paid Weathersbee \$700 he thought he was purchasing the land in question at that price as its value. Such price so paid was not an extinguishment of the debt due Weathersbee by Lard, but only such portion of the debt as was secured by the land pledged to secure the debt. Equity would only subrogate Bist to such a proportion of the debt as was secured by the mortgage. The sale ascertained the portion of the debt so secured by the mortgage. This view does not, when well considered, impeach the correctness of the rule laid down by this court in the cases of *Lowrance v. Robertson*, supra, or *Bredenberg v. Landrum*, supra. In the first-cited case the inquiry was confined to the construction of the statute of this state fixing a rule for damages for breach of a covenant arising under a general warranty where a vendee had been evicted by title paramount; and the court there decided that the words of the statute, "In any action or suit for reimbursement or damage upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of alienation, with legal interest," should be applied to the alienation by Caldwell to Pearse, and not that of Miller, as clerk, to Lowrance, (Caldwell had received \$5,000 as the purchase money from Pearse, while Miller, as clerk, had only received \$4,000 from Lowrance,) because it was Caldwell's contract that was being enforced, and any liability of his executor, Robertson, only existed by reason of Caldwell's contract. In its last analysis it seems to us this cited case tends to sustain the view we here suggest and maintain; for it is Weathersbee's contract with Bist which connects Carroll with this mortgage, and in that view \$700 was the portion of the debt, as secured by this mortgage, that was assigned, by operation of law, by Weathersbee to Bist, and through Bist's heirs to Carroll. In the case of *Bredenberg v. Landrum*, supra, it is true this court did hold that "where a party, at the instance of the mortgagor, advances less than the mortgage in the purchase of a mortgage, judgment creditors of the mortgagor cannot object to the recovery of the full original debt by the assignee;" but this was in a case where all the mortgagees had expressly assigned, in writing, all their interests in the mortgage to Landrum, and where Landrum had only paid \$3,000 for a \$4,000 mortgage. This court only recognized in that case the right of persons under no disabilities to contract for the sale of their property at their own price, and denied to strangers any right to question such conduct when it was confessedly bona fides. In the case at bar we are called upon to enforce an equity growing out of a contract, and for which equity the parties themselves

made no direct provision. Under such circumstances it seems to us that such equity should be confined and made operative within the limits of the transaction of the parties to it.

The second exception seems well taken. Its language is: "Because his honor erred in holding that the plaintiffs were not entitled to interest on the rents of said land as the same accrued, whereas it is submitted that his honor should have held that the rents should have been applied in the accounting annually to the satisfaction and discharge of the mortgage debt, and that he should have overruled the master's report in this respect." We do not mean to sustain the exception in the form in which it is presented. The underlying idea embodied in the exception amounts to this: If A. is indebted to B. by an obligation bearing interest, and B., at the same time such indebtedness subsists, is indebted to A. for sums of money that accrue and become payable at the beginning of each year, when an account is taken in chancery of such mutual indebtedness, if the sums of money due by B. to A. exceed the interest due on the contract of A. to B., this excess should be applied to the extinguishment of interest, and thereafter to the principal, as far as it will do so. Take this as an illustration of our views: If A. owes B. a debt of \$700, evidenced by a note wherein interest is fixed at 7 per cent., at the end of the first year A. owes B., on such debt, \$749. But suppose, when the debt is contracted, B. is in possession of a tract of land belonging to A., whose rental value is \$50 for that first year, and for any cause this mutual indebtedness is carried into chancery; will not A. be held to have his debt due to B., of \$749, reduced by the \$50 due by B. to A. for rent? Would not the same principle be applied if the debt had run at interest for several years, on the one hand, and the indebtedness for rent had run on for a corresponding period? This would be so, not because the rent bears interest, (the payment of interest is a matter of contract,) but because in equity such mutual indebtedness, accruing and maturing at stated intervals, is subject to such a rule. Now, in the case at bar, on the 1st day of January, 1880, the heirs at law owed, so far as the assets of their ancestor descended to them would pay, to Carroll, the defendant, the sum of \$700 at 7 per cent. interest, and therefore this indebtedness on the 1st January, 1881, amounted to \$749. But, on the other hand, Carroll owed these heirs at law, on the 1st January, 1881, the sum of \$50 for the rent of their lands. The true amount of this indebtedness on the 1st January, 1881, was the \$749, less the rent of \$50, to wit, \$699. This last amount of \$699, with interest, amounted, on the 1st January, 1882, to \$747.93, but Carroll owed the heirs rent on that day, \$50. The true amount due by plaintiffs to Carroll on the 1st January, 1882, was \$697.93. Plaintiffs owed Carroll, on the 1st January, 1883,

\$746.79, less \$50 for rent,—really, \$696.79. Plaintiffs owed Carroll, on the 1st January, 1884, \$745.57, less \$50 for rent,—really, \$695.57. Continuing this process to the amounts due by the parties to each other, and governed by the findings of fact, from which there is no appeal, down to the 1st January, 1892, the plaintiffs will owe, as the balance of the mortgage debt due at that date, \$382.55. But at that date the plaintiffs also owed Carroll \$173.35 for improvements and taxes. The whole indebtedness at that date would be \$555.90, and this sum, with interest to the 1st January, 1893, would amount to \$594.81. Applying the rent for 1893 at \$90 per annum would leave the lands in the heirs' hands liable to pay Carroll \$504.81. The decree in the circuit court should provide that if the heirs at law of Lord (the plaintiffs) do pay to the defendant the sum of \$504.81, and the costs of this action, by a day certain, to be named in the decree, the lands should be turned over to the plaintiffs with any rents for the year 1894, but that, in the event of their failure to pay these sums, then the lands in question should be sold, and the proceeds of sale applied to costs and the debt of Carroll, and thereafter such proceeds as remain be paid to the plaintiffs.

The last exception relates to the findings of fact by the circuit judge and master. When scrutinized under the light of the decisions of this court regulating the same, no error is manifested. It is the judgment of this court that the judgment of the circuit court be modified in the particulars herein indicated, and for that purpose that the action be remanded to that court, with directions that such modifications be there decreed.

McIVER, C. J., and McGOWAN, J., concur.

STATE v. McINTOSH.

(Supreme Court of South Carolina. Feb. 17, 1894.)

HOMICIDE—SELF-DEFENSE—DEFENDING HOUSE—INSTRUCTIONS.

1. In a murder case, where the killing by defendant was admitted, an instruction that to make out a case of self-defense it is necessary for defendant to prove his innocence by a preponderance of the evidence, followed by an instruction that the state must make out its case beyond a reasonable doubt, is not open to the construction that defendant, in the first instance, is bound to prove his innocence.

2. That defendant may avail himself of the plea of self-defense, it must appear that he was so assaulted that he believed that there was no other probable means of escape.

3. Defendant cannot avail himself of the right to protect his house, where he shoots his invited guest in his house without notice to leave.

4. An instruction that, if the jury believed certain things, then it would be manslaughter, does not charge on the facts.

5. Error in an instruction on murder as to

malice, which does not enter into manslaughter, is not available where the conviction was merely of manslaughter.

Appeal from general sessions circuit court of Abbeville county; J. J. Norton, Judge.

Singleton A. McIntosh was convicted of homicide, and appeals. Affirmed.

The charge of the court was as follows:

"Mr. Foreman and Gentlemen of the Jury: The defendant in this case is charged in this indictment with the murder of a fellow being, and it involves, of course, questions of fact as well as questions of law. The first question for your consideration is, did the defendant kill the person who is alleged to have been killed, and, if he is guilty of any offense, what offense is he guilty of, if he did the killing? There are two degrees of murder which are offenses against the law,—murder and manslaughter,—but justifiable homicide, the third degree, is no offense against the law; and therefore you will take notice particularly of these three different grades of homicide. The highest grade of homicide is murder. Murder is the felonious killing of any person with malice aforethought, either express or implied. Excusable homicide is rendered so by several reasons which operate to a justification or excuse in law that is wholly excusable. And, gentlemen, some confusion might, perhaps, be in your mind to distinguish the manner of proof as to the different grades of homicide. Now, there have been different witnesses sworn upon the stand. I don't mean to say that they have all been consistent in their statements. But the defense, in not putting up any testimony, insist that the case has not been made out by the state; that is to say, if you take that testimony,—so much of it as you can possibly believe, and do believe,—and formulate a theory out of which it will show a state of facts which would excuse this defendant as to the killing, which is admitted to have occurred, and you would not have any doubt about that if it were presented to you singly, as in the case where a man is executed, and it is brought to your attention that he had been executed under a proper mandate of the court, it would appear clearly that it was a justifiable homicide; and so you need not be confused when the question comes up for your consideration in locating the character of the crime as between self-defense and justifiable homicide, or whether or not it was by reason of self-defense. Don't let that confuse you in the one case or the other. It would be necessary for it to appear that the defendant had not been proven to be guilty beyond a reasonable doubt. In the case of the sheriff, if he would hang a man, and if he did not produce the authority, although he had it, but if he did not produce it, he might be considered guilty of murder; or, if he hung the man at a different place from where he was ordered to hang him, he would be guilty of murder; but you would say that the sheriff had not been proven legally guilty by the tea-

timony offered by the state. Now, gentlemen, in order to make out a case of self-defense, it is necessary for the defendant to prove his innocence by a preponderance of the testimony; and the state must make out its case beyond a reasonable doubt, when you take all of the testimony in the case into consideration, and you must believe all of it beyond a reasonable doubt before you can convict him. Now, in order to avail one's self of the plea of self-defense, it must appear that he was without fault in bringing about the difficulty,—that at the time he struck the fatal blow he was so assaulted that he believed that he had no other probable means of escape from immediate death or from immediate serious bodily harm. And the defendant must not only have believed that himself, but he must act upon that belief, subject to your judgment that a man of ordinary firmness and resolution, endeavoring to obey the law, would have believed the same thing under similar circumstances, in which the defendant was placed at the time.

“Now, gentlemen, you are ready to begin to apply the more minute definitions of the different degrees of homicide. Murder is the killing of any person with malice aforethought, either express or implied. ‘Malice’ is a technical term. Ordinarily we use the term as if it was a grudge or hatred. If there was any grudge or hatred, and the killing is upon that grudge or hatred, that is express malice; and that express malice is evidenced by certain deliberation,—by such deliberation as lying in wait and shooting from ambush. That would be a very great evidence of express malice. And so, gentlemen, if one deliberately and intentionally poisons another, it must be upon an old grudge. Implied malice is malice implied from the law itself. Every killing, if nothing more occurred except the killing, would be upon an implied malice. But you are to take into consideration that that is implied by law,—it is a presumption of the law. And, whenever the facts and circumstances attending the killing have been developed before you, the law does not imply any malice, but it affords you room for the exercise of your judgment, and it gives you certain rules of law which will aid you in determining whether there is or is not malice. If all of the circumstances in the case gave you no more light than the mere fact that the killing occurred, you would not be helped at all, but would still be left to your presumption of law, because, if the fact of the killing is made out beyond a reasonable doubt, then you must be able to say, from the facts and circumstances, whether it was a malicious killing or not; and if the circumstances throw no light at all on it, then you would still be left to the presumption of the law; but, if the circumstances throw any light upon the character of the transaction at all, then you must determine from these circumstances what the character of those transactions was, and you are to

say whether it was from malice, or upon sudden heat and passion, or whether it was justifiable or excusable. Then, gentlemen, malice is defined, also, to show the deliberation. But the deliberation need not be any longer than enough to determine whether or not he will take the life of his adversary. If long enough to determine, then it will be long enough to be malicious. If nothing more appears for it to be malicious,—if it is only for a moment, and that is sometimes without any apparent motive or deliberation, but upon the impulse of the moment; sometimes a person takes up an axe, and inflicts the fatal blow, or shoots one down,—that impulse, then, without any provocation, it is said in the law, would be sufficient to imply the malice, nothing else appearing. But malice does not always exist when there is a killing with a deadly weapon,—a weapon which causes death. But the presumption may be rebutted when it is highest. Certainly it can be rebutted when the act has been committed with a deadly weapon, which is the very highest. This presumption can be rebutted only with reference to the facts which have been testified to in this case. But, not attempting to determine for you what facts have not or have been proven, where the killing is with a gun, as in this case, the killing may be reduced to manslaughter if it is done in sudden heat and passion. For instance,—without being able, if I desired to do so, to go all over all the testimony for the purpose of illustration—But I say to you that if the defendant here did as he says he did, and, not having any malice, got up from a table at which the deceased was sitting, for the purpose, bona fide, of avoiding a difficulty, and the conduct of the deceased was so provoking as to arouse his blood,—to temporarily lose control of his passions,—then it would be manslaughter, even if adhered to still further to reduce it. But the law don't allow the defendant, when slightly touched, to put up the excuse that his blood was so inflamed that he had lost control of his passions, unless it was really so, or unless the circumstances justified the jury in believing that it was so; that is, there must be sufficient legal provocation. If there was merely a light touch or blow, he would not have the right to say that his blood was inflamed so that he had lost control of his passions. The law would not excuse him if he got in that uncontrollable fit, but it would judge him by a man of ordinary firmness and courage. But, gentlemen, even a slight blow, or even no blow at all, when it is accompanied by menace to serious bodily harm or life of the defendant, if it was, in your judgment, sufficient to excite the defendant's passions beyond control, would reduce the crime from murder to manslaughter. Now, when you go to consider that subject, you inquire whether the deceased was making towards the defendant, and whether it was under such circumstances after a threat, and under such circumstances as would have induced him.

and would have induced a reasonable man, to have lost the control of those passions, you are to determine. You are to determine, gentlemen, what knowledge the defendant had of the surroundings of the deceased, what opportunities he had of knowing how much he was in danger by being armed or not being armed, or any other circumstances that he may have known, and that in your judgment the testimony shows that he must have known of the condition of the deceased; and you are to determine from that what the degree of menace to his body was, because I don't think he told Mr. Mann, the sheriff, that he was actually struck, but that he was making at him as if he was trying to do him serious bodily harm. I don't remember the exact words, but you do. You will get the real meaning of the words, and apply it.

"Then, gentlemen, are you satisfied from the surroundings of the case that the defendant was guilty of murder, or that he was guilty of manslaughter? If you come to the conclusion that the law of self-defense has not been sufficiently minutely laid down for you to come to a conclusion, then I desire to state it to you more particularly. A man must be without fault in bringing about a difficulty. That is the first element to be shown to constitute self-defense, no matter whether it comes from the state's witnesses or from the defendant's witnesses; but you view the whole testimony in determining the question. Was the defendant without fault in bringing about the difficulty? You may review all of the evidence; you may go back to the first time we hear of those parties being together,—to the time that they were at Bordeaux, and to the time that the invitation was extended to go to his house. Was the invitation genuine? Was it for the purpose of having mutual enjoyment? Or was it for the purpose of getting the deceased to his house, and then slay him there? Those are the questions that are to be considered by you; and they might not be worthy of consideration, but I suggest the possibilities which you may consider in reaching your conclusions. You may consider, when they were there that night, and the next morning, what was the conduct of the defendant. Was it collected and scheming for the purpose of inveigling the deceased into some trap whereby he would kill him? The law would not tolerate any such thing as that. And then, at the very moment, gentlemen, when the defendant left the table, did he go, as he says he did, for the purpose of avoiding a difficulty? Is that true? Now, you are to determine what is true, not by the words that the witnesses state upon the stand merely, but you are to determine what is the truth of the matter, not only by the words, but by the witnesses themselves, and the opinion you have as to what is the truth in the matter. Well, if you conclude that it was feigned at the time, and he changed his mind. *bona fide*, he had

a right to do it. If it was not feigned, it would not be conclusive, because it does not deprive it of all of the elements of self-defense. But on that one point, if you believe that the assault was made upon the defendant by the deceased for the purpose of doing him harm, did he use threatening language, and follow it up with threatening acts? When a great many men carry concealed weapons, it is not safe to require of every defendant that he shall sit still and wait until the assault is actually made upon him,—that is, a weapon drawn and aimed at him. Then it might be too late for one to save himself. But you are to look carefully on both sides of this case, and you are to determine. Now, if you conclude that that was an assault, and the defendant really did believe, and had a right to believe, that the deceased was approaching him to do him violence, then you are to determine the question what that violence was; that is to say, the extent to which the defendant believed, under all of the circumstances, so far as they were known to him, and so far as you judge they were known to him. What would he have believed the extent of the injury about to be inflicted upon him by the deceased? Could the deceased, in his opinion, have then had an opportunity to have used the weapon? Did he have time, at that time, to have attacked him, and do him serious bodily harm, at the short distance that they were from each other, before he could do anything except what he did? What did the defendant really believe would be the injury that was likely to be done to him by the deceased? But, gentlemen, you are not to take what the deceased would have done, or yourself, but you are to take a man of ordinary firmness and resolution,—a man trying to carry out the law; and you are to say what a man of that kind would have believed under the circumstances. What would such a man have believed under the circumstances, if he knew as much as the defendant did, under the circumstances and possibilities of the deceased to do him serious bodily harm? If the defendant really thought and believed that the deceased would do him serious bodily harm, that would be another step in the direction towards making out self-defense; or if a man of ordinary firmness and courage, or a weak man, believed that, it would be made out.

"There is still one other element of self-defense to be shown by the testimony, before the defendant would be entitled to rely upon it; that is, if all these other circumstances concurred to have made this condition, and for a man of ordinary firmness to believe that he was in danger of serious bodily harm, and that there was no other probable means of escape, not, gentlemen, that there was no possible means of escape; men might run around the corner and escape the bullet of the assassin, although it was probable that they could not,—yet, if the

word 'possible' was used in the definition of the term 'murder,' then, to make out the plea of self-defense, running around the corner would be required. But it is not required. Having all these other elements in your favor, you have the right to shoot him down to prevent the execution of that probability, and you would not be required to take the means of escape. Now, gentlemen, what were the means of escape for this defendant? You are to take into consideration whether or not any persons were present, and whether or not the defendant, in making up his chances for life or the prevention of serious bodily harm, believed that he could have controlled other persons in time to have saved him, or could have avoided being killed himself or killing his neighbor and friend; and, if you come to the conclusion that he thought that there was any other means of escape, then you ought not to give him the benefit of self-defense, but, if you come to the conclusion that there was no other probable means of escape than to shoot him, then you ought to give him the benefit of the plea of self-defense, if you think he was a man of ordinary firmness. I cannot say, as I have not been able to listen to all of the testimony, what inconsistencies are in the testimony, if any; but that is for you to say. You are to take all of the testimony into consideration, and if, upon a review of the whole testimony, you have any reasonable doubt of the guilt of the defendant arising out of the testimony, then you ought to give him the benefit of that doubt, and find a verdict of not guilty.

"I am requested to charge you: '(1) That under the plea of not guilty, interposed by the prisoner in this case, he is not compelled to rely upon the plea of self-defense, which is an affirmative defense; but if the jury, after their consideration of all the testimony in the case, have a reasonable doubt as to any material fact necessary to constitute the crime of murder or of manslaughter, then the jury must find a verdict of not guilty.' I so charge you, gentlemen. It is in accordance with what I have already said. '(2) That, although the law ordinarily presumes malice from the use of a deadly weapon, this is not the case where the state introduces testimony as to the facts and circumstances attending the homicide.' I so charge you, gentlemen; but you take it in connection with what I said to you in the direct charge. You are to be governed by the facts and circumstances, if they throw any light upon it. '(3) That, if the jury find from the testimony that the prisoner left the state immediately after the homicide for the purpose of avoiding arrest, this is not to be construed as evidence of guilt, but would be only a circumstance to be considered by the jury.' I so charge you, gentlemen,—that it would only be a circumstance to be considered by you in connection with all of the testimony in the case. Counsel explained very fully to you

what I said upon this subject, and he stated it correctly,—that it might be no evidence at all, because a very timid man might jump up and run off, and it would be no evidence of guilt at all. A man might be suffering from some particular disease, and he might think that confinement might be injurious to him, and he might not want to be confined; and it might not be a circumstance to consider at all, because there might not be a judge near by that he could apply to for bail. And, on the other hand, it might be a circumstance to be considered; and, if so, you are to determine what weight is to be given to it. '(4) The conduct of the prisoner, in surrendering himself to the sheriff, is a circumstance to be weighed by the jury.' Of course, gentlemen, you will take that into consideration, too. And, while upon that subject,—it came out without objection,—but ordinarily a defendant cannot make evidence for himself when he is out on bond. He could not have introduced that testimony of Mr. Mann. And, in one view of it, that operates in his favor, because Mr. Mann could not, at his suggestion, tell that he did it in self-defense. But, if you believe every word that Mr. Mann said, yet you do not have to arrive at the conclusion that he did it in self-defense.

"I am sorry that every citizen in the land does not know the law as to homicide. Even lawyers and judges make mistakes as to the law. At the last trial of this case, the judge who tried the case made a mistake, and one of the supreme court judges failed to agree with the others. But in this case, now, you cannot make a mistake. You have to take the law from me. It imposes a responsibility upon me at this stage of the case to know what the supreme court has decided, and to deliver it to you; and, when I have done so, you must apply the facts to it. If I have made a mistake in the law, you must apply it, and leave it to a superior tribunal to correct that law.

"And then, gentlemen, the attribute of mercy; that is placed in the power of the governor. If we follow out our duty, endeavoring to know neither friend nor foe,—if we did that, I feel sure the law would be more faithfully carried out in the future than it has been in the past, and we would have fewer homicides. Remember, gentlemen, you are to divest yourselves of all prejudice in the case; and I believe that you will do so, as I judged from your manner of testifying on your voir dire. The form of your verdict will be, 'guilty,' which means guilty of murder; or, 'guilty of manslaughter,' which means that he killed the deceased in sudden heat and passion; or 'not guilty,' which means that neither charge has been proven to your satisfaction beyond a reasonable doubt.

"Mr. McGowan: Will your honor charge the jury as to a man's rights in his castle?

"Certainly. Gentlemen, counsel asks me to

charge you as to a man's rights in his own house. It is a high and exalted privilege to be a master of one's own house. It is the right of the master of the home to keep every intruder out, with or without cause. He doesn't have to consult with his neighbors, and ask them who he shall admit into his house. He does not have to consult anything except his own wishes. And, when one has intruded himself into one's house, he has the right to remove him from it. He has the right, as the law says, to gently lay his hands upon him, and tell him to go; and he has the right to use so much force, under the circumstances, as is necessary to eject the trespasser. If a trespasser assails him with violence, he has the right to not wait to use that gentle means, but he has the right to use such force as is necessary to eject him. Of course, in all these cases involving these questions, he must use that right subject to a review by your panel. There is no dispute, gentlemen, as to how the deceased entered the house. He entered it upon the invitation of the defendant; and, having so entered, before he could be rudely driven from it or shot down, it was the business of the defendant here to have notified him to leave, or else he must make out a plea of self-defense as if he had notified him. In other words, gentlemen, when one of you invites a friend to his house, that friend is entitled to notice before you have a right to eject him from your house. The law requires that, when you have allowed a friend to enter your door, you must give him reasonable notice to leave your door before you eject him; reasonable notice depending upon the violence of his conduct, or the loss of the power to understand the notice to leave. Take the record."

The jury not having agreed, the judge ordered the jury into court.

"Clerk of Court: Have you agreed upon a verdict?"

"Foreman of Jury: We have not. Some of the jurors don't understand the law in reference to excusable homicide. And Sheriff Mann's statement seems to bother some of the jurors, as to whether they should accept that as a matter of consideration or not.

"The Court: In regard to the testimony of Sheriff Mann, there would be no doubt in the world that you should take that. Suppose he would come to you and say to you that the defendant here had told him that a certain state of facts existed at a certain time, as he tells you that the defendant did tell him what occurred,—well, you will exercise your common sense in that matter. But you would not be obliged to take everything that he says as absolutely and perfectly true. He may be a man of the strictest veracity, but he might be mistaken. It is very difficult to lay down the exact words one hears sometimes, and therefore you are to determine, if you can, whether Sheriff Mann

was exact. The presumption is that he was. But you are to review that testimony just as you would any other testimony in the case, to see if it corresponds with your knowledge of human nature, and see as to its accuracy. You get at the exact sense of what he heard, and, when you get at the exact sense of what he heard, you apply it all to the test of common sense. Then you are to determine how much of that statement of the defendant was true, and how much of it was not true. The presumption is, if nothing else appeared, that it was all true. You would not be justified in saying that it was not all true, unless it was so plain that it was untrue that you could not believe it. Now, I don't remember that there was a word to contradict it; and if you come to the conclusion that there was not, and it was properly given to you, then you will take that as true as if it was by a witness on the stand. But you are to test that testimony, and say if it is true, because it is the degree of conviction which it produces upon your mind as to the weight of the testimony.

"Now, as to excusable homicide. When a homicide has been committed, it must occupy either the degree of murder, or of manslaughter, or of excusable homicide. Justifiable homicide is the equivalent of it, but in stronger terms. Excusable homicide is not a crime,—very often a duty. In a case where self-defense is relied upon, then the circumstances must show, before the defendant can receive the benefit of it, that he was without fault in bringing about the difficulty. Consider all of the circumstances of the case. At the time of the homicide he must have believed that the deceased was assaulting him, and assaulting him in such a manner that he had no other probable means of escape from that assault except by taking the life of his assailant, or by doing what he did do, to prevent the loss of his own life or serious bodily harm to himself. Then another step in the direction of self-defense is made out; but it is not necessary that a person should believe that himself only, but that a man of ordinary firmness would do the same as the defendant here did. If you desire anything further, I have no objection to stating it.

"The Foreman: As this evidence of Sheriff Mann has been a stumbling-block in our way, we would like to know if we have not the right to give this evidence the same consideration as we do the other witnesses?

"The Court: Why, certainly, sir. It would be hard to call upon the state, having fifty witnesses, to say that every word of every witness is true. If that were so, there could be no telling what the verdict would be. But you are to take that into consideration just as you do the sworn testimony of Calaham, or of Dr. Muller, or whoever the other witnesses are. The state says, "That is testimony, which I adduce to you as credible testimony. I don't require that it shall

be sworn to by the defendant in order to make it credible testimony. My witnesses heard him say so, and I am satisfied to introduce it to the jury as facts in the case.' Under the circumstances under which it was introduced in this case, there was nothing for him to contradict; and there was only one interpretation to put upon it, and that is that it was as credible as any other testimony. Now, if the defendant had gone upon the stand before Mr. Mann's testimony, and had been allowed to give a version of the conversation which Mr. Mann detailed, and he had varied that conversation in any material particular, and the solicitor, for the purpose of contradicting him in that material particular, would then introduce Mr. Mann, then I would not require that you could attack the unsworn testimony of the defendant, and put it in as good testimony and uncontradicted. But here it is to be considered along with all of the other testimony in the case. The state gave the jury the right to give credit to the unsworn statement of the defendant as detailed by Mr. Mann. It must be taken in connection with all the other testimony in the case."

Parker & McGowan, Benet & Caron, and E. B. Gary, for appellant. M. F. Ansel, for the State.

McIVER, C. J. Under an indictment for the murder of James N. Newby, the defendant was convicted of manslaughter, and, having been sentenced to confinement in the penitentiary at hard labor for the term of five years, appeals upon the several grounds which will hereinafter be considered. These exceptions impute to the circuit judge sundry errors in his charge to the jury; and, as they are based upon detached quotations from the charge, it is necessary that the entire charge should be set out in the report of this case, in order that the connection in which the words quoted as the basis of the several exceptions were used may be seen, for it has been repeatedly held that the correctness of the charge must be determined, not by detached sentences, but by a consideration of the charge as a whole. It should also be observed that there was no controversy as to the fact that the deceased was killed by the prisoner, and the only question for the jury was as to the character of the homicide,—whether it was murder, manslaughter, or excusable as done in self-defense.

The first exception imputes error to the circuit judge in using this language to the jury: "In order to make out a case of self-defense, it is necessary for the defendant to prove his innocence by a preponderance of the testimony." From the connection in which this language was used in the charge, it is very manifest that it was not used, and could not have been understood by the jury, as conveying the idea that the accused is ever called upon to prove his innocence in the first

instance; but the meaning plainly was, and was so undoubtedly understood by the jury, that, while the state was bound to prove its case beyond all reasonable doubt, the defendant who sets up a plea of self-defense is only bound to prove the facts necessary to sustain such plea merely by the preponderance of the evidence, and, when that degree of evidence is offered, his innocence is established. The manifest object and effect of the language objected to was to draw the distinction, well recognized in the law, between the degree of evidence required to sustain the plea of self-defense,—that is, the innocence of the accused,—and that which is required to sustain the charge made by the state. This is manifest from the language used by the judge in the same sentence, immediately after the language quoted as objectionable, where the jury are explicitly instructed that the state must make out its case beyond a reasonable doubt. We do not think that the jury could have failed to understand, from that portion of the charge here under consideration, that, while the defendant was only bound to prove the facts necessary to sustain his plea of self-defense by a mere preponderance of the testimony, the state was bound to prove every material element of the charge beyond all reasonable doubt; and this is in direct conformity to the rule as laid down in *State v. Bodie*, 33 S. C., at pages 132, 133, 11 S. E. 624. The first exception cannot, therefore, be sustained.

We will next consider that portion of the charge which is objected to in the second, fourth, and seventh exceptions, which may be considered together, as they all complain of the instructions given to the jury as to what was necessary to sustain the plea of self-defense; for in the second exception the complaint is that the jury were instructed that, in order to avail one's self of the plea of self-defense, it must appear that "at the time the prisoner struck the fatal blow he was so assaulted that he believed that he had no other probable means of escape from immediate death, or from immediate serious bodily harm;" in the fourth exception the language objected to is: "If you come to the conclusion that he [the defendant] thought that there was any other means of escape, then you ought not to give him the benefit of self-defense;" and in the seventh exception the language pointed out as objectionable is this: "At the time of the homicide the prisoner must have believed that the deceased was assaulting him in such a manner that he had no other probable means of escape from that assault except by taking the life of the deceased, or by doing what he did do, to prevent the loss of his own life or serious bodily harm to himself." In the case of *State v. Wyse*, 33 S. C., at page 504, 12 S. E. 558, it is said that "the plea of self-defense rests upon the idea of necessity,—a legal necessity; that is, such a necessity as

in the eye of the law will excuse one for so grave an act as the taking of human life." In other words, one cannot claim indemnity or excuse for taking the life of another unless he makes it appear, by the preponderance of the evidence, that it was necessary for him to do so in order to protect his own life, or to protect his person from some grievous bodily harm; and of course, where it appears that there were other probable means by which the shedding of human blood might have been avoided, it cannot, with any propriety, be said that there was any such necessity to take human life as would excuse the slayer. We do not think, therefore, that either of these exceptions can be sustained.

The sixth exception is in these words: "Because his honor erred in charging the jury that the deceased having entered defendant's house upon defendant's invitation, it was the business of the defendant to have notified him [the deceased] to leave, or else he must make out a plea of self-defense as if he had notified him." It seems to us that, when the language here objected to is read in connection with that portion of the charge in which it appears, all objection to it must disappear; for the judge, while fully recognizing the sacredness of one's home, and the right of the owner to protect it from all intruders, very properly drew a distinction between a case of a trespasser intruding himself into the dwelling house of another, and a case in which one enters the house of another by the invitation of the owner, for here the undisputed evidence was that the deceased was urgently invited to the house of the prisoner for the purpose of engaging in a Christmas frolic, and that they did engage in a drunken debauch, which doubtless gave rise to the difficulty which terminated in bloodshed. It does not seem to us that the defendant can claim anything from that well-recognized right which allows one to protect his house, where his invited guest was shot down in his own house, without

any notice, even, to leave. This exception must therefore be overruled.

As to the third and fifth exceptions, we are somewhat at a loss to understand how they are pertinent to the present appeal. These exceptions seem to relate to so much of the charge as contained instructions to the jury in reference to the charge of murder, but, as the defendant was convicted of manslaughter only, we do not see what application they can have to the present appeal; for, even if we could hold that the jury were improperly instructed as to the charge of murder, (which, however, we must say is not the case,) we are unable to perceive how such error, if there was error, could affect an appeal from a conviction of manslaughter, which practically amounts to an acquittal of the charge of murder. The language objected to in the third exception is taken from that portion of the charge in which the judge was explaining the distinction between murder and manslaughter; and the instruction there given, in case the jury took a certain view of the facts, that it would be manslaughter and not murder, can in no sense be regarded as charging on the facts, as it did not intimate, in the slightest degree, what was the judge's opinion of such facts, but expressly informed the jury that, if they believed certain facts, then it would be manslaughter. The language upon which the fifth exception is based manifestly relates to the charge of murder, of which the defendant was practically acquitted, and could not possibly relate to the charge of manslaughter, of which the defendant has been convicted, for certainly malice is not an ingredient in the last-named offense. Besides, the mere failure to repeat what had been already stated to the jury was certainly no error of law. The judgment of this court is that the judgment of the circuit court be affirmed.

McGOWAN, J. I concur in the result. Opinion to be filed hereafter.

POPE, J., concurs.

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A new trial will not be granted for the admission of irrelevant harmless testimony. (W. Va.) 478.

Where the issue was not as to the existence of a bill of lading, but the effect of indorsing it to third party, the fact that secondary evidence of its contents was received is harmless error. (Ga.) 363.

The refusal to allow a question to be answered is not reversible error, where it does not appear that the answer would be material. (W. Va.) 575.

— **Objections waived.**

If defendant proceeds after denial of its motion to exclude plaintiff's evidence as insufficient, such motion will be disregarded on appeal, unless whole evidence insufficient to justify verdict. (W. Va.) 596.

Where defendant, after plaintiff had rested, moves the court to direct judgment for defendant, he waives the petition by going on with the case. (W. Va.) 782.

Rehearing.

Rehearing will not be granted on ground that certain results might follow from previous judgment and opinion, if the points were not previously raised. (S. C.) 889.

Rehearing will not be granted when no material fact or principle of law was overlooked. (S. C.) 886.

Effect of appeal.

Notice of appeal from a judgment obtained on a money demand does not stay the execution of the judgment. (S. C.) 790.

Decision.

Entry by trial court after affirmance on appeal of "judgment as per transcript filed from the supreme court" terminates action. (N. C.) 77.

Decision—Affirmance.

Where the court is evenly divided, the judgment below is affirmed. (N. C.) 208.

Where there is no case on appeal, the judgment will be affirmed unless error appears on record. (N. C.) 170.

— Modification and reversal.

Where in trespass there was judgment for plaintiffs, and some of defendants are shown not to have committed any trespass, the judgment will be modified. (N. C.) 91.

A decree, though void, may be reversed. (W. Va.) 468.

Where the charge is not set out in full, the court cannot reverse for want of more specific instructions, in the absence of exceptions. (N. C.) 708.

The denial of a new trial for newly-discovered evidence will not be reversed where the evidence was known at time of trial. (Ga.) 313.

Where, in action for injuries, a verdict for plaintiff has been twice reversed on appeal, and there is a verdict for plaintiff on the third trial, on the same evidence, the appellate court will dismiss the action. (Ga.) 850.

— Dismissal and reinstatement.

Appeal will be dismissed when there is no person present to represent appellant on call of case. (S. C.) 886, 889, 891.

Will be dismissed where appellant has allowed two terms to pass without remedying defects in record. (N. C.) 199.

A motion to docket and dismiss for failure to file transcript, made after call of the docket, and after the appeal is docketed, is too late. (N. C.) 714.

If dismissed for default in filing return, will not be reinstated merely because each of the two counsel expected the other to do the filing. (S. C.) 942.

Sufficiency of showing for reinstatement of appeal dismissed because return was not filed within prescribed time. (S. C.) 893.

Appeal dismissed by clerk for failure to file return will not be reinstated when neither unavoidable cause for default nor mistake is shown. (S. C.) 943.

Indorsement on "the case" of acceptance of service by counsel does not show waiver of right to dismiss because not docketed in time. (N. C.) 212.

Liabilities on appeal bonds.

On withdrawal of a claim in superior court on appeal from a justice's court, the claimant being the appellant, no judgment can be rendered on appeal bond except for costs. (Ga.) 547.

Application.

Of payments, see "Payment."

ARBITRATION AND AWARD.

Question whether notice of time and place of hearing was given is to be determined by trial judge, with aid, if he desire, of jury. (N. C.) 87.

Where an arbitrator admits new parties at request of one defendant, and against the objection of the others, his award will be set aside. (N. C.) 672.

ARREST.

Indorsement on warrant of arrest appointing one special constable "to execute the within process" is sufficient. (S. C.) 919.

Whether certain facts constitute probable cause for arrest without warrant, question for the jury. (Ga.) 305.

An officer may use such force as is necessary to arrest one attempting to rescue a person in officer's hands. (N. C.) 394.

Sufficiency of information to justify issuance of warrant for arrest for trespass on land. (S. C.) 919.

Warrant need not set out the offense. (S. C.) 919.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide." Jurisdiction of justice, see "Justices of the Peace."

A warrant charging school teacher with unmercifully whipping and bruising a child charges a battery. (N. C.) 256.

Where defendants, armed, go to a man's house and order him to go with them, they are guilty of assault, though no actual violence is done. (N. C.) 388.

Sufficiency of evidence to sustain conviction. (Ga.) 651.

ASSIGNMENT.

See, also, "Assignment for Benefit of Creditors."

Of debt secured by mortgage, see "Mortgages."

Of note, see "Negotiable Instruments."

Question whether vendor who deposited with bank bill drawn on vendee for price, with bill of lading attached, and got credit therefor, assigned fund to the bank, was for the jury. (Ga.) 188.

When a stranger pays the debt of another, he may take the assignment of it from the creditor. (W. Va.) 456.

A check is equitable assignment pro tanto. (W. Va.) 620.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Bankruptcy;" "Fraudulent Conveyances."

Need not be executed by creditors, but their assent will be presumed. (W. Va.) 611.

An assignment by a firm of the firm property is not void because it does not include the individual property of the partners. (S. C.) 150.

An assignment by the firm of the firm property is not void because one of the partners afterwards confesses a judgment in favor of an individual creditor, which is made a lien on the partner's individual property. (S. C.) 150.

May include property nominally held by assignor in trust, which is in reality his own, and exclude property equitably belonging to others. (Va.) 883.

Question whether releases executed after time fixed in assignment, in connection with previous offer to release, entitle creditor to benefit of assignment. (S. C.) 150.

Omissions in schedules of assets and creditors do not necessarily vitiate the assignment, but intent to defraud does. (Ga.) 47.

Does not defeat holder of check subsequently presented. (W. Va.) 620.

Fraud.

Will not be wholly void because fraudulent in part, unless all the creditors secured or the

trustee knew of or participated in the fraud. (W. Va.) 611.

Preferences and reservations.

Preference among creditors. (N. C.) 341.

Evidence sufficient to show that defendant contemplated assignment when he executed certain mortgages, and that hence together they constituted one assignment with preferences. (S. C.) 145.

That assignment provides that the exemptions reserved shall be set apart by grantee does not raise presumption of fraud. (N. C.) 53.

That the two partners assigning reserved, by agreement, such exemptions as the law permits, raises no presumption of fraud. (N. C.) 53.

A creditor who successfully impeaches one of the preferred claims does not thereby obtain the preference originally given such claim. (W. Va.) 611, 620.

The assignee.

The trustee is a purchaser for valuable consideration. (W. Va.) 611.

Assignee who compromises suits under advice of his counsel and counsel of creditor cannot be charged by latter with bad faith in so doing. (N. C.) 103.

Sale of assigned property.

A court of equity in charge of property assigned does not direct sale until all claims and priorities are ascertained. (W. Va.) 611.

Associations.

See "Building and Loan Associations;" "Corporations."

ASSUMPSIT.

Payment of the debt of another, without request, does not give volunteer the right of action. (W. Va.) 436.

When lies for money had and received. (W. Va.) 575.

When brought on a contract under seal in which the covenants are dependent, plaintiff must show a legal excuse for his nonperformance. (W. Va.) 478.

Where nothing remains as to performance of contract but the duty of defendant to pay, plaintiff may recover on the common counts. (W. Va.) 575.

Assumption of Risks.

See "Master and Servant."

ATTACHMENT.

See, also, "Execution;" "Garnishment."

Of property of national banks, see "Banks and Banking."

A gas company can attach in action for damages caused by the wrongful breaking by defendant of its gas pipes. (N. C.) 693.

When court has no jurisdiction of attachment, judgment cannot be rendered on the account on dismissal of the attachment. (Ga.) 295.

Where order of attachment is quashed, property of defendant sold by him after attachment to third party will be restored to such party. (W. Va.) 382.

Defendant cannot complain of a judgment condemning the fund attached, on the ground that he had assigned it before attachment. (N. C.) 665.

A creditor at large of an absconding debtor is not a person interested in disputing plaintiff's claim, within Code, c. 106, § 23. (W. Va.) 753.

Affidavit.

A defective affidavit cannot be supplemented by subsequent affidavit or proof. (W. Va.) 382.

Affidavit against corporation for failure to appoint person to accept service must show failure to comply with requirements of the law. (W. Va.) 382.

An affidavit against a nonresident is not defective because not alleging that defendant "had property in this state." (N. C.) 665.

An affidavit which does not state, in the language of the statute, "the amount at the least, which the affiant believes plaintiff is justly entitled to recover," is defective. (W. Va.) 753.

An affidavit may be amended in a material point, under Code, c. 106, § 1, cl. 8. (W. Va.) 753.

Sufficiency of affidavit. (W. Va.) 924.

Return.

In equity cannot be returned to rules. (Va.) 899.

Writ returnable under Act Feb. 21, 1873, to superior court only. (Ga.) 295.

Wrongful attachment.

Where an attachment is levied by direction of an attorney on property of third person, the attorney believing it was the property of defendant in attachment, his client is liable for actual damages only. (Ga.) 423.

Where property attached did not belong to defendant in attachment, and plaintiff's attorney knew such fact, his client was chargeable with notice, and liable for wrongful attachment. (Ga.) 423.

Where property is wrongfully attached by the officer in presence of plaintiff's attorney, his client is liable for wrongful attachment. (Ga.) 423.

Actual damages for wrongful attachment include expenses in regaining possession, and reasonable hire for the property while withheld from the owner. (Ga.) 423.

ATTORNEY AND CLIENT.

Liability of client for acts of attorney, see "Attachment."

Attorneys for creditors who are not attorneys in fact cannot execute releases under assignment for creditors. (S. C.) 145.

Evidence of authority to accept service of summons. (S. C.) 268.

Autrefois Acquit and Convict.

See "Criminal Law."

Award.

See "Arbitration and Award."

BAIL.

A recognizance to appear "on next Friday," and not to depart without leave of court, is broken if prisoner appear on Friday, and, the trial having been commenced and adjourned, he fails to appear the next day. (Va.) 437.

A recognizance is not defective because it binds defendant "to answer the charge against him," instead of "to answer the felony whereof he stands charged." (Va.) 437.

On recognizance to appear at a county court to answer indictment, an appearance is not necessary until indictment found. (Ga.) 432.

A bond on arrest in a civil action should show sureties to be residents and freeholders within the state. (N. C.) 672.

Bailment.

See "Carriers."

BANKRUPTCY.

See "Assignment for Benefit of Creditors;" "Fraudulent Conveyances."

Title acquired by sale of interest of bankrupt in land. (W. Va.) 744.

A discharge may be set up in state court to stay execution on a judgment against bankrupt, rendered after commencement of proceedings, and before discharge. (W. Va.) 443.

A sale in bankruptcy is not binding on persons claiming an interest who were not served with notice. (Va.) 869.

Persons not served with notice of sale in bankruptcy are not precluded from attacking the sale because the bankrupt was the administrator of the estate through which they claim. (Va.) 869.

BANKS AND BANKING.

The individual account of a firm member cannot be charged with the overdraft of the firm. (N. C.) 513.

Liability of corresponding bank for collections to depositor of insolvent bank. (N. C.) 695.

Under Rev. St. U. S. § 5249, seizure of property of national banks by attachment under state law is void. (Ga.) 137.

BASTARDY.

Where the father of a bastard, on conviction and commitment to county jail for failure to pay fine imposed, is released on taking poor debtor's oath, he cannot, at subsequent term, be sentenced to imprisonment. (N. C.) 657.

Battery.

See "Assault and Battery."

Best and Secondary Evidence.

See "Evidence."

Betting.

See "Gaming."

Bill of Sale.

See "Sale."

Bills and Notes.

See "Negotiable Instruments."

Bona Fide Purchasers.

See "Negotiable Instruments;" "Vendor and Purchaser."

Bonds.

See "Bail;" "Principal and Surety."

Issued by city, see "Municipal Corporations." Sufficiency of bond, see "Replevin."

BOUNDARIES.

Sufficiency of secondary evidence of location of boundaries in deeds; witness testifying what a person, deceased, pointed out to him as to the location. (N. C.) 52.

Plaintiff's testimony that corner tree was marked on boundaries in dispute, and that plaintiff marked tree to take the place of one which had disappeared, was competent. (N. C.) 52.

Declarations as to boundaries made by the adjacent owner ante litem motam are competent. (N. C.) 52.

A plat by a county surveyor, made on receiving an order of survey for a claim, is evidence of its shape and location. (N. C.) 708.

BUILDING AND LOAN ASSOCIATIONS.

When the foreclosure has realized enough to pay the debt, and the association has allowed nothing for payments on the stock assigned when the mortgage was made, the borrower, after the foreclosure, is entitled to a return of the stock. (N. C.) 965.

A contract by which stock of a borrower, assigned to the association when the mortgage is executed, is forfeited on default, without being credited on the mortgage, is unconscionable. (N. C.) 965.

Burden of Proof.

See "Evidence."

BURGLARY.

Forceful violence is not necessary to constitute burglary. (Ga.) 350.

Tools adapted for opening safes, found in defendant's possession were admissible, though they had apparently not been used. (Ga.) 154.

A shot bag containing money stolen at time of burglary, and found in defendant's possession within four days thereafter, is admissible. (Ga.) 154.

Defendant is bound only to show that he obtained stolen articles by means not involving participation in offense. (Ga.) 154.

Sufficiency of evidence. (Ga.) 350.

Sufficiency of evidence to sustain conviction. (Ga.) 557.

Cancellation.

Of contracts, see "Contracts;" "Equity."

CARRIERS.

See, also, "Railroad Companies."

Carriage of goods.

Where agent, by mistake, misquotes freight rates, the company is bound thereby. (N. C.) 392.

A stipulation that, in view of reduced rates, shippers shall give notice of injury before shipment is removed from destination, is valid. (N. C.) 88.

A railroad is bound to provide cars strong enough to transport animals that are ordinarily unruly; but not those that are vicious as well. (N. C.) 88.

Railway agent is authorized to give receipts for goods only at the time of their delivery, and not thereafter. (Ga.) 24.

Code, §§ 1202, 1203, do not forbid the charge of one dollar per day for detention of a car

more than 72 hours after notice of arrival to consignee. (Va.) 673.

Are not liable for delay in forwarding freight, where evidence shows it to have been forwarded with all the dispatch possible. (Ga.) 977.

Carriage of passengers.

Admissibility of evidence as to precautions necessary on electric cars. (Ga.) 406.

The fact that a passenger had never before ridden on an electric car is admissible in evidence. (Ga.) 406.

What constitutes negligence in street railway as to precautions in relation to passengers alighting from car. (Ga.) 406.

When street-railway car stops because of an obstruction, it is not responsible for the safety of the place as to a passenger getting off there. (Ga.) 406.

Whether failure to have gates on platform of electric car is negligence is for the jury. (Ga.) 406.

Excursion ticket—Rights of passenger on fast train. (Ga.) 315.

Injury to passenger boarding train at unusual stopping place—Contributory negligence. (Ga.) 422.

Ejection.

One buying ticket limited in time cannot recover for ejection after such a time. (Ga.) 650.

A passenger wrongfully expelled from train may recover as for a tort. (Ga.) 315.

In order to recover for wrongful expulsion from train, it is not necessary that conductor put his hands on passenger. (Ga.) 315.

Liability of sleeping-car company.

Liability of sleeping-car company for property stolen from passengers. (Ga.) 364.

CERTIORARI

Is the proper remedy to review the proceedings of a municipal council. (W. Va.) 770.

One is not entitled as of right to a certiorari to review a judgment of a justice. (W. Va.) 926.

Will not issue from circuit court to review a judgment of a justice which is clearly wrong, where the justice has jurisdiction of the subject-matter and the person. (W. Va.) 577.

Will not be granted to supply evidence omitted from the case made, where the judge has not intimated a readiness to make the correction. (N. C.) 205.

The pendency of a writ in favor of one party to suit is not ground for dismissing a writ taken out by the other. (Ga.) 365.

Sufficiency of notice of application, and time and place of hearing. (Ga.) 435.

Where petition for writ to the judgment of a justice shows that it was not applied for within 10 days after judgment entered, unless good cause is shown, it should be quashed. (W. Va.) 476.

Where judgment of a justice is removed to circuit court on certiorari, the court should review the judgment on the merits, and render such judgment as justice may require. (W. Va.) 476.

When petition to review justice's judgment for want of jurisdiction does not require magistrate to show by his answer that his court was in lawful session. (Ga.) 138.

Challenge.

See "Jury."

Chancery.

See "Equity."

CHATTEL MORTGAGES.

Priority of lien, see "Taxation."

Question whether mortgage by individual to secure his debt bound timber contracted for by him, and paid for and used by his firm. (N. C.) 94.

On crops to be raised on land described, and on "any other land," is good as to the land described. (N. C.) 341.

The insertion of a power of sale on default does not invalidate a crop mortgage. (N. C.) 341.

Though mortgage of married woman's realty and personality is invalid as to realty because husband does not join, it is valid as to personality. (N. C.) 323.

Statute relating to record of chattel mortgages does not apply to mortgage executed outside of state unless it expressly so provides. (Va.) 899.

Claim and delivery may be maintained under a chattel mortgage for installments due and unpaid. (N. C.) 515.

Demand for possession and for judgment for debt may be joined in action for claim and delivery. (N. C.) 515.

Checks.

Effect of, see "Assignment."

Children.

See "Infancy;" "Parent and Child."

Circumstantial Evidence.

See "Criminal Law."

Claim and Delivery.

See "Replevin."

CLERK OF COURT.

Has jurisdiction over settlements between a guardian and the ward's personal representatives. (N. C.) 694.

Collateral Attack.

See "Judgment."

On corporate franchise, see "Corporations."

Colleges and Universities.

Restraining grant of charter to, see "Injunction."

Commerce.

Regulation, see "Constitutional Law."

Common Carrier.

See "Carriers."

Complaint.

See "Pleading."

COMPOSITION WITH CREDITORS.

Is invalid if some creditors are allowed to retain claims until notes given in settlement are paid, or they have a secret understanding for payment before rest of creditors. (N. C.) 89.

Compromise.

See "Arbitration and Award;" "Composition with Creditors;" "Payment."

Condemnation Proceedings.

See "Eminent Domain."

Confession.

See "Criminal Law."

CONFLICT OF LAWS.

A contract made and to be performed in another state is governed by its laws. (W. Va.) 456.

A note bearing interest payable in New York is *prima facie* to be governed by the statute of New York. (Ga.) 131.

Where a mortgagor and his land were in North Carolina, and he executed a mortgage there to a Virginia association having a local board of managers and treasurer, the usury law of North Carolina applies, though the mortgage was sent from the home office, and the bond was payable there. (N. C.) 965.

The fact that a note, not dated at any place but payable in New York, was secured by a deed executed in Georgia, and conveying land therein, does not render the statute of New York inadmissible as evidence to show usury. (Ga.) 131.

A promise to pay, contained in a telegram sent from Massachusetts to South Carolina, is a contract made in Massachusetts. (S. C.) 120.

Chattel mortgage payable where executed will be upheld in court of another state to which property may be removed. (Va.) 899.

In action for tort committed in another state the rules of evidence of the forum govern. (Ga.) 290.

Consideration.

See "Contracts."

To support guaranty, see "Guaranty."

CONSTITUTIONAL LAW.

Act Oct. 21, 1891, providing that it shall go into effect in each county on recommendation by the grand jury, is valid. (Ga.) 28.

Acts 1891, c. 42, making it unlawful to use profane language on the lands of Henrietta Cotton Mills, does not unduly interfere with free speech. (N. C.) 498.

Code, c. 47, § 13, requiring members of municipal councils to be freeholders, is constitutional. (W. Va.) 770.

The power given a certain town by statute to regulate the running at large of animals may be curtailed by subsequent act confining exercise of this power over animals owned by residents of town only. (Ga.) 1007.

The provision of the United States constitution securing persons against unreasonable seizure and searches has no application to the power of the state government. (S. C.) 1021.

Laws 1891, c. 323, § 2, imposing a capitation tax, and devoting a portion thereof to the payment of pensions to indigent Confederate veterans, is valid. (N. C.) 661.

Constitutionality of statute increasing sentence on proof of prior conviction for crime and sentence. (Va.) 439.

Local and special laws.

Act Nov. 26, 1890, providing that in every county and district boundary lines are legal fences, is a general law. (Ga.) 44.

Act Oct. 21, 1891, in relation to public roads, is not special, because it does not go into effect until recommended by grand jury of each county. (Ga.) 28.

Acts 1891, c. 42, protecting the operation of the Henrietta Cotton Mills, is not invalid as a local criminal law. (N. C.) 498.

Jury trial.

A highway act is not invalid because it denies to those who fail to work the roads or pay the commutation taxes the right to jury trial. (Ga.) 28.

Police power.

Act providing for taxation of emigrant agent, and exacting a very large fee, is restrictive of the agent's business, and void as an exercise of the police power. (N. C.) 342.

Regulation of commerce.

A statute providing for a penalty against telegraph company for delay in delivering message not in violation of interstate commerce clause. (Va.) 280.

Taxation.

It is no objection to a highway act that the rates of taxation may vary in different counties. (Ga.) 28.

An act providing for taxing emigrant agents before they can hire laborers in certain counties is void for want of uniformity. (N. C.) 342.

CONTEMPT.

Refusal to pay alimony, see "Divorce."

A mayor has jurisdiction to punish a defaulting witness in a criminal case for contempt. (N. C.) 690.

It is within the discretion of lower court to discharge rule for contempt in instituting action in violation of restraining order against one's ancestor, the rights of the parties being determinable in that action. (N. C.) 78.

CONTINUANCE.

In criminal cases, see "Criminal Law."

Refusal of continuance will not be reversed unless plainly erroneous. (Va.) 195.

Not granted for immaterial amendment to pleading. (Va.) 278.

A decision denying a continuance will not be reviewed where no abuse of discretion is shown. (Ga.) 350.

Will be denied when no diligence to obtain presence of witness is shown. (Va.) 901.

CONTRACTS.

See, also, "Alteration of Instruments;" "Arbitration and Award;" "Assignment;" "Assignment for Benefit of Creditors;" "Assumpsit;" "Carriers;" "Chattel Mortgages;" "Deeds;" "Frauds, Statute of;" "Fraudulent Conveyances;" "Insurance;" "Landlord and Tenant;" "Master and Servant;" "Mortgages;" "Negotiable Instruments;" "Partnership;" "Promissory Notes;" "Sales;" "Seigniorial Rights;" "Torts;" "Wills;" "Zoning Laws."

tible Instruments;" "Partnership;" "Principal and Agent;" "Principal and Surety;" "Sale;" "Specific Performance;" "Usury;" "Vendor and Purchaser."

Reformation, see "Equity."
Rescission, see "Equity;" "Sale."
What law governs, see "Conflict of Laws."
With corporations, see "Corporations."

Correctness of charge as to mental capacity necessary. (Ga.) 27.

Sufficiency of consideration. (W. Va.) 575.

A contract by which certain persons agreed to send a certain number to school for a scholastic year must be performed by the teacher before he can recover thereon. (N. C.) 698.

For the purchase of land will not be rescinded because vendee is unable to pay, there being no misrepresentations by him. (Va.) 277.

A contract cannot give rise to a cause of action until there has been a breach. (S. C.) 120.

Action against loan company for recovery of subscription to stock made on promise of loan which was not kept—Sufficiency of complaint. (N. C.) 655.

Conveyances.

See "Chattel Mortgages;" "Deed;" "Fraudulent Conveyances;" "Mortgages;" "Sale;" "Vendor and Purchaser."

CONVICTS.

The fact that a convict is under the general charge of a state officer does not relieve a company employing such convict from liability for injuries received by him by going into a dangerous place by order of a guard of the company who had control of his movements. (Ga.) 1015.

The rule forbidding recovery by a servant who subjects himself to injury by going, without objection, into a place known by him to be dangerous, does not apply to a convict whose movements are controlled by a guard having power to compel obedience. (Ga.) 1015.

CORPORATIONS.

See, also, "Building and Loan Associations;" "Carriers;" "Creditors' Bill;" "Insurance;" "Municipal Corporations;" "Railroad Companies;" "Telegraph Companies."

When validity of franchise cannot be collaterally attacked. (N. C.) 254.

In Pennsylvania, the president of a corporation created there cannot recover on a quantum meruit for services, in the absence of any by law or resolution allowing compensation. (W. Va.) 456.

When notice to the officers of a corporation is notice to stockholders. (S. C.) 680.

Directors of companies chartered under the "Boom Law" must be stockholders, but need not be state residents. (W. Va.) 620.

Sufficiency of evidence to show an executed contract of sale, so as to take case out of statute requiring contract with domestic corporation to be in writing. (N. C.) 705.

The board of visitors of a chartered camp of Confederate Veterans has power to sell land acquired by the camp. (Va.) 839.

Preference by insolvent corporation in favor of directors is prima facie fraudulent. (W. Va.) 620.

A director cannot take advantage of his position to obtain judgment by confession from corporation so as to secure his debt as against other creditors. (N. C.) 107.

The failure of a domestic corporation to maintain its office within the state is an abuse of franchise, authorizing stockholders to institute proceedings for its dissolution. (N. C.) 117.

Right of foreign corporation to sue cannot be questioned by demurrer. (S. C.) 264.

COSTS.

In foreclosure proceedings, see "Mortgages."

Where verdict is rendered for sum admitted by defendant, he is liable only for costs approved before the admission, and for those in judgment. (N. C.) 107.

Of appeal should be taxed to party who is unsuccessful in contention on appeal. (S. C.) 5.

COUNTIES.

See, also, "Highways."

Citizens and taxpayers of county may interpose in proceedings to relocate county seat. (W. Va.) 8.

When result of county seat election is declared by county court, and entered on record book, the place named by electors becomes county seat. (W. Va.) 8.

Special session of county court can be held only when notice of time and purposes have been posted two days before. (W. Va.) 8.

To give special session of county court jurisdiction, the record must show posting of notice and the purposes of session. (W. Va.) 8.

A special meeting of the justices of the peace, not called by the board of commissioners, is unauthorized and void. (N. C.) 84.

County commissioners who have, by mistake of law, directed a greater proportion than one-fourth of the capitation tax to be applied to the support of the poor, are not liable either as individuals or as a corporation. (N. C.) 661.

The nine cents appropriated to the payment of pensions to Confederate veterans, under Laws 1891, c. 323, must be deducted from the 25 per cent. of the total tax appropriated by county commissioners to the support of the poor. (N. C.) 661.

Limitation of powers of county court to contract indebtedness. (W. Va.) 373.

A county court cannot bind levies of future years for improvements on roads and bridges without submission to people. (W. Va.) 373.

A contractor dealing with county court is charged with notice of its limited powers. (W. Va.) 373.

A board of commissioners is not required to hear claims as a court. (S. C.) 794.

Gen. St. § 623, providing that nothing in it shall prevent a board from disallowing, as incorrect, any account, nor from requiring further evidence of its truth, does not require the board to hear other testimony. (S. C.) 794.

An assignee of a void claim against a county court has no greater rights than his assignor. (W. Va.) 373.

COURTS.

See, also, "Justices of the Peace;" "Removal of Causes."

The supreme court of appeals cannot review a decision in matter of correction of tax assessment. (W. Va.) 632.

The lessee of a railroad partly within and partly without the state can be sued in the state for personal injuries sustained in the other state. (Ga.) 306.

Under statute that a city court shall come into existence upon the report of grand jury recommending same, a city court so established has jurisdiction, though senate has not confirmed the judge appointed to preside. (Ga.) 992.

The superior court has jurisdiction of an action not founded on contract, though property sued for is worth less than \$50. (N. C.) 341.

The criminal court has jurisdiction of indictment for retailing spirituous liquors, under Code, § 1076. (N. C.) 387.

A circuit court has control over all proceedings had during the same term, or in the office during the preceding vacation. (W. Va.) 748.

Where, at the time of the commission of an offense, jurisdiction was in justices of the peace alone, the superior court does not acquire jurisdiction because it had cognizance of such offense when indictment was found. (N. C.) 707.

The fact that the clerk directed to appoint a special term fails to post a copy of the warrant at the courthouse door does not invalidate the proceedings of the term. (W. Va.) 734.

COVENANTS.

In action for breach of warranty, eviction of plaintiff under paramount title is not sustained by mere proof that he surrendered possession under a judgment against him in ejectment. (Ga.) 994.

Action on covenant—Sufficiency of answer. (S. C.) 229.

CREDITORS' BILL.

See, also, "Fraudulent Conveyances."

May be filed under Code, § 3149, against all corporations not municipal, as well as traders generally. (Ga.) 160.

CRIMINAL LAW.

See, also, "Arrest;" "Bail;" "Indictment and Information;" "Jury;" "Witness."

Crimes of married woman, see "Husband and Wife."

Increased sentence on second conviction, see "Constitutional Law."

Jurisdiction, see "Courts."

—of justice, see "Justices of the Peace."

Obstruction of highway, see "Highways."

Particular crimes, see "Abortion;" "Affray;" "Assault and Battery;" "Bastardy;" "Burglary;" "Disturbance of Public School;" "Escape;" "False Pretenses;" "Gaming;" "Homicide;" "Intoxicating Liquors;" "Kidnapping;" "Larceny;" "Perjury;" "Rape;" "Robbery;" "Seduction."

An accused not in custody may be arrested and confined in jail for the payment of the fine before a fieri facias has been issued. (Va.) 838.

A charge that drunkenness, while not an excuse for crime, is a fact which may be proven to throw light on other facts, is not error, though drunkenness was set up to show physical inability to do the act complained of. (Ga.) 992.

Jurisdiction.

The courts of South Carolina have jurisdiction of defendant for the offense of advising a woman of that state to take a drug to cause her to abort, though the drug was procured in another state, and sent to the woman by mail. (S. C.) 853.

Motion to quash.

Court may refuse to quash indictment because of disqualification of grand juror, if motion made after plea. (N. C.) 507.

The hearing of a motion to quash an indictment is not a part of the trial. (S. C.) 1021.

An indictment will not be quashed because of disqualification of a grand juror. (W. Va.) 748.

Pleas.

It is too late to file a plea of misnomer at the close of the evidence introduced by the state. (Ga.) 545.

On indictment for illegal sale of liquor, the plea of guilty may be entered without formally withdrawing a prior plea of not guilty. (W. Va.) 734.

—Former jeopardy.

The fact that the court discharged a juror because of the death of his mother, and directed a mistrial, is not a sufficient predicate for a plea of former jeopardy. (Ga.) 847.

Continuance.

The grant of a continuance is within the discretion of the trial court. (S. C.) 797.

Continuance at request by prosecution—Right to speedy trial. (Va.) 282.

A continuance for absent witness improperly refused because court does not credit prisoner's statement. (Va.) 273.

Sufficiency of showing on motion for continuance. (Ga.) 553.

When continuance should be granted for the illness of a witness. (Va.) 841.

Conduct of trial.

The court has discretion whether to compel an election between a count for larceny and one for receiving stolen goods. (N. C.) 515.

Where solicitor general is rebuked for improper remarks to witness, there is no new cause for trial. (Ga.) 303.

The prosecution need not call all the witnesses present at commission of crime or named on indictment. (Va.) 440.

A witness present at commission of crime, and named on the indictment, if called by the court, is not a witness for or against defendant. (Va.) 440.

It is not reversible error for a judge to absent himself from the court room without suspending trial for a few minutes, for a necessary purpose, during arguments of defendant's counsel. (Ga.) 536.

Where counsel states irrelevant facts not in the evidence, it is no cause for new trial that the judge, forbidding a repetition of the statement, expresses his own knowledge of the real fact. (Ga.) 536.

A remark by a prosecuting attorney, in reply to one of defendant's counsel that defendant was a respectable white man, that he was a colored man, and, if defendant was, the jury would convict him in five minutes, if error, is cured by an instruction that the question was only whether the evidence satisfied the jury that defendant was guilty. (N. C.) 971.

Where jury were kept under charge of officer from the time they were impaneled until verdict rendered, there was no error in not instructing them, on adjournment at night, not to discuss the case. (Ga.) 536.

An issue to be determined by inspection of the record must be tried by the court. (W. Va.) 748.

A person charged with a misdemeanor may be tried therefor in his absence. (S. C.) 797.

An accused duly summoned may be tried for a misdemeanor in his absence without the award of a *capias* for his arrest. (Va.) 838.

Evidence.

Where a witness had traced before the jury the peculiarities of the foot of accused, and had shown how such peculiarities were reproduced in a track, it was error for him to express his opinion that the track was made by accused. (S. C.) 933.

There is no presumption as to the truth of a statement of defendant in a criminal case. (Ga.) 154.

Circumstantial evidence is sufficient to convict, if the jury believe, beyond a reasonable doubt, in defendant's guilt. (S. C.) 1021.

— Confessions and admissions.

Confessions by accused—Competency as evidence. (Ga.) 302.

Confessions made by defendant after his arrest by detective, on being told by latter that he knew what he had done, and advising him how to escape, were admissible. (Ga.) 154.

Confession is inadmissible if made under influence of statement by officer that confession may lighten punishment, and magistrate advises him to tell the truth if he tells anything. (N. C.) 166.

A confession by a conspirator after the conspiracy is ended binds him, but not his co-conspirator. (S. C.) 933.

Accused's admissions before magistrate are admissible if previously instructed that he need not answer questions. (N. C.) 507.

Admissions of prisoner are admissible, though officer had pointed pistol at him. (N. C.) 507.

The admission of evidence furnished by defendants against themselves under compulsion is not prejudicial, where it is stricken out, and the jury instructed not to record it. (S. C.) 1021.

Instructions.

It was not error for the court to make general observation showing the advance in the law relating to the crime with which defendant was charged. (S. C.) 1025.

The omission of instruction as to drunkenness, when charge not requested, is not error. (Ga.) 305.

The omission to give an instruction not asked for is not error. (N. C.) 394.

It is not error to say that the law "permits" the prisoner's statement to go to the jury along with the evidence. (Ga.) 140.

It is not error to caution the jury not to be influenced by public opinion in favor of or against the accused. (Ga.) 140.

A charge on reasonable doubt, followed by a statement that in legal investigation, "however," mathematical certainty is not obtainable, is not erroneous. (Ga.) 140.

An instruction that the jury must take the law from the judge is not error. (Ga.) 298.

Where the attention of the court is not called to an omission in charge, and the general charge is full and correct, there is no error. (Ga.) 298.

In charging on the prisoner's statement court should give all the provisions of the statute. (Ga.) 303.

The court may charge that the jury must make a designated finding if they believe certain witnesses. (N. C.) 394.

A charge stating the claims of the state is not an infringement of the rule forbidding the judge to intimate his opinion on the evidence. (Ga.) 536.

Defendant cannot complain of an error in a charge allowing his conviction for a less crime than the evidence warrants. (N. C.) 692.

One convicted of misdemeanor cannot complain of failure to give charges not asked for. (S. C.) 891.

Where defendant fails to appear at trial for misdemeanor, he cannot complain of failure to give charge for his benefit. (S. C.) 892.

Where defendant offered no evidence, and that of the state was uncontradicted, the recital of such evidence in the charge was not a charge on the facts. (S. C.) 1025.

An instruction which has no application to the evidence or the prisoner's statement should be denied. (Ga.) 298.

Testimony that defendant, after consulting lawyers, began "fixing up a defense," warranted a charge that defendant saw fit, after taking advice, to stand his ground. (S. C.) 1025.

An instruction inapplicable to the facts should be denied. (N. C.) 394.

A charge not based on the evidence should be denied. (Ga.) 536.

— Credibility of witnesses.

A charge that there is a *prima facie* presumption that witnesses not impeached tell the truth is not error. (Ga.) 154.

It is proper to refuse instruction that detective's testimony is to be received with great caution and distrust. (S. C.) 886.

A charge on the credibility of the evidence is error. (N. C.) 692.

Instructions as to credibility of witness tendered by the state and impeached. (Ga.) 550.

Instructions as to credit to be given to testimony of accomplice considered. (N. C.) 515.

— Recalling jury.

A jury may be recalled after they have retired, to be instructed as to the form of the verdict. (Ga.) 536.

Custody and conduct of jury.

That the attending bailiff remained in the room all night with the jury at the hotel where they were lodged will not vitiate the verdict, when the room was used merely as a place for sleeping. (Ga.) 154.

That one of the jurors repeated to the attending bailiff a message to his son, who was with in hearing, will not vitiate the verdict. (Ga.) 154.

That two jurors left the room in charge of bailiff for a short while, and the jurors in the room were not attended by an officer, will not vitiate the verdict, when none of them had intercourse with outsiders. (Ga.) 154.

Remark of bystander overheard by juror.

Question whether the fact that one of the jury who were going to dinner in charge of bailiff heard a remark by a bystander was ground for new trial. (Ga.) 140.

Verdict.

A special verdict in a prosecution for violating a city ordinance, which fails to set forth the provision violated, is fatally defective. (N. C.) 200.

Where the jury rendered a special verdict, and the court adjudge defendant not guilty, no formal verdict is necessary. (N. C.) 700.

Directing verdict.

It is error to direct a verdict of guilty. (N. C.) 657.

Though evidence for state is uncontradicted, court cannot direct clerk to enter verdict of guilty. (N. C.) 168.

Impeachment of verdict.

Recommendation to mercy does not impeach verdict. (S. C.) 886.

— By jurors.

Jurors cannot give evidence to impeach their verdict. (Ga.) 154.

The affidavit of a juror cannot be considered to impeach the verdict. (S. C.) 886.

Judgment and sentence.

A judgment cannot be arrested except for errors apparent in the record. (W. Va.) 748.

One charged with a misdemeanor may be sentenced in his absence. (Va.) 838.

New trial.

A new trial for newly-discovered evidence will not be granted where there is no affidavit that it was unknown at time of trial. (Ga.) 557.

A new trial was properly refused for newly-discovered evidence simply cumulative. (Ga.) 550.

New trial will be granted when newly-discovered evidence, if believed, would warrant acquittal. (Ga.) 303.

A new trial will not be granted for newly-discovered evidence, simply to impeach state's witnesses. (Ga.) 401.

Court may refuse new trial for newly-discovered evidence that witness for state was hostile to defendant. (N. C.) 507.

A new trial will not be granted because bills of indictment were received in evidence, there being no objection made at the time. (Ga.) 435.

That bailiff advised accused to go to trial without counsel and without jury is no cause for a new trial. (Ga.) 550, 551.

The use of improper remarks by counsel for state in argument is not ground for new trial, where verdict is as favorable to accused as evidence warrants. (Ga.) 987.

Appeal and error.

Where a judgment is affirmed, and the case remanded, the appellate court loses jurisdiction; but, on appeal from an order of the lower court refusing to hear a motion for new trial, it retains jurisdiction, and can suspend the appeal, and grant the trial court leave to hear the motion. (S. C.) 676.

Counsel may on appeal agree on and sign brief, and file it as returned, so as to give supreme court jurisdiction. (S. C.) 891.

A request for time to except to a charge should be denied where applicant has had five months in which to prepare his exceptions. (S. C.) 797.

Bill of exceptions must be tendered and signed within 20 days of rendition of decision. (Ga.) 649.

A bill of exceptions must be signed and certified within 20 days from the date of the judgment, and the fact that the judge was absent during that time will not avail. (Ga.) 558.

Where there is a repugnancy between the record and the case stated, the record will control. (N. C.) 707.

Record must be transmitted within 15 days after service of bill of exceptions on adverse party. (Ga.) 648, 649.

An entry on order book that defendant excepted to ruling will not supply the place of bill of exceptions. (Va.) 440.

Alleged error in admitting evidence cannot be reviewed when not set out in motion for new trial or bill of exception. (Ga.) 401.

Where the evidence excepted to is not incorporated into the record, its admission cannot be reviewed. (S. C.) 853.

Appeal and error—Review.

Affidavits on new trial cannot be considered on appeal unless facts have been found and placed on record. (N. C.) 507.

Where several grounds of complaint are made that evidence was admitted over objection, but the objection is not stated, it will not be considered. (Ga.) 545.

Error in rejecting evidence will not be considered where it does not appear what was proposed to be briefed. (Ga.) 553.

Objections to evidence, not stating what the evidence objected to was, will not be considered. (Ga.) 555.

Error in trying together pleas of former conviction and not guilty will not be reviewed where no exception was taken. (N. C.) 657.

Where the evidence, though not conclusive, authorizes the verdict, a refusal to grant a new trial will not be reviewed. (Ga.) 555.

A verdict on conflicting evidence will not be disturbed. (Ga.) 979.

Denial of a new trial for insufficiency of evidence cannot be reviewed. (S. C.) 886.

On prosecution for misdemeanor, variance cannot be first objected to on appeal. (S. C.) 891.

Increasing punishment on appeal.

On appeal from conviction before justice, the superior court may impose a heavier punishment. (N. C.) 256.

Cruelty.

As ground for divorce, see "Divorce."

CUSTOM AND USAGE.

In action for injuries through misplaced switch, defendant cannot show the custom of railroads as to providing watchmen for each switch. (Ga.) 18.

In action against a railroad company for injuries received while crossing a street, evidence of the custom of pedestrians in crossing a street is incompetent. (Ga.) 816.

DAMAGES.

Caused by exercise of power of eminent domain, see "Eminent Domain."

For malicious prosecution, see "Malicious Prosecution."

For wrongful attachment, see "Attachment."

A passenger injured by negligence of carrier's servants may recover for the pain he will probably endure in the future. (Ga.) 64.

As the earnings of a wife belong to her husband, her personal damages can be measured only by the enlightened conscience of an impartial jury. (Ga.) 11.

\$7,500 not excessive where plaintiff's thigh is crushed and his leg shortened. (Va.) 278.

Evidence of damage—Error in telegram. (Ga.) 287.

In action for damages, plaintiff may write off from her recovery any sum she may desire. (Ga.) 406.

DEATH BY WRONGFUL ACT.

The right of action under the statute is not confined to residents of the state. (Ga.) 406.

It is no bar to suit by a mother for death of minor child that the father has a suit pending. (Ga.) 406.

Evidence of the father's inability to labor is admissible in behalf of the mother. (Ga.) 406.

Where father, mother, and minor children live together, and are dependent upon the labor of the family, a child of 15 years, whose labor contributes to the mutual support, is to be considered as contributing to support of mother. (Ga.) 406.

Decedents.

See "Executors and Administrators."
Transactions with, see "Witness."

Declarations.

See "Evidence."

DEED.

See, also, "Fraudulent Conveyances;" "Vendor and Purchaser."

Acknowledgment of, see "Acknowledgment."

On issue as to capacity to make deed, charge as to law of testamentary capacity is rightly refused. (Ga.) 527.

The presumption is that the grantor was sane, and competent to execute. (W. Va.) 383.

Where grantor, though old and feeble, understands the nature of his act, his deed is valid. (W. Va.) 383.

A description of the vendees as "trustees," where no trust is declared, is surplusage. (Ga.) 548.

A stranger to a deed cannot urge, as an objection to its validity, that it was executed for the sole purpose of enabling the grantee to maintain ejectment. (Ga.) 830.

Deed or will.

Instrument construed to be a deed reserving a life estate, and not a will. (Ga.) 527.

Description.

Deed conveying portion of timber on certain swamp, and providing that grantor may retain enough for certain purposes, is void for indefiniteness. (N. C.) 72.

Sufficiency of description to cover three separate tracts which are mentioned as lying in one body, but of which the specific boundaries are given. (N. C.) 165.

Presumption from misdescription in deed. (Ga.) 404.

A description of a tract as "left me by 'P.,'" and as "adjoining the land of 'S.,'" containing 180 acres, is not void for uncertainty. (N. C.) 339.

Sufficiency of description. (Ga.) 830.

Recording and delivery.

A prior recorded deed takes precedence of a deed afterwards recorded, though the latter was executed first. (N. C.) 964.

The recording of a deed does not constitute delivery where there was no intention so to do. (Ga.) 404.

Construction and effect.

Construction—Rights conveyed. (Ga.) 370.

By accepting a conveyance of land "more or less," grantee waives any mistake and exception as to quantity. (Ga.) 355.

A provision that the land is not to be sold during the grantee's life, and then to belong to her heirs, is void, as a restraint on power of alienation. (N. C.) 668.

By a deed of trust in fee of a wife's land to secure the joint indebtedness of the husband and wife, who join in the deed, the trustee

takes fee simple, though deed recites that wife's joinder is for purpose of releasing dower and homestead. (N. C.) 668.

By a deed to a person and her heirs and assigns, forever, with a provision that the land is "not to be sold during her life, then to belong to her heirs," the grantee takes a fee simple. (N. C.) 668.

Sufficiency of deed to convey an equitable fee, though words of inheritance are omitted. (N. C.) 713.

Default.

See "Judgment."

Defective Streets.

See "Municipal Corporations."

Demurrer.

See "Pleading."

To evidence, see "Trial."

DEPOSITION.

A commissioner to whom an account is referred may take depositions without giving special notice. (W. Va.) 960.

Effect of notice by defendant's attorneys as to taking depositions in distant state on same day as depositions in plaintiff's suit. (Va.) 195.

Answers to interrogatories of nonresident witness should not be read to jury if witness is in attendance. (Ga.) 18.

Answer cannot be first objected to while defendant is introducing testimony, no objection in writing having been made and notice given defendant. (Ga.) 25.

Where record does not show that objection to interrogatories was presented before the trial, they will not be considered on appeal. (Ga.) 360.

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators;" "Wills."

Children by the second marriage of a man, whose first wife had left him, and gone to another state, are legitimate, though born before the first marriage was dissolved. (Va.) 841.

Description.

In deed, see "Deed."

In mortgages, see "Mortgages."

Detinue.

See "Replevin."

Devise and Legacy.

See "Wills."

Discharge.

Of insolvent, see "Bankruptcy."

DISCOVERY.

A borrower of money may compel a discovery on oath of the money lent, and the interest and consideration of the same. (W. Va.) 810.

Evidence of adverse party taken before trial need not be used. (N. C.) 328.

An order to furnish papers for inspection should not be granted on affidavit alleging that they "contain evidence relating to the merits of the action." (S. C.) 929.

An order to furnish papers for inspection will not be granted where no demand and refusal are shown. (S. C.) 929.

A penalty for refusing to obey order to produce papers for inspection should not be imposed, until it is shown that refusal was without good reason. (S. C.) 929.

Dismissal.

Of appeal, see "Appeal."

Dissolution.

Of corporation, see "Corporations."

DISTURBANCE OF PUBLIC SCHOOL.

To take possession of a schoolhouse, when there are no pupils present, and forbid the teacher to use the building, is not disturbance of a school, within the statute. (N. C.) 700.

DIVORCE.

Evidence of brutal treatment justifying a divorce, and the grant to plaintiff of the custody of the children. (Va.) 193.

The provision that allegations of complaint shall be deemed denied though no answer is filed, does not apply to application for alimony. (N. C.) 334.

Notice of application for alimony not invalid because it does not specify time and place of hearing. (N. C.) 334.

In fixing alimony for wife, when she is granted custody of children, the education of the latter may be considered as item of expense. (Va.) 193.

Case in which allowance of \$1,000 annually for wife's maintenance and education of children was considered excessive, in view of amount and character of husband's property. (Va.) 193.

A sentence of imprisonment for contempt in refusing to pay alimony, affirmed where order for alimony not appealed from. (N. C.) 334.

Documents.

See "Evidence."

DOMICILE.

The presumption is that one's domicile remains unchanged. (N. C.) 691.

DOWER.

A wife in her husband's lifetime cannot have dower allotted to her in land sold on execution against him. (Ga.) 318.

Druggists.

Sale of liquor, see "Intoxicating Liquors."

Drunkenness.

See "Criminal Law."

EASEMENTS.

One trespassing on a private way is liable for injury done to the way or to land by its wrongful use. (Ga.) 370.

One having a mere right of way cannot recover for damage done to the freehold. (Ga.) 370.

Ejection.

Of passengers, see "Carriers."

EJECTMENT.

See, also, "Adverse Possession."

In ejectment by a wife, defendant cannot object to evidence that plaintiff's husband, who had paid for the land, had assigned to her a contract of purchase. (S. C.) 690.

Sufficiency of evidence to support. (Ga.) 830.

Character of judgment when defendant claims undivided one-third as tenant in common with plaintiffs, and latter show title to undivided two-thirds only. (N. C.) 73.

Election.

Between counts, see "Criminal Law."

ELECTION OF REMEDIES.

The fact that a party to a contract sues to reform it does not defeat his right to sue for its specific performance. (N. C.) 947.

EMINENT DOMAIN.

Where landowner institutes proceeding to assess damages for taking of railroad right of way, he need not allege that parties are unable to agree as to value of land. (N. C.) 171.

Under Code, §§ 1947, 1949, rights of all parties interested in land taken for railroad right of way should be adjusted in one proceeding. (N. C.) 171.

After grant of right of way by joint owner, his cotenant may begin suit to assess damages sustained by him. (N. C.) 171.

If all persons interested make themselves parties, a demurrer will not be sustained to petition for defect of parties. (N. C.) 171.

The record need not show in terms that a jury in a proceeding to take land for public use were freeholders. (W. Va.) 957.

Use of street by railroad under license from city—Rights of abutting owner. (N. C.) 330.

If market value of abutting property after building railroad in street is same as before, owner cannot recover damages. (W. Va.) 604.

The owner of land abutting on a street may recover for depreciation in value caused by building railroad in street. (W. Va.) 604.

Evidence of donation of similar property to plaintiff cannot be shown. (Va.) 901.

Measure of damages in condemnation of land and improvements thereon. (Va.) 901.

Construction of charter of railroad company. (Acts 1854-55, c. 225, §§ 24, 26, 28.) Presumption of grant of right of way arising when there is no contract with landowner. (N. C.) 653.

EQUITY.

See, also, "Creditors' Bill;" "Fraudulent Conveyances;" "Injunction;" "Mortgages;" "Partition;" "Partnership;" "Receivers;" "Specific Performance;" "Trusts."

Remedy for erroneous taxation, see "Taxation."
Suit by master for specific performance, see "Specific Performance."

Jurisdiction.

A bill for an accounting will be dismissed where plaintiff has an adequate remedy at law. (W. Va.) 579.

Equity alone has jurisdiction of an action in which the petition alleges that land was purchased with trust funds belonging to plaintiffs; that it was sold by the court with knowledge of this fact; and that the purchasers had constructive information of the trust. (Va.) 869.

Reformation of contract.

Deed will not be reformed to correct alleged misdescription when true construction of description gives plaintiff all the land he claims. (N. C.) 165.

Rescission of contracts.

To justify rescission for fraud, concealment must be willful suppression of facts party is bound to disclose. (Va.) 916.

A deed given in consideration of future support will not be canceled where the only ground is dissatisfaction with the character of the support furnished. (W. Va.) 732.

Where a mining lease was entered into under a mutual mistake as to the existence of coal, it will be rescinded. (W. Va.) 493.

A mistake of law is no ground for relief from covenants in mortgage. (S. C.) 229.

Old age is not evidence of incapacity to make deed. (W. Va.) 383.

If deed is made partly for love and affection, disproportion of money consideration raises no presumption against validity. (Ga.) 527.

There is no presumption against validity of deed to one who is in effect an adopted son, because there is no blood relationship. (Ga.) 527.

Pleading.

Pleading may follow the chancery practice used before enactment of Code, c. 125, § 37. (W. Va.) 468.

Sufficiency of pleading in action to set aside deed as obtained by undue influence, and for an accounting. (Ga.) 421.

Two distinct grounds of relief must not be joined in the same bill. (W. Va.) 611.

A bill may be framed with a double aspect, and ask relief in the alternative, but the states of facts must not be inconsistent. (W. Va.) 611.

Bill must in some way make parties plaintiff or defendant. (W. Va.) 468.

Where plaintiffs desire any relief other than that specially prayed for, the bill must contain a prayer for general relief. (W. Va.) 757.

A demurrer may be incorporated in answer. (W. Va.) 468.

Special demurrers are abolished. (W. Va.) 468.

A demurrer need not specify causes. (W. Va.) 468.

Where causes of demurrer are not specified, court may ask an assignment of errors, or, on overruling demurrer, state that none were assigned. (W. Va.) 468.

Answers and other pleadings, except in case of injunction, can be filed only at rules or in court. (W. Va.) 611.

It is error to refuse permission to file answer after rendition of final decree, but before its entry. (Va.) 914.

A bill to prevent a third party from removing trust property from the state may be amended

by making new parties defendant, and showing the necessity for an accounting and for aid in administering the trust. (W. Va.) 757.

Parties.

In suit between sureties for contribution, the heirs of a dead insolvent cosurety are not necessary parties. (W. Va.) 485.

Intervention.

In an accounting as to certain lands, one claiming an interest, under a deed from plaintiff, as having paid for the lands, can intervene. (N. C.) 701.

Decree.

Where, on accounting, plaintiff owes defendant a certain sum yearly, in excess of the interest due on the debt owed by defendant to plaintiff, the sum due by plaintiff should be applied each year on the interest of the debt due by defendant, and the balance on the principal. (S. C.) 1030.

Error, Writ of.

See "Appeal;" "Certiorari;" "Exceptions, Bill of;" "New Trial."

ESCAPE.

Where prisoner was allowed to escape by assistant of defendant officer, the question was whether defendant was duly careful in selecting assistant. (N. C.) 69.

ESTOPPEL.

See, also, "Election of Remedies."

Res judicata, see "Judgment."

To deny landlord's title, see "Landlord and Tenant."

In an accounting for proceeds of land conveyed to defendant, and sold by her, plaintiff is not estopped by a prior deed of an undivided interest to defendant's agent. (N. C.) 701.

A junior chattel mortgagee who induces the senior mortgagee to release his mortgage and take another is estopped from asserting his mortgage as the prior lien. (N. C.) 203.

A tenant in common is not estopped by declarations of a cotenant made without authority. (N. C.) 73.

When mortgagee is not estopped by representations of his attorney to mortgagor as to the legal effect of the terms of the mortgage. (S. C.) 229.

By acquiescence and retention of benefits. (W. Va.) 744.

That plaintiff consented that title to land which he bought should be taken by defendant will not defeat his right to have a resulting trust declared. (N. C.) 712.

EVIDENCE.

See, also, "Boundaries;" "Damages;" "Death by Wrongful Act;" "Deposition;" "Fraudulent Conveyances;" "Negligence;" "Payment;" "Witness."

Declarations, see "Boundaries."

In criminal cases, see "Burglary;" "Criminal Law;" "Homicide."

Parol, see "Negotiable Instruments."

Secondary, see "Boundaries."

Tax deed as evidence, see "Taxation."

Testimony of plaintiff as to his conversation with another is admissible as corroborative of his testimony on the trial. (N. C.) 209.

Plaintiff cannot testify as to data for which he has to refer to certain books which were

kept partly by himself, and partly by another. (Ga.) 24.

Relevancy. (Ga.) 311.

The fact that boys pointed out a hole to plaintiff's husband as the one into which she fell is inadmissible. (Ga.) 11.

Information furnished by agent of railway company as to past transactions is inadmissible, when furnishing such information is not within agent's employment. (Ga.) 24.

Where issue is as to usury, and the testimony is conflicting, defendant cannot ask his own witness if plaintiff has not the reputation of suing for usury. (N. C.) 711.

Where witness states that he went to scene of the tort after making certain purchase, the opposite party can show that he made no such purchase. (Ga.) 22.

Judicial notice.

The court cannot take judicial notice that rice beer is intoxicating. (Ga.) 288.

Presumption.

It will be presumed that a married woman who joined her husband in a deed of land had, or claimed, title. (Ga.) 994.

In replevin, evidence by plaintiff that the articles in controversy were given to her before her marriage to defendant raises the presumption that it was solemnized under statutes enabling a married woman to acquire a separate estate. (N. C.) 200.

Sale on execution having been acquiesced in for 20 years, and the minutes having been destroyed, it will be presumed that the proper verdict was entered. (Ga.) 425.

It will be presumed that a debt for which land was sold without allotment of homestead was contracted after the constitutional provision for a homestead exemption. (N. C.) 691.

Secondary evidence.

Records of foreclosure proceedings may be shown by secondary evidence if loss is proven. Facts sufficient to show loss considered. (N. C.) 501.

A certified copy from the record after the original deed has been lost, though the copy be recorded where the land lies, is insufficient. (Ga.) 542.

Hearsay.

That it was generally reported that a certain person had become a resident of another state is hearsay. (N. C.) 691.

Declarations and admissions.

A party's declarations, made soon after the transaction in question, are only competent to corroborate his testimony. (N. C.) 701.

Declarations of payee of note after assignment as to amount due are inadmissible. (N. C.) 252.

Declarations of a deceased person cannot be received to defeat a title by prescription, complete in persons who never heard of such declarations. (Ga.) 13.

In suit by widow on antenuptial contract of husband, will of latter is not evidence as to discharge of contract by him. (Ga.) 39.

If contract sued on is claimed to be one of partnership, declarations of deceased, after his death, showing whether plaintiff was his partner, are not admissible. (N. C.) 79.

Declarations by agent having authority to borrow money are admissible to show the purpose of the loans. (Ga.) 366.

Conversation between the parties is admissible, though brought about by plaintiff through a proposition of settlement. (Ga.) 366.

Admissions in answer are admissible against defendant in another suit. (Ga.) 311.

Defendant may make use of allegations in plaintiff's declaration without offering the declaration in evidence, or proving the allegations. (Ga.) 18.

Opinion evidence.

Of attorney as to intention of parties as to covenants in a mortgage inadmissible. (S. C.) 229.

The opinion that defendant in an action for negligence was not as careful as he should have been, inadmissible. (Ga.) 311.

A witness need not have peculiar scientific knowledge to testify whether a certain person has African blood. (N. C.) 55.

In action by passenger on freight train, person present, who has had experience on same railway, can testify that car was not going fast, and that the jolt which injured plaintiff was not unusual, or sufficient to throw a man down. (Ga.) 64.

Where a surveyor, as an expert, has fully explained the plat, he cannot testify whether any other person than those he mentioned got any land, it being an opinion as to facts. (S. C.) 680.

Documents.

President of Board of Trustees of Clemson College can identify records of department of agriculture. (S. C.) 264.

Minutes of town commissioners' proceedings are admissible to show the point of intersection of two streets. (N. C.) 92.

The registry of a contract for the sale of land may be received in evidence. (N. C.) 91.

In order for an issue as to the genuineness of a deed to be made for separate trial, it is necessary that the deed be recorded in the county in which the land in controversy lies. (Ga.) 542.

A sketch of a plat made by a grantor, and annexed to his deed, is admissible in illustration. (S. C.) 680.

A deed more than 30 years old, and coming from the proper custody, and recorded, is admissible, without proof of its execution. (Ga.) 830.

A diagram made by a witness, and shown by him to be correct, is admissible. (W. Va.) 782.

Proof of foreign judgment.

Judge's certificate as to clerk's attestation of copy of record of foreign judgment is conclusive. (N. C.) 500.

Parol evidence.

Of oral agreement will not be excluded where written contract made at same time refers to a different subject. (W. Va.) 378.

Execution and return thereon cannot be proved orally unless their absence be explained. (N. C.) 106.

Admissibility of parol evidence as to loss of seal on document. (Ga.) 530.

Parol evidence to show collateral agreement postponing a contract until the happening of a contingency is admissible. (N. C.) 693.

Where a deed describes the land as bounded by that of persons named "and others," parol evidence is admissible to show who "the others" are. (S. C.) 680.

In ejectment by a wife on a contract of purchase made by her husband with one deceased, receipts from deceased, not showing that they related to the land in dispute, are admissible with parol explanation. (S. C.) 680.

Proof of handwriting.

Qualifications of experts on handwriting considered. (N. C.) 507.

Affidavit made by accused is proper exemplar for comparing handwriting. (N. C.) 507.

Examination.

See "Witness."

EXCEPTIONS, BILL OF.

See, also, "Appeal;" "Certiorari;" "New Trial."

Corrections by judge of brief of evidence by erasures sufficient. (Ga.) 294.

Inexcusable neglect in settling. (Ga.) 294.

Excessive Damages.

See "Damages."

Excusable Homicide.

See "Homicide."

EXECUTION.

See, also, "Attachment;" "Garnishment;" "Judicial Sales."

Leave to issue execution against decedent's estate on judgment rendered against him in his lifetime will not be granted. (N. C.) 329.

An execution on a judgment two years after its rendition, without an order of court, is void. (W. Va.) 476.

An estate for life by will in land, which can be enjoyed without interfering with remainder, is liable on execution. (Ga.) 425.

A judgment creditor whose debt is secured by conveyance of the land, he having made a bond to reconvey, cannot levy on the land until reconveyance to debtor. (Ga.) 399.

Goods delivered to agent, to be sold on commission, are not liable on execution against agent. (W. Va.) 482.

Where animal levied on, and released to claimant on giving bond, falls into hole on claimant's premises, the latter is not freed from liability. (Ga.) 23.

In action on forthcoming bond, a plea alleging the death of the animal levied on, but not averring that it arose from the act of God, should be stricken out. (Ga.) 23.

An execution and a levy in the circuit court after appeal, but before the return is filed, are not void for want of jurisdiction. (S. C.) 790.

Sale.

Personal property should be present at sale in officer's possession. (N. C.) 335.

Sale under writ issued after owner's death is void if no scire facias is issued. (N. C.) 505.

A sale of interest in land of one entitled to a homestead without allotting it is void. (N. C.) 691.

Affidavit of illegality.

Where a judgment is wholly void, an affidavit of illegality is a proper remedy as to an execution issued thereon. (Ga.) 137.

An affidavit of illegality to an execution issued upon foreclosure of a chattel mortgage, alleging that defendant is not legally indebted to plaintiff, and that the mortgage foreclosed is without consideration, is good. (Ga.) 830.

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EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution;" "Wills."

The appointment of an administrator with will annexed not void because executor had duly qualified. (Ga.) 311.

The right of a husband to administer his wife's estate is not affected by a contest over her will, which named no executor. (N. C.) 689.

A husband may have another appointed co-administrator with him of his wife's estate. (N. C.) 689.

Where an executor, having power to sell, withdraws from the estate more than is his share, judgment against him personally is no lien upon the estate. (Ga.) 402.

Liability of surety on bond to pay costs and damages—Release by administrator of plaintiff. (N. C.) 327.

Claims against estate.

An executor who has notice of claim cannot justify his failure to produce assets to pay it by setting up that what he retained depreciated in value, pending suit. (Ga.) 39.

Claim for deficiency on foreclosure sale does not rank as judgment, if sale not made till after deceased's death. (S. C.) 640.

Settlement and accounting.

Where there is no evidence of appropriation of assets by executor he is not chargeable with interest. (N. C.) 96.

Where administrator reduced personalty to money from 1862 to 1864 and paid the debts, the balance was properly scaled at three dollars for one dollar. (N. C.) 96.

Executor should not be allowed fee for attorney if he does not ask it. (S. C.) 640.

Sales under order of court.

An order of sale granted to an administrator, but not executed by him, may be executed by an administrator de bonis non who succeeds him. (Ga.) 62.

Though separate sale of timber on testator's land is not authorized by order, the order is admissible in favor of the purchaser, together with receipt of the purchase money, as against later purchaser of land. (Ga.) 62.

Allowance to widow.

Allowance of support for five years to widow entitled to it for only one year is void as against a creditor of remainder-man. (Ga.) 63.

A widow, having whole estate for life, who, of her own will, keeps it together for over a year, there being no minor children, is entitled to allowance for only one year. (Ga.) 63.

EXEMPTIONS.

See "Assignment for Benefit of Creditors;" "Homestead."

Holder of a specialty executed by deceased before 1868 has no prior claim on proceeds of property exempt under act of that year. (S. C.) 640.

FACTORS AND BROKERS.

See, also, "Principal and Agent."

Where the contract had been made by a broker of purchaser, the goods consigned, and bill of lading sent by mail, the broker cannot rescind the contract. (Ga.) 363.

A single sale of land for a commission, without anything to show that the agent professed

to follow the business of selling for commission, will not make him a broker, under Code, c. 32, § 2. (W. Va.) 575.

An agent's right to a lien for commissions is not transferable. (W. Va.) 482.

FALSE PRETENSES.

Evidence of other similar transactions by defendant is admissible. (N. C.) 945.

It is no defense to a charge of inducing a county treasurer to cash an order as genuine that the order was for stationery for a county officer, where it had not been authorized by the county commissioners. (N. C.) 945.

Fellow Servant.

See "Master and Servant."

FENCES.

See, also, "Railroad Companies."

Question as to the day on which an election could be held on the question of "fence or no fence," under Code, § 1455, and amendments. (Ga.) 61.

When injunction against commissioners from proceeding under the fence laws will be granted. (S. C.) 938.

FERRY.

The owner of land on which the public ferry is situated is liable for the negligence of the ferryman. (Ga.) 311.

One of several owners of a ferry is liable for the negligence of the ferryman. (Ga.) 311.

Foreclosure.

Of mortgage, see "Mortgages."

Foreign Corporations.

See "Corporations."

Foreign Judgment.

See "Judgment."

Former Jeopardy.

See "Criminal Law."

Forthcoming Bond.

See "Replevin."

FRAUD.

See "Assignment for Benefit of Creditors;" "Fraudulent Conveyances."

The specific acts or language constituting the fraud must be alleged in a bill for relief on that ground. (W. Va.) 611.

FRAUDS, STATUTE OF.

As a defense must be pleaded. (N. C.) 337.

A receipt of part payment, coupled with possession, takes an oral contract out of the statute. (S. C.) 680.

FRAUDULENT CONVEYANCES.

What constitute.

Conveyance from parent to child, 21 years old, is not presumed to be fraudulent. (N. C.) 81.

Fraud may be inferred from deceptive statements, and from facts which would lead a reasonable man to believe that the conveyance was fraudulent. (W. Va.) 451.

Actions to set aside.

Unnecessary that execution should first issue on judgment, and return nulla bona should be had. (W. Va.) 375.

Action to set aside—Parties. (N. C.) 328.

Where land sought to be subjected as fraudulently conveyed is described only as in a certain county, it is too indefinite to authorize any proceedings therein. (W. Va.) 485.

Evidence.

Acts and declarations of the agent of alleged fraudulent grantee after execution of conveyance not admissible to show bad faith of grantee. (Ga.) 309.

The fact that the grantee did not return land for taxation admissible to show fraud. (N. C.) 328.

On an issue as to the good faith of a mortgage, the tax lists are competent to show that the mortgagee had no solvent credits. (N. C.) 206.

Sufficiency of evidence to establish fraud. (Ga.) 309.

Evidence as to the validity of a conveyance to wife considered. (Ga.) 525.

Sufficiency of evidence—Conveyance, without consideration, to son-in-law. (W. Va.) 451.

Where a mortgage was set aside as fraudulent, the sufficiency of the evidence of judgment debts, which were liens on the property, did not concern the mortgagee. (N. C.) 206.

Instructions.

An instruction that the law looks with suspicion on a conveyance by a debtor to a brother-in-law for an alleged pre-existing indebtedness is correct. (N. C.) 206.

Priorities on setting aside.

A party filing a bill to set aside fraudulent conveyance should be first satisfied out of proceeds, unless they are prior liens. (W. Va.) 375.

GAMING.

Tenpins is not a game of chance, the playing of which is a misdemeanor. (N. C.) 169.

Sufficiency of evidence under charge that defendant knowingly permitted persons to play at prohibited games in his house. (Ga.) 186.

On prosecution for betting on game of dice in public place, it is proper to charge that to allow money to be staked on game of dice is gambling. (S. C.) 891.

GARNISHMENT.

See, also, "Attachment."

A chief of police cannot be garnished for effects which came to his hands under his official authority. (Ga.) 1004.

The real owner of fund by equitable assignment may make claim thereto as against the garnishing creditor. (Ga.) 188.

GIFTS.

Between husband and wife, see "Husband and Wife."

Question whether parol gift of land for services rendered, accompanied by possession and purchase of materials for improvements, was complete as against donor's heirs. (Ga.) 59.

GUARANTY.

Of bonds of railroad by corporation—Sufficiency of consideration. (Ga.) 358.

Sufficiency of allegations in action against guarantor as to notice by the creditor of acceptance of defendant's guaranty. (Ga.) 158.

GUARDIAN AND WARD.

Guardian who allows administrator to take charge of real estate is liable for rents up to time land is sold to pay decedent's debts. (N. C.) 96.

Guardian is not personally liable for necessary expenses of resisting a motion to remove him. (N. C.) 94.

A guardian who fails to sue on a note due his ward's estate until the parties thereto are insolvent is liable. (N. C.) 96.

Guardian was not negligent because in 1865 he rented land, and hired out the slaves for Confederate currency. (N. C.) 96.

Guardian is not liable on bond because he fails to sue administrator who, during the war, paid simple contract debts with Confederate money, before applying it to higher class of debts, when, by emancipation, decedent's estate became insolvent. (N. C.) 96.

Where accounts were closed yearly, and transactions were in Confederate money, the scale was properly applied to the balance at the end of the war. (N. C.) 96.

Where ward, after majority, accepts proceedings of unauthorized sale by guardian, during minority, he cannot attack the sale, in the absence of fraud. (Ga.) 25.

Evidence and burden of proof in action on deceased guardian's bond. (N. C.) 96.

HABEAS CORPUS.

Burden on petitioners to show their detention illegal when in custody under mittimus regular on its face. (N. C.) 249.

A hearing will be continued to allow district solicitor to examine case. (N. C.) 249.

Handwriting.

Proof, see "Evidence."

Harmless Error.

See "Appeal."

HAWKERS AND PEDDLERS.

A person who sells stoves by sample, and takes orders, is not a peddler. (N. C.) 713.

Hearsay.

See "Evidence."

HIGHWAYS.

A road surveyor may change a county road with the consent of the owner of the land, and

the former road is discontinued to the extent of such alteration. (W. Va.) 782.

In action for damages for defects in road, complaint must disclaim contributory negligence. (S. C.) 936.

A criminal prosecution will lie against a railway for obstructing a county road. (W. Va.) 582.

HOMESTEAD.

Is liable on a judgment on a note given in renewal of note for purchase price. (Ga.) 313.

One is not entitled to homestead, as infant child of debtor, in land never lived on by such debtor. (S. C.) 636.

To entitle one to a homestead exemption, he must be an actual resident. (N. C.) 510.

Where, in action by judgment creditor to recover his reversionary interest in homestead of deceased judgment debtor, it does not appear that the debtor's children have attained majority, a nonsuit is proper. (N. C.) 666.

Burden of proof on issue as to the right to a homestead exemption, defined. (N. C.) 510.

HOMICIDE.**Murder.**

If an officer, without warrant, and without stating that he is an officer, attempts to arrest one for breach of the peace, the arrest is illegal, and, if the officer kills the person while resisting arrest, the crime is murder. (N. C.) 394.

One may be convicted of murder for aiding, though the person who did the killing has been acquitted. (N. C.) 715.

Where an officer, in resisting rescue, shoots a rescuer, the burden is on him to show matter of excuse. (N. C.) 394.

To reduce killing to homicide in self-defense, the accused must prove retreat, and killing to preserve life or save from great bodily harm. (Va.) 440.

Drunkenness of defendant cannot be considered in determining intent. (S. C.) 937.

Murder—Sufficiency of evidence. (Ga.) 298.

Sufficiency of evidence to establish crime of murder. (Ga.) 552.

Manslaughter.

Sufficiency of evidence to warrant conviction of manslaughter. (Ga.) 552, 553.

Sufficiency of evidence. (Ga.) 823.

Sufficiency of evidence to sustain conviction of manslaughter. (Va.) 440.

A conviction of manslaughter cannot be sustained if an instruction reciting facts as negating murder, which facts would negative manslaughter also, does not so state. (Ga.) 44.

Assault with intent to kill.

Shooting at an officer to prevent illegal arrest is not an assault with intent to kill. (Ga.) 305.

One who willfully inflicts on another a dangerous wound, from which death ensues in a year, is not relieved because the wound was aggravated by unskillful treatment. (Va.) 440.

Sufficiency of evidence of assault with intent to kill. (Ga.) 435.

Excusable and justifiable homicide.

The killing of another because of a past attempt to debauch the slayer's wife is not justifiable homicide. (Ga.) 987.

Defendant cannot avail himself of the right to protect his house, where he shoots his invited guest without notice to leave. (S. C.) 1033.

Justification of the killing another to resist arrest. (Ga.) 1018.

When justifiable—Killing paramour of wife. (Ga.) 298.

Where only one's safety is in question, he is bound to avoid bloodshed, if possible, by retreat. (S. C.) 940.

Where defendant puts himself in a position to defend against an attack by deceased, and his gun goes off accidentally, he is not guilty if he took care in holding the gun. (S. C.) 937.

An officer can use force to resist one attempting to rescue person lawfully in his charge. (N. C.) 394.

Excusable and justifiable homicide—Self-defense.

Where the accused goes into a room where deceased is, and provokes the quarrel, there is no question of self-defense. (S. C.) 940.

That defendant may avail himself of the plea of self-defense, it must appear that he believed there was no other probable means of escape. (S. C.) 1033.

Indictment—Joining principal and accessory.

The principal and the accessory before the fact may be charged jointly in one count of an indictment. (S. C.) 1021.

Evidence.

Testimony that, immediately after a fight, deceased said that he was shot and was killed, that he could feel the blood running inside of him, is admissible. (N. C.) 715.

Declarations of deceased shortly after injuries received, admissible. (Ga.) 301.

Competency of declarations by third persons as evidence. (Ga.) 553.

Paper found at defendant's room, of the same kind as used for gun wadding at the killing, was competent, where there was no evidence that defendant was compelled to furnish the paper as evidence against himself. (S. C.) 1021.

Admissibility of evidence. (N. C.) 394.

One who flees on approach of officer has no right to express information as to intent of officer to arrest him. (Ga.) 305.

Evidence admissible on trial for homicide in resisting arrest. (Ga.) 536.

Clear evidence of the corpus delicti will corroborate a confession by the accused which will serve as corroboration of evidence of an accomplice. (Ga.) 552.

— Expert testimony.

A practicing physician is presumably competent to testify as to probable effect of wounds. (Ga.) 301.

Instructions.

Where the killing was admitted, an instruction that, to make it self-defense, defendant must prove his innocence by the preponderance of the evidence, with the instruction that the state must make out its case beyond a reasonable doubt, is proper. (S. C.) 1033.

Where evidence shows defendant killed his wife by throwing her down and stamping on her, the charge on the law of manslaughter is unnecessary. (Ga.) 301.

When there is no evidence that the killing was involuntary, an instruction as to involuntary manslaughter should not be given. (Ga.) 298.

An instruction that, if the jury believed certain things, then it would be manslaughter, is not a charge on the facts. (S. C.) 1033.

An instruction illustrative of the law of accidental killing is not erroneous where the defense is of that nature. (S. C.) 937.

Question for jury.

Whether, on the evidence, an attempt by an arresting officer to commit serious injury on another reduced to manslaughter the homicide committed by the latter, is for the jury. (Ga.) 536.

Verdict.

Where indictment charges killing feloniously and with malice aforethought, a verdict finding accused guilty as charged is a conviction of murder in the first degree. (Ga.) 319.

A verdict of guilty, with a recommendation to the mercy of the court, is good. (Ga.) 823.

Appeal—Review.

Where the evidence was circumstantial and in some degree conflicting, the judgment will not be reversed, where there was some evidence to support it. (Ga.) 545.

Error in an instruction as to malice is not available where the conviction was of manslaughter. (S. C.) 1033.

The court will assume, in absence of evidence to the contrary, that trial judge passed on admissibility of dying declarations before submitting to jury. (Ga.) 301.

An objection that a sentence of 20 years for manslaughter is cruel and unusual will not be considered. (Ga.) 553.

Horse and Street Railroads.

Carriage of passenger, see "Carriers."

HUSBAND AND WIFE.

See, also, "Divorce;" "Dower;" "Homestead."

Acknowledgment by wife, see "Acknowledgment."

Administration of wife's estate, see "Executors and Administrators."

Personal injuries to wife, see "Damages."

Validity of contract, see "Chattel Mortgages."

Where a husband sells household furniture, his wife need not be examined privately, as in conveyances of land. (N. C.) 81.

In action for loss of wife's services, occasioned by a tortious personal injury to her, the husband can recover the reasonable value of her services. (Ga.) 816.

A husband, acting as agent for his wife, has no authority to receive real estate in payment of a debt due her, and take conveyance to himself. (Ga.) 545.

A personal decree against a married woman for a debt contracted during coverture before Acts 1893, c. 3, § 15, is void. (W. Va.) 561.

A married woman may sign an administrator's bond as principal, and administer an estate. (S. C.) 935.

A married woman is bound by contract for purchase of interest of her husband's partner. (S. C.) 3.

It is no excuse for nonperformance of purchase by wife that seller purchased goods from husband fraudulently. (S. C.) 3.

Under a trust deed for married woman, providing that trustee shall convey property as she may direct in writing, a deed of the property by her and her husband is invalid. (N. C.) 85.

Wife's separate estate.

Property purchased by a married woman from one other than her husband is her separate property, though purchased on credit, and paid

for from profits arising from its use. (W. Va.) 726.

A note is not within Act Dec. 24, 1887, providing that instruments in writing by a married woman shall convey or charge her separate estate, when the intention so to do is declared therein. (S. C.) 125.

Validity of mortgage executed by wife to secure debt of husband. (Ga.) 348.

Loan to firm by mortgage on property of wife of one member; evidence as to whether said wife assumed position of principal debtor. (Ga.) 65.

Conveyances and gifts between.

Where wife transfers her separate estate to her husband, she cannot avoid the transaction because of her ignorance of the law. (Va.) 285.

A married woman may bestow her separate estate upon her husband. (Va.) 285.

Testimony of a husband and wife that money delivered by the wife to the husband was a loan will not, as against the creditors of the insolvent husband, rebut the presumption of gift. (W. Va.) 960.

To show that money of the wife delivered to the husband was a loan, the wife must prove an express promise of the husband to repay. (W. Va.) 960.

Crimes of wife.

A wife is not excused by the mere presence of her husband for the voluntary doing of a criminal act. (Ga.) 186.

Wife is not liable criminally because gambling took place in house in which she and her husband resided, unless she was active in granting permission. (Ga.) 186.

Impeachment.

Of witness, see "Witness."

INDEMNITY.

Construction of a mortgage by a trustee to the sureties on his bond, as to whether it was one of indemnity. (S. C.) 224.

INDICTMENT AND INFORMATION.

See "Homicide;" "Intoxicating Liquors;" "Larceny;" "Perjury;" "Robbery."

Motion to quash, see "Criminal Law."

An indictment for a misdemeanor, naming defendant as "S. C.," may be amended in his absence to read "S. S., alias S. C." (Va.) 838.

INFANCY.

See, also, "Parent and Child."

Validity of exchange of infant's property made under decree of court in 1884 without following rules then prescribed for sale of infant's property. (Va.) 883.

On petition by commissioner of school lands to sell certain land as forfeited, a guardian ad litem for minor defendant must be appointed. (W. Va.) 461.

INJUNCTION.

Against proceedings under fence law, see "Fences."

Mandamus and injunction, see "Mandamus." Remedy for erroneous taxation, see "Taxation." — of surety, see "Principal and Surety."

In suit under Acts 1893, c. 6, to determine adverse claim to land, plaintiff may restrain defendant from selling land under judgment pending suit. (N. C.) 165.

Pendency of garnishment against chief of police for effects of debtor taken under official authority is no ground for enjoining action by debtor against chief for conversion. (Ga.) 1004.

To enjoin granting of charter to dental college. (Ga.) 430.

Sufficiency of grounds. (Ga.) 824.

INSANITY.

Liability of purchaser of property of insane person, see "Trusts."

The real estate of an insane married woman cannot be charged with any debts with which it would not be chargeable if she was sane. (W. Va.) 721.

A guardian of a lunatic will be allowed credit for payment of just debts. (N. C.) 694.

Where a committee of an insane married woman petitions for the sale of her real estate for debts with which it is not chargeable, he is guilty of fraud, and all proceedings thereunder are void. (W. Va.) 721.

Insolvency.

See "Assignment for Benefit of Creditors;" "Bankruptcy;" "Corporations;" "Fraudulent Conveyances."

Instructions.

See "Criminal Law;" "Trial."

INSURANCE.

Delivery of policy without requiring payment of premium is a waiver of condition of prepayment. (Va.) 195.

Company cannot, on request of insured for new policy covering same period, without his knowledge, issue policy for shorter period, and so avoid liability for loss occurring after its expiration. (Va.) 911.

A policy procured by a religious society on life of one of its members is void as a wagering contract. (N. C.) 175.

After delivery of policy as valid contract, company's liability thereon can only be terminated, in case of nonpayment of premium, by giving stipulated notice of cancellation. (Va.) 195.

Insured cannot impeach application for insurance by showing that he could not read, and that it was filled up by agent who did not read it to him. (Va.) 191.

Where premium is charged to agent personally by the company, and the former credits the insured, it is equivalent to payment. (Va.) 195.

Statement in application that insured would keep his book of account in secure place construed to be a warranty. (Va.) 191.

Where policy provides that it is made and accepted subject to the "foregoing stipulations," the materiality of a warranty cannot be inquired into. (Va.) 191.

Where company furnishes blanks to a man, responds to his acts, approves removal permits given by him, and pays his rent, it is bound by his acts. (Va.) 911.

If company gives person apparent authority to deliver policy and receive premiums, it cannot defend on ground that he is without written authority, as required by statute. (Va.) 195.

Question in action on insurance policy whether the premium was paid by plaintiffs through intervening broker. (Va.) 195.

An agent of a foreign unincorporated insurance association is not personally liable for doing business without license. (Ga.) 14.

INTEREST.

See, also, "Usury."

What law governs, see "Conflict of Laws."

On recovery against surety company for default of corporate officer, interest should be allowed on amount of the default from time it was demanded and refused. (S. C.) 5.

An agreement for a higher legal rate after maturity than that on note which specifies no rate is valid. (N. C.) 251.

Interstate Commerce.

See "Constitutional Law."

Intervention.

See "Equity."

INTOXICATING LIQUORS.

Judicial notice, see "Evidence."

Jurisdiction of prosecution, see "Courts."

What are. (Ga.) 288.

Prohibition of sale—Title to act. (Ga.) 288, 289.

A legal option law does not vary the prior general law relating to license. (Ga.) 288.

Sale by practicing physician—Evidence. (Ga.) 289.

Authority to grant licenses to sell in Putnam county is vested exclusively in the commissioners of roads and revenues of such county. (Ga.) 996.

Where delivery is effected in county where sale is unlawful, the contract of sale will be deemed to be made there, though negotiations for sale were carried on in another county. (Ga.) 997.

A druggist who mixes liquors with other ingredients, and sells same as a beverage, is liable for unlawful sale, if he has no license. (Ga.) 998.

On indictment for an illegal sale, the burden is on accused to show that he comes within the exception as to licensed physicians. (Ga.) 558.

An indictment for unlawful selling in Putnam county need only negative the grant of a license by the commissioners of such county. (Ga.) 996.

An allegation that the sale charged was in the "714th District Georgia Militia" is established by proof that the offense was committed in the "714th District G. M." (Ga.) 558.

Sufficiency of evidence to sustain a conviction for unlawfully selling liquors considered. (Ga.) 526.

Judge.

See "Courts;" "Justices of the Peace."

JUDGMENT.

Defective service of process, reversible error, see "Writs."

Presumption in favor of, see "Evidence."

Proof of foreign, see "Evidence."

Where partner dies pending action against firm, and his death is not suggested before rendition of judgment, it is a lien on the partnership estate. 268.

Judgment rendered by justice, without due notice to defendant of time and place of hearing, cannot be set aside by suit in the superior court. (N. C.) 55.

It is no ground for setting aside a judgment that the property alleged to have been converted was loosely described in petition. (Ga.) 433.

Setting aside default—Laches of attorney. (Ga.) 430.

Where the clerk improperly enters an order for a writ of inquiry in action for debt at rules, the court may enter judgment in disregard of such order. (W. Va.) 724.

Act 1893, c. 81, authorizing a judgment on verdict taken in defendant's absence to be opened in certain cases, applies only to judgments rendered after its passage. (N. C.) 704.

A judgment in an action on a judgment merges the old judgment in the new. (S. C.) 861.

An action on a judgment by regular summons and complaint, wherein a money judgment alone is prayed for, is not in the nature of a scire facias. (S. C.) 861.

In action to charge a tax collector personally is not vitiated by the addition of "tax collector" to defendant's name. (Ga.) 981.

Order in foreclosure proceeding for sale of land cannot be amended at later term without rehearing, so as to include another tract. (S. C.) 220.

Res judicata.

The overruling of a motion to attach for contempt, not having been appealed from, is a bar to a subsequent motion to punish on an affidavit identical with that in the first proceeding. (N. C.) 715.

A decree by consent a bar to action between the same parties. (N. C.) 339.

Where, in an action against principal and surety, the latter alone defends, and the verdict is against the principal only, the legal effect is a finding in favor of the surety. (Ga.) 132.

An erroneous decision of a state court is binding on the parties, though on a similar case the judgment of the state court has been overruled by the United States supreme court. (N. C.) 606.

Where a lease provided for its termination on sale of the land, and the landlord conveyed his interest to his wife, and she to a third person, a judgment in an action by the wife, before her conveyance, that there was no sale, is not binding on the wife's grantee in an action by him to recover possession. (N. C.) 971.

Lien.

The right of the former owner of land to the excess of the proceeds of the sale for taxes is property which is liable to the lien of a judgment against him. (W. Va.) 807.

The lien of a judgment on the land of an insolvent is superior to that of a trust deed executed by the insolvent to his wife, pending the action for which the judgment was obtained, where the sum secured by the trust deed was barred by limitations, and the only evidence of the validity of the trust deed was the testimony of the husband and wife. (W. Va.) 960.

A judgment against one whose land has become forfeited to the state, rendered after such forfeiture, is no lien on such land. (W. Va.) 807.

Collateral attack.

Where records do not show jurisdictional infirmity, parol evidence is inadmissible to collaterally attack judgment. (S. C.) 636.

Where record shows that court had jurisdiction, on subsequent proceedings to renew defendant cannot show lack of summons. (S. C.) 33.

In collateral attack on judgment ordering sale of intestate's land, the sheriff's return showing a proper service on the heirs is conclusive. (N. C.) 174.

Question whether a person whose title was divested by previous action could show that summons therein was not served, as stated in return. (S. C.) 220.

Question whether, in action on indemnity bond given by trustee to his sureties, the latter could claim that order previously given by the probate court as to the trust fund was without jurisdiction. (S. C.) 224.

Foreign judgments.

The judgment of a sister state is entitled to the same faith and credit it has in state where rendered. (W. Va.) 456.

In action on foreign judgment, the court will inquire as to jurisdiction of court rendering the same. (W. Va.) 456.

Of a sister state, without process of any kind, and without appearance, is void. (W. Va.) 456.

In a suit on foreign judgment, defendant cannot show that judgment was excessive. (N. C.) 500.

Revival.

The proper proceeding to revive a judgment is to issue a summons and renew execution. (S. C.) 861.

On revival of judgment by *scire facias*, the writ must pursue the terms of the judgment. (Ga.) 443.

A judgment entered in 1879 can be revived in 1891, under Act 1873. (S. C.) 247.

May be revived against the executor of a deceased judgment debtor. (S. C.) 247.

An action on a judgment obtained in 1871 may be maintained without first reviving it, where plaintiff does not seek to maintain a lien growing out of it. (S. C.) 861.

JUDICIAL SALES.

See "Bankruptcy."

Foreclosure sale, see "Mortgages."

Under execution, see "Execution."

A sale made at a time other than that fixed in the decree is void. (S. C.) 233.

A decree for sale of land need not direct execution of deed. (S. C.) 237.

Where a sale is set aside after payment by purchaser and use of the money so paid, on ordering a new sale the rights of purchaser will be protected. (S. C.) 233.

A purchaser is not protected on reversal of the decree where record shows that necessary parties were not parties when the sale was ordered and confirmed. (W. Va.) 561.

A judgment that the purchaser shall pay into court \$3,000, to be applied, etc., and that, on payment to the commissioner of \$3,000, the latter shall make him a deed, does not direct the money to be paid twice. (N. C.) 600.

Jurisdiction.

See "Courts;" "Criminal Law;" "Equity."

JURY.

Custody and conduct, see "Criminal Law."

Misconduct of juror, see "New Trial."

Right to jury trial, see "Constitutional Law."

Question whether juror's statements, made before criminal trial, were ground for his rejection. (Ga.) 154.

A juror not incompetent because his step-daughter married the brother of the plaintiff. (Ga.) 315.

Opinions of jurors adverse to prisoner, based on rumors only, do not disqualify if they can render a fair verdict. (N. C.) 507.

An objection to a juror for want of qualification comes too late after verdict. (W. Va.) 957.

No list need be furnished sergeant of another county on summoning jurors for trial in adjoining county. (Va.) 440.

That a sheriff was allowed to amend his return showing the number of men summoned is no ground for a challenge to the array. (N. C.) 715.

A juror may be challenged if he attended court in expectation of being called as witness. (N. C.) 515.

That one of the men named in the special venire was dead, and another had removed from the county, is not ground for a challenge to the array. (N. C.) 715.

It is no ground for a challenge to the array that one named in venire was not summoned. (N. C.) 715.

Defendant in criminal case is not entitled to have panel full or entirely read over before entering on his right of challenge. (S. C.) 919.

The court may excuse juror before he is accepted. (N. C.) 515.

JUSTICES OF THE PEACE.

Separating accounts to give jurisdiction, see "Account Stated."

A warrant charging that defendant inflicted bruises on child does not allege a crime beyond jurisdiction of justice. (N. C.) 256.

Where defendant answers summons made returnable to another justice than the one who issues it, and proceeds to trial without objection, the justice acquires jurisdiction. (N. C.) 76.

Justice's court may be held from day to day until its business is disposed of. (Ga.) 649.

Original summons to recover personalty which fails to state value may be amended, with permission of justice. (N. C.) 212.

When not in court do not act judicially in answering questions of counsel. (Ga.) 138.

A bill of particulars attached to a summons will not be established instantaneously. (Ga.) 138.

Where on certiorari from a verdict of a jury in a justice court the case is remanded, the new trial must be by jury. (Ga.) 293.

Error of justice in issuing a venire for jury before summons returned, waived where defendant appears, and has case continued and the jury adjourned. (W. Va.) 380.

When pending case is suspended to give opportunity for settlement, which fails, neither party is entitled to notice of subsequent trial. (Ga.) 649.

Justifiable Homicide.

See "Homicide."

KIDNAPPING.

A man is not guilty because he persuaded a female, 14 years old, to run away with him, and get married without the consent of her parents. (Ga.) 10.

LANDLORD AND TENANT.

Mining leases, see "Mines and Mining."

A tenant may recover damages for injury to his use of premises caused by the maintenance of a nuisance in the street adjacent to such premises. (Ga.) 1013.

Where a tenant obtains a temporary injunction restraining his landlord from evicting him, and, pending hearing, abandons possession, suffers others claiming title to enter, and then dismisses proceeding, the court cannot, on summary petition by landlord, turn such others out. (Ga.) 1016.

A lease in which the tenant stipulates to make all needful repairs at his own expense exempts the landlord from making any repairs. (Ga.) 815.

One who, while in possession of land, accepts a lease thereof, is estopped to deny his lessor's title. (N. C.) 325.

Leases.

Where both parties to a lease have violated its provisions, the damages therefrom should on distress be set off against each other. (Ga.) 350.

Measure of damages for breach of lessor's covenant to clean out certain ditches, whereby crop was diminished. (N. C.) 167.

A contract for a term of years at a fixed rental, providing that all crops made shall be bound for the rent, is a lease. (N. C.) 669.

Where premises are leased for one year, with the privilege of retaining them the following year, at such price as any one would give, it is a jury question whether the contract of renewal embraced an agreement to apply certain terms of the first lease to the second. (Ga.) 815.

Where a lease provided for its termination on sale of the land, and for the removal of the building, the notice by the purchaser that the lease was ended was sufficient, without a demand for the removal of the building. (N. C.) 971.

Where a lease provided for removal of the building on sale of the land, and the owner conveyed his life estate to his wife, with the remainder to others, and the wife conveyed her interest, there was a sale, within the lease. (N. C.) 971.

Where a lease provided for termination on sale of the land, a notice from the purchaser of the life interest of the landlord was sufficient, without a joinder by the remainder-men. (N. C.) 971.

Where a lease provided that it should continue until lessor sold the land, and that the lessee should have 30 days thereafter to remove the building, a sale terminated the lease, and the lessee had 30 days in which to remove the building. (N. C.) 971.

Where a lease provides for forfeiture on nonpayment of rent, and lessee, on nonpayment, agrees to surrender his lease, the tenancy is ended. (W. Va.) 378.

Holding over.

Where a landlord permits tenant to remain in possession after expiration of his lease, it will be presumed he holds under the terms of the original lease. (W. Va.) 762.

A tenant holding over without paying rent becomes either a trespasser or a tenant, at the option of his landlord. (W. Va.) 762.

Landlord's lien.

A landlord is liable to his tenant for value of property converted in excess of his lien. (N. C.) 341.

Under a lease providing that crops shall be bound for the rent, the landlord retains a statutory lien superior to agricultural lien for advances. (N. C.) 609.

Recovery of possession.

Where a tenant disavows his tenancy, the landlord has the right to recover possession. (S. C.) 257.

Possession under a recorded deed from a tenant is notice to the landlord of disavowal of tenancy. (S. C.) 257.

That during the tenancy the title of the landlord has been forfeited for nonpayment of taxes is no defense to an action to dispossess the tenant. (W. Va.) 762.

In unlawful detainer, where no fraud is shown in procurement of a lease, the landlord need not prove title. (W. Va.) 762.

LARCENY.

See, also, "Robbery."

If ownership is laid in C. as agent, and there is no exception that evidence does not show special property in C., verdict of guilty establishes his ownership. (N. C.) 517.

Under indictment for larceny and receiving stolen goods, a general verdict of guilty is good if either count be good. (N. C.) 515.

It is not necessary to show an attempt to conceal the taking. (N. C.) 971.

Sufficiency of proof of ownership. (Ga.) 436.

Sufficiency of evidence. (Ga.) 303.

Leases.

See "Landlord and Tenant."

Mining leases, see "Mines and Mining."

Legacies.

See "Wills."

Legitimacy.

See "Descent and Distribution."

LIBEL AND SLANDER.

In case of a publication of qualified privilege, the language may be considered in determining presence of malice. (N. C.) 209.

Evidence showing malice in charging plaintiff, a Democratic candidate, with having requested Populist support. (N. C.) 209.

In libel for imputing crime, truth as a justification need only be established by a preponderance of the evidence. (Ga.) 1010.

LIENS.

See, also, "Mechanics' Liens."

Of judgment, see "Judgment."

Of landlord, see "Landlord and Tenant."

Of vendor, see "Vendor and Purchaser."

One furnishing machinery in steam sawmill is entitled to a lien. (Ga.) 359.

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."

When statute applicable.

For fees due an officer by the judgment of a court. (N. C.) 329.

Specific performance of contract of purchase at judicial sale is not barred, although statute has run against action for price. (S. C.) 237.

The lien of a mortgage securing a note is not affected because the statute of limitations has run against the note. (N. C.) 696.

Code Civ. Proc. §§ 155, 164, determine the time within which an action may be brought against the representative of a deceased surety on a note under seal. (N. C.) 50.

Under Code 1863, c. 35, § 20, the statute runs against the state. (W. Va.) 470.

Code 1868, c. 35, § 20, subjecting the state to the statute of limitations, as amended and re-enacted by Acts 1882, c. 18, is retroactive upon judgments rendered in favor of state before its re-enactment. (W. Va.) 470.

The two-years limitation of actions against an assignee in bankruptcy do not apply to actions against a purchaser from the assignee. (Va.) 869.

Running of statute.

Begins to run against a demand for money had and received for the use of another from the receipt of the money. (W. Va.) 575.

The statute does not begin to run on a chattel mortgage until the condition is broken. (N. C.) 205.

Action by one plaintiff is not recommencement of former action by him and another which was dismissed. (Ga.) 13.

The statute does not run against an action on a bond of a deputy sheriff for default until the sheriff has paid the debt occasioned by such default. (W. Va.) 737, 740.

Acknowledgment.

In order that delivery of specific articles be part payment, stopping running of statute, they must be received as payments, or by agreement applied as such. (N. C.) 84.

A letter proposing to settle bill may be sufficient acknowledgment to prevent the running of the statute. (N. C.) 504.

Payment on mortgage bond within 10 years before suit brought prevents operation of statute. (N. C.) 501.

Indorsement of a payment on sealed note, with statement by payer that he makes it as heir of maker of note, stops running of statute. (S. C.) 640.

Pleading.

In action to recover land, defendant may prove possession for seven years under general denial without pleading statute. (N. C.) 92.

Pleading exception, on ground of mistake. (N. C.) 387.

Liquor Selling.

See "Intoxicating Liquors."

Local and Special Laws.

See "Constitutional Law."

Magistrate.

See "Justices of the Peace."

MALICIOUS PROSECUTION.

Of civil suit by landlord against tenant for recovery of premises—Rights of tenant. (Ga.) 296.

In action for malicious suing out and execution of a warrant to dispossess plaintiff, a plea setting up facts that led to such action, and claiming that it was authorized, is a plea of justification. (Ga.) 1017.

A suit charging defendants with fraud, unaccompanied by attachment of property or person, is no ground for the action for malicious prosecution. (N. C.) 943.

A counterclaim for malicious prosecution should allege facts showing want of probable cause in instituting suit. (N. C.) 947.

Measure of damages for illegally dispossessing tenant. (Ga.) 296.

MANDAMUS.

And injunction, are not appropriate remedies in the same case. (Ga.) 548.

Will not lie to compel a county court to issue an order against county funds for a county debt. (W. Va.) 895.

Manslaughter.

See "Homicide."

Marriage.

See "Divorce;" "Dower;" "Homestead;" "Husband and Wife."

Of emancipated slaves, see "Slavery."

MASTER AND SERVANT.

See "Convicts."

Where employer violates contract with employe, the latter has cause of action for damages. (Ga.) 309.

Where a breach of contract of employment would result in reduction of employe's compensation, he is justified in rescinding contract. (Ga.) 309.

Contract of employment—Construction. (Ga.) 309.

Negligence of master.

An employe cannot recover for injuries from running a machine, safe when properly operated, in absence of evidence that the employer failed to give warning of the dangers of operation. (Ga.) 974.

Duties of master operating coal mine. (W. Va.) 584.

Railroad companies have a right to presume that cars delivered by connecting lines are in good condition. (Va.) 274.

Proof that the cars which plaintiff was coupling were pushed together with undue force by engineer did not make a prima facie case of negligence. (S. C.) 213.

Where expert evidence showed that accident could not have occurred if bumpers had been in repair, a nonsuit was properly refused. (S. C.) 213.

Whether master, at time of hiring, should have inquired as to experience of servant, is a question for the jury. (Ga.) 300.

Action for injuries caused by incompetency of fireman in charge of engine—Sufficiency of evidence. (W. Va.) 596.

Railroad company is liable for injuries to employes caused by engineer placing incompetent fireman in charge of engine. (W. Va.) 596.

Negligence of master—Pleading.

Sufficiency of declaration in action for death of brakeman through negligence. (Va.) 559.

Negligence of fellow servants or vice principals.

A conductor, having the entire control of a train, is a vice principal, for whose negligence the railroad is liable. (W. Va.) 748.

Neither a conductor nor a signal operator are fellow servants of a section hand going to work on a train. (W. Va.) 748.

An assistant fireman of one train is a fellow servant of the conductor of another. (S. C.) 182.

Servant's neglect to warn approaching train of car standing on track is not a breach of master's duty to furnish a safe place. (S. C.) 182.

Assumption of risks.

Injury to employe—Assumption of risk. (Ga.) 290, 292.

Railroad company is not liable for injury to an employe knowing the inexperience of the fireman whose negligence caused the injury. (Ga.) 361.

Where engineer fails to go on siding to pass train about due, and brakeman goes forward on top of cars to warn him to stop, and is injured, the company is liable. (Ga.) 999.

Contributory negligence.

An engineer who leaves his place in the cab to look at a hot journal that he could have seen without leaving it, and is injured, cannot recover. (Ga.) 976.

Action for injuries to railroad employe—Contributory negligence. (Va.) 837.

A servant has a right to assume that the appliances furnished him are safe. (S. C.) 213.

Injury while coupling cars by hand—Construction of rule. (Ga.) 290.

Injury to railroad employe—Contributory negligence. (Va.) 274.

Where a servant knows of defects in machinery, and continues in service, by reason of the promises of his employer, he is not guilty of contributory negligence. (W. Va.) 584.

Mere continuance in service, with knowledge of defects in appliances, is not per se negligence in the servant. (W. Va.) 584.

A servant, knowing of the danger, if he willfully encounters it, cannot recover from his employer for an injury caused thereby. (W. Va.) 573.

Where a collision is caused by the negligence of the conductor or the signal operator, a section hand, who jumps from the car to avoid it, is not guilty of contributory negligence. (W. Va.) 748.

Train conductors cannot maintain action for injuries caused by their disobedience of rules. (Va.) 274.

A brakeman who willfully violates a reasonable rule cannot recover for injury caused by such violation. (W. Va.) 573.

Where a brakeman knows a rule of the company to report all defects in brakes, etc., and, knowing of a defect, fails to report it, and is injured, he is guilty of contributory negligence. (W. Va.) 729.

Measure of Damages.

See "Damages."

MECHANICS' LIENS.

Cannot be enforced against a county building. (W. Va.) 895.

A failure to claim and record lien not excused because property was put in hands of a receiver before time of recording had expired. (Ga.) 359.

Mental Capacity.

See "Contracts;" "Deed;" "Equity."

MINES AND MINING.

Where nothing has been done for 17 years under a mining lease for 99 years, which provides for the payment of royalty on coal mined, the lease may be considered as abandoned. (W. Va.) 493.

Construction of mining lease—Reasonable time to commence operations. (W. Va.) 493.

Minor.

See "Infancy."

Misjoinder.

Of causes of action, see "Action."

Money Had and Received.

See "Assumpsit."

MORTGAGES.

See, also, "Building and Loan Associations;" "Chattel Mortgages;" "Subrogation."

Of indemnity, see "Indemnity."

Where intestate has conveyed land as security, a purchaser from his administrator gets title only on redemption from the conveyance. (Ga.) 134.

The estate for life of a married woman, with the remainder to her children, is subject to levy and sale on foreclosure of a mortgage thereon given by her. (Ga.) 546.

Whether mortgage or charge on separate estate of married woman. (N. C.) 323.

The word "convey" is sufficient to transfer property. (N. C.) 323.

Description.

The words "such an interest" in property already described is sufficient description of interest mortgaged. (N. C.) 323.

Sufficiency of description of property. (N. C.) 323.

A description of the premises, though meager and vacant, if sufficient to identify premises, will not render mortgage void. (Ga.) 31.

Assignment of debt and mortgage.

A transfer of a note carries with it the mortgage securing it, without assignment or delivery. (N. C.) 696.

Foreclosure.

Subsequent incumbrancers are not necessary parties. (N. C.) 501.

One who has had possession under title paramount to that of the mortgagor, but from the same common source, is a necessary party to an action to foreclose. (S. C.) 798.

One not recording his deed until after foreclosure suit is brought is bound by the judgment. (N. C.) 501.

A provision for possession by mortgagee after default until the rights of the parties are deter-

mined, does not prevent sale under foreclosure. (N. C.) 320.

Personal judgment for deficiency on foreclosure cannot be rendered till after sale and report. (S. C.) 636.

A decree in foreclosure directing payment of "costs of this action" authorizes payment of costs of second mortgagee, made defendant therein. (S. C.) 677.

Right to tax costs of foreclosure against homestead. (S. C.) 677.

Sale under power.

The place of sale of land under deed of trust is within the discretion of the trustee, where there is no provision in the deed for the place of sale. (Va.) 843.

Trustees in deeds of trust must act in person. (Va.) 843.

MUNICIPAL CORPORATIONS.

See, also, "Counties;" "Highways;" "Schools and School Districts."

Power of city to prohibit sale of certain articles elsewhere than in city market established after passage of act giving power. (Ga.) 143.

Statute empowering city to prohibit sale of certain articles elsewhere than in the market will be construed to apply only to sales during reasonable market hours. (Ga.) 143.

Sufficiency of evidence to show that defendant sold marketable commodities during market hours elsewhere than at the city market. (Ga.) 143.

A city is not liable for injuries by negligence of its officials in the discharge of governmental duties. (W. Va.) 447.

Where an injury is alleged to have been caused by negligent use of corporate property, the burden of proof is on plaintiff. (W. Va.) 447.

A city with power over the sewers thereof cannot maintain a manhole from which poisonous gases escape in dangerous quantities. (Ga.) 135.

Injury from defective street—Sufficiency of declaration. (Ga.) 351.

A city is liable for failure to keep its streets in repair. (W. Va.) 447.

A city that permits a railroad company to erect a bridge at a street crossing in such a way as to injure the premises of an abutting owner is liable therefor. (Ga.) 1013.

Issuance of bonds.

A city will not be restrained from issuing bonds where there has been a majority vote therefor. (S. C.) 792.

Application of constitutional limitation as to bonded debt is to be determined by the last tax assessment before the bond issue. (S. C.) 184.

Murder.

See "Homicide."

National Banks.

See "Banks and Banking."

NAVIGABLE WATERS.

Where town, under Code, § 2751, attempts to regulate the line on deep water, but locates one not extending thereto, an action will lie to compel the town to do it properly. (N. C.) 76.

NEGLIGENCE.

See, also, "Death by Wrongful Act."

Contributory, see "Master and Servant."

Evidence of custom, see "Custom and Usage."

Injuries to passengers, see "Carriers."

In transmission of messages, see "Telegraph Companies."

Liability of city, see "Municipal Corporations." — of railroad companies, see "Railroad Companies."

Of fellow servants, see "Master and Servant."

Of master, see "Master and Servant."

A railroad is not responsible for the negligence of United States postal clerks on its trains. (W. Va.) 782.

Where one, by the negligence of another, is compelled to choose instantly, in the face of grave peril, between two hazards, he is not guilty of contributory negligence, though the one he selects results in injury, and he might have escaped if he had chosen the other. (W. Va.) 748.

A declaration is good which contains the elements of the cause of action, the duty violated, and the breach thereof. (W. Va.) 782.

A prima facie case of negligence on defendant's part, covered by plaintiff's declaration, cannot be answered by a state of facts involving a breach of diligence by defendant. (Ga.) 18.

In action for death of engineer, it cannot be shown that he was habitually reckless in running too fast by witness who had knowledge of only two instances. (Ga.) 18.

NEGOTIABLE INSTRUMENTS.

See "Alteration of Instruments."

Where, at time of indorsement of note in blank, another between the same parties was folded in it, there was only equitable assignment of the latter. (Ga.) 32.

A note may be transferred by delivery without indorsement. (N. C.) 696.

A note given for usurious interest is void in the hands of an innocent purchaser. (N. C.) 717.

A holder of a note by equitable assignment cannot sue without equitable pleadings setting up facts. (Ga.) 32.

Action on note — Pleading want of consideration. (Ga.) 293.

In an action on a note by indorsee against a payee and joint makers, plaintiff's failure to allege a purchase before maturity relieves the joint maker from alleging notice by plaintiff of fraud in obtaining the note. (N. C.) 687.

A plea by maker of a note that he executed with understanding that he was not to be bound therefor is insufficient. (Ga.) 354.

An answer to a complaint in action on a note, which denies that plaintiff is the owner and holder, is not frivolous. (N. C.) 703.

NEW TRIAL.

Discretion of trial court, see "Appeal." In criminal cases, see "Criminal Law."

A motion for a new trial may be filed in recess. (Ga.) 830.

Where notice of motion for errors in charge does not state what the charge was it cannot be reviewed. (Ga.) 308.

It is error to dismiss a motion because movant declined to furnish a brief of evidence made from official report. (Ga.) 986.

Under Act Nov. 12, 1889, the brief of evidence must be filed within 30 days from the trial, or within time allowed within such 30 days. (Ga.) 11.

Should not be granted because juror assisted plaintiff who was suing for personal injuries to go downstairs during a court recess, no prejudice being shown. (Ga.) 187.

In action for personal injury and suffering, but not for loss of earning capacity, a new trial should be granted, if verdict is excessive. (Ga.) 11.

A new trial for excessive damages in condemnation proceedings is properly denied where the record contains data from which compensation can be estimated, and appellee remits all above just compensation. (W. Va.) 957.

The propounding of a leading question is no ground for new trial, if answer was harmless. (Ga.) 997.

If writing purporting to be signed by party is admitted without objection, subsequent discovery that it is not genuine is no cause for new trial, unless adverse party knew it was spurious. (Ga.) 65.

When granted for newly-discovered evidence. (W. Va.) 953.

For newly-discovered evidence which disclosed material admissions by prevailing party, inconsistent with his right of recovery, was properly granted. (Ga.) 1017.

No more than two new trials can be granted to the same party in the same case. (W. Va.)

Nonsuit.

See "Practice in Civil Cases."

Notes.

See "Negotiable Instruments."

Notice.

Of special session of county court, see "Counties."

Of taking deposition, see "Deposition."

To corporate officers, see "Corporations."

NOVATION.

When mortgage is satisfied and surrendered because of execution of deed on same premises to secure same debt, there is a novation. (Ga.) 81.

NUISANCE.

Liability of city, see "Municipal Corporations." Obstruction of highway, see "Highways."

Office and Officer.

See "Clerk of Court;" "Justices of the Peace;" "Receivers;" "Sheriffs and Constables."

Corporate officers, see "Corporations."

Opinion Evidence.

See "Evidence."

ORDERS.

When order is not accepted, no liability attaches to drawee or to his principal. (N. C.) 94.

PARENT AND CHILD.

See, also, "Infancy."

Conveyances between, see "Fraudulent Conveyances."

Where a minor lives with his uncle as a member of his family, he cannot recover for services rendered without any mutual understanding as to compensation for such services. (W. Va.) 589.

Where a minor lives with his uncle as a member of his family, the uncle may release to the minor his right to wages earned elsewhere. (W. Va.) 589.

Parol Evidence.

See "Evidence."

PARTIES.

See "Equity."

Demurrer for defect of parties, see "Eminent Domain."

In action to enforce lien, see "Vendor and Purchaser."

In foreclosure proceedings, see "Mortgages."

Where a mortgage is transferred to the cashier of a bank as collateral for the note due the bank, an action to foreclose is properly brought in his name. (N. C.) 696.

Debtors by open account are not subject to suit jointly with one who has guarantied, in writing, payment of the account. (Ga.) 158.

Claimants under a contract of personal property mentioned in a deed of trust are proper parties to suit to set it aside. (W. Va.) 611.

In suit between sureties for contribution, and to sell land as the property of one surety, where the wife of the surety claims the land as hers, and held by her vendor for her, her vendor should be made a party. (W. Va.) 485.

PARTITION.

Where the pleadings contain no proper prayer therefor, it is error to give affirmative relief. (W. Va.) 568.

PARTNERSHIP.

See "Banks and Banking."

Action by surviving partner to compel accounting, see "Trusts."

Assignment for creditors, see "Assignment for Benefit of Creditors."

An agreement to employ one as clerk, the latter to have half the net profits, and become a half owner, constitutes partnership. (N. C.) 940.

One advancing money to enable another to carry out certain contract, repayment to be contingent on profits, can be charged as partner only as to that contract. (N. C.) 113.

In action on notes signed by defendant, with the addition "& Co.," where defendant files sworn plea of no partnership, he is liable, whether he had a partner or not. (Ga.) 354.

Part Payment.

See "Limitation of Actions."

Passengers.

See "Carriers."

PAYMENT.

See, also, "Composition with Creditors."

A voluntary payment by a stranger, accepted by the creditor, discharges the debt as to him. (W. Va.) 456.

Of the debt of another, without request, does not give volunteer the right of action. (W. Va.) 456.

The burden of proof on a plea of payment is on the party pleading it. (Ga.) 39.

A lapse of 21 years after an order for distribution among creditors raises presumption of payment. (Va.) 436.

Where defendant delivered property to be applied on either of two debts, he cannot object to application to either. (N. C.) 83.

Presumption as to application. (Ga.) 415.

Peddlers.

See "Hawkers and Peddlers."

Pension.

Disbursement of capitation tax, see "Counties." To indigent Confederate veterans, see "Constitutional Law."

PERJURY.

Sufficiency of indictment for perjury on the trial of a certain action. (N. C.) 211.

A witness for the state, after reciting what the accused testified, may say that it was false. (Ga.) 553.

Perpetuities.

Rule against, see "Deed."

Petition.

See "Pleading."

Physician.

Sale of liquor, see "Intoxicating Liquors."

PLEADING.

See "Equity;" "Frauds, Statute of;" "Limitation of Actions;" "Negligence;" "Partition;" "Usury."

Admissions in, see "Evidence."

Declaration, see "Municipal Corporations."

In action on contract, see "Contracts."

— on note, see "Negotiable Instruments."

Negligence of master, see "Master and Servant."

Objections taken by demurrer, see "Corporations."

A plea containing merely allegations of law is bad. (N. C.) 946.

It is proper to refuse to strike special plea when it contains some good allegation. (Ga.) 25.

The striking of a plea that notes sued on were without consideration is harmless where evidence shows full consideration given. (Ga.) 364.

Will not be stricken out for failure of plaintiff to support some of his allegations by evidence. (Ga.) 361.

Where there is no demurrer to a declaration, it is not error to refuse to strike out certain words therein. (Ga.) 406.

Sufficiency of allegations in pleading that note in suit was procured by fraud or mistake, and was in excess of the proper amount. (Ga.) 41.

A judgment will not be set aside because the petition described the court as city court of F. county, while the process described it correctly, as city court of A., which court is the only city court in F. county. (Ga.) 433.

Where defendant has taken depositions, and there has been a full hearing, the decree will not be reversed because complainant did not file reply to an answer asking for affirmative relief. (W. Va.) 765.

Demurrer.

The joinder of unnecessary parties is not ground for demurrer. (N. C.) 76.

Laches may be raised by demurrer where pleading shows the facts on which the defense rests. (W. Va.) 765.

A general demurrer to the sufficiency of an affidavit will not reach a defect in the jurat. (Ga.) 830.

Answer.

Where answer to amended complaint denies indebtedness, admission in original answer as to part of debt is not conclusive. (N. C.) 170.

Averment in answer that defendant has no knowledge of fourth paragraph of complaint, and demands proof, does not deny such paragraph. (N. C.) 655.

Amendment.

Amendment to declaration in replevin construed not to assert a cause of action wholly different from that in original complaint, nor to change the subject of action. (N. C.) 110.

A complaint in an action for injuries, from defective machinery, is amendable to show the particulars in respect to which the machinery was defective. (Ga.) 817.

The court can allow an amendment to a complaint which fails to allege that plaintiff is in possession. (N. C.) 973.

Objections waived.

Objection not raised below cannot be raised on appeal. (N. C.) 337.

An objection to the entry of final judgment that there are no pleadings is waived where the case has been referred, and judgment entered in it without objection. (N. C.) 694.

Exceptions to an answer are deemed waived if a replication to it is filed. (W. Va.) 810.

Police Power.

See "Constitutional Law."

Poor and Poor Laws.

Disbursement of capitation tax, see "Counties." Pensions to indigent Confederate veterans, see "Constitutional Law."

Poor Debtor's Oath.

See "Bastardy."

Possession.

See "Adverse Possession."

POWERS.

Of sale in mortgage, see "Mortgages."

Powers authorized to be executed on contingent event may, unless contrary to creator's in-

tention, be executed before that event. (Va.) 197.

Appointment under a power in a will considered and held valid. (Va.) 197.

PRACTICE IN CIVIL CASES.

See, also, "Action;" "Appeal;" "Certiorari;" "Continuance;" "Costs;" "Courts;" "Discovery;" "Evidence;" "Judgment;" "Jury;" "New Trial;" "Parties;" "Pleading;" "Reference;" "Trial;" "Witness;" "Writs."

Inspection of books and papers, see "Discovery."

A motion for a nonsuit cannot be sustained where it involves the determination of a question of fact. (S. C.) 119.

Where declaration in action on contract sets up one materially variant from the evidence, a nonsuit was properly granted. (Ga.) 534.

Effect and construction of stipulation. (S. C.) 245.

A motion based on affidavits as to an agreement the existence of which is denied, must be refused, as, by rule of court, agreements of counsel must be in writing. (N. C.) 70.

Super. Ct. Rule 20, providing that no stipulation shall be enforced unless in writing, applies to a consent not to insist that a proof of evidence should be filed within 30 days, on motion for a new trial. (Ga.) 136.

Preferences.

See "Assignment for Benefit of Creditors."

Prescription.

See "Adverse Possession;" "Limitation of Actions."

Presumption.

See "Evidence."

Of grant, see "Adverse Possession."

PRINCIPAL AND AGENT.

See, also, "Master and Servant."

Declarations of agent, see "Evidence."

The mere fact that plaintiff was attorney of mortgagor in proceedings to foreclose does not make him his agent. (S. C.) 517.

Proof of agency. (Ga.) 354.

The actions of an alleged agent, not acquiesced in by the alleged principal, are not sufficient to establish an agency. (S. C.) 125.

An agent to rent premises for owner may, after the notes for rent have been taken, become agent to sublet for tenant. (Ga.) 354.

Evidence of scope of authority. (Ga.) 366.

Failure of agent to keep principal's property insured—Liabilities. (Ga.) 312.

Where plaintiff knew that rules of defendant railroad required payment of demurrage and storage, he cannot sue for breach of contract made by him with defendant's station agent, by which no such charge should be made. (Ga.) 159.

A recovery can be had against a concealed principal of a person acting in his own name, though the fact be not alleged in pleading. (Ga.) 366.

Merchants employing a broker are chargeable with notice received by such broker that a member of a firm, with whom they have dealt only through the broker, has withdrawn from the firm. (Ga.) 975.

PRINCIPAL AND SURETY.

See "Subrogation."

Sureties on the bond of a constable are not relieved from liability by the fact that the bond was not approved by the county court. (W. Va.) 949.

Where husband and wife include, in trust deed to secure former's debt, property both of husband and wife, her property stands as surety, and will be discharged by extension to husband, without her knowledge. (N. C.) 56.

The release of a surety of note because of usury concealed from him is not affected by a subsequent arrangement between the creditor and the principal debtor purging the note of usury. (Ga.) 132.

Where a defaulting ex-sheriff, with taxes collected, has taken up county orders, and is selling them to third persons, an injunction will lie at suit of sureties. (W. Va.) 449.

Privileged Communications.

See "Libel and Slander."

Process.

See "Writs."

Promissory Notes.

See "Negotiable Instruments."

Quashing Indictment.

See "Criminal Law."

Quieting Title.

See "Ejectment."

RAILROAD COMPANIES.

See, also, "Carriers;" "Eminent Domain."

Obstruction of highway, see "Highways."

Action against lessee of road—Pleading. (Ga.) 306.

A complaint in action against lessee of railroad alleging that its principal office is in county where suit is brought shows jurisdiction. (Ga.) 306.

A railroad contractor has no priority as against the lien of a mortgage upon the railroad, duly recorded and foreclosed, because he supplied the materials which went to make up its real value. (Ga.) 540.

Penalty for failure to fence.

The erection of a legal fence by the landowner, where railroad company is required by law to fence, does not relieve the company from penalty for failure to fence. (Va.) 909.

Liability for negligence.

A railroad company is only liable for wanton injury done by the gross negligence of the company or its servants, to a licensee standing on a platform. (W. Va.) 782.

Are liable for the injury of person calling at depot for freight. (Va.) 278.

The fact that a railroad fails to recover from a discharged employe a switch key does not make it liable for the act of such employe in misplacing a switch to wreck a train. (Ga.) 18.

In action for death resulting from misplaced switch, defendant cannot show the common experience of railroads in obtaining a return by employes of switch keys. (Ga.) 18.

An engineer is justified in assuming that man on track will step off to avoid collision when danger signals are given. (N. C.) 114.

Injuries at a railroad crossing by being thrown from a vehicle by the frightening of a horse are not caused by "collision," within Gen. St. § 1529. (S. C.) 119.

Evidence showing that plaintiff, when about to cross a track, failed to look and listen carefully. (Va.) 35.

Injury to boy at railroad crossing—What constitutes contributory negligence. (Ga.) 304.

Sufficiency of evidence upon issue as to whether one injured by falling from wagon on defective railroad crossing could have avoided the accident. (Ga.) 652.

Accident to person on track—Evidence—Contributory negligence. (Ga.) 358.

A railroad company is not liable for the killing of the driver of a mule, where the mule, in running away, attempted to cross the track in front of a locomotive. (Ga.) 825.

A railroad company is not liable for the killing, by the derailment of a car, caused by fast running, of one walking outside the track at a point not customarily used by pedestrians, if the company's servants did not see such person. (Ga.) 990.

Stock-killing cases.

A railroad company is not liable for killing a horse at a crossing, where the engineer blew the whistle after the horse got on the track, and the train could not be stopped in time to prevent the killing. (W. Va.) 896.

Are liable for horses killed owing to their concealment from the view of the engineer by bushes growing inside of the side ditches. (N. C.) 211.

A charge requiring railroad to use all possible care to avoid killing live stock is cause for new trial. (Ga.) 22.

Where statute requires railroad to fence its right of way, the fact that the landowner had built a fence does not relieve railroad company from liability for stock killed on its track. (Va.) 909.

Liability for stock killed by failure to maintain guards. (W. Va.) 926.

RAPE.

Sufficiency of evidence that defendant, a negro, came to a white woman's bed at night, and got upon her bed, to show assault with intent to rape. (Ga.) 132.

RECEIVERS.

Where a controversy is as to whether a tenancy in common exists between the parties, a receiver is properly appointed to take possession of the property. (Ga.) 417.

After appointment of receiver on petition in nature of bill of equity, a creditor should assert his claim for equitable relief in original suit. (Ga.) 160.

A creditor secured by a solvent indorser cannot join in a petition as one of three unsecured creditors to obtain the appointment of a receiver. (Ga.) 136.

A petition for the appointment of a receiver may be amended by adding another unsecured creditor. (Ga.) 136.

It is error to appoint a receiver when neither petition nor answer is verified, and no evidence is taken to establish the facts alleged. (Ga.) 435.

The act of a stockholder, in ignorance of the rights of the corporation, does not estop the re-

ceiver of the corporation, afterwards appointed. (Ga.) 134.

Where a receiver was appointed for a corporation, and, on the expiration of its charter, another receiver was appointed, with authority to sue, a defendant, in ejectment by the second receiver, cannot set up outstanding title in the first. (Ga.) 134.

Of railroads are subject to suit in any county in which the road may be sued on like cause of action. (Ga.) 64.

RECORDS.

Of deed, see "Deed."

Of mortgage, see "Chattel Mortgages."

Agreement between tenants in common for division of proceeds of a sale, and authorizing one to take entire control, need not be recorded as against purchasers for valuable consideration. (N. C.) 73.

Redemption.

From tax sale, see "Taxation."

REFERENCE.

Where parties attend reference, and give no notice of appeal until final decision on referee's report, their acquiescence in order for reference is presumed. (S. C.) 3.

Where, in action on contract of sale, defendant set up fraud, and asked an accounting, the case may be sent to referee. (S. C.) 3.

Sufficiency of finding. (Ga.) 353.

Reformation.

Of contracts, see "Equity."

Release and Discharge.

See, also, "Composition with Creditors;" "Payment."

Of surety, see "Principal and Surety."

Remittitur.

See "Damages."

REMOVAL OF CAUSES.

An alien defendant, who is a resident, cannot remove a case to the federal court, under Act Cong. March 3, 1887. (N. C.) 56.

Act Cong. Aug. 13, 1888, § 3, which provides for actions against the federal receiver in the court which appointed him, does not affect the jurisdiction of a state court over an action on his bond to which he is not a party. (N. C.) 202.

The fact that the United States is a formal party plaintiff does not render a cause removable to the federal court. (N. C.) 202.

The fact that the state has been improperly joined as relator does not authorize a removal. (N. C.) 202.

Whether the liability of sureties on the bond of a receiver appointed by the federal court is joint or several does not involve a federal question. (N. C.) 202.

The construction of a decree of a federal court does not involve a federal question. (N. C.) 202.

Where a removal is asked on the ground of prejudice, the order may be granted, upon a

proper showing, at any time before trial. (N. C.) 698.

Repeal.

Of statute, see "Statutes."

REPLEVIN.

Enforcement of mortgage, see "Chattel Mortgages."

Value of time consumed in claim and delivery, action, and expenses thereof, cannot be recovered therein. (S. C.) 1.

A sheriff cannot vary terms of forthcoming bond so as to excuse the delivery of the property "at time and place of sale." (Ga.) 313.

Agreement of levying officer to vary the terms of a forthcoming bond is void. (Ga.) 313.

Action on forthcoming bond—Inability to produce goods. (Ga.) 364.

What defects in bonds given in action for conversion of property insufficient to cause setting aside of judgment. (Ga.) 433.

Sufficiency of bond in action for conversion. (Ga.) 433.

Rescission.

Of contract, see "Contracts;" "Equity."

Res Judicata.

See "Judgment."

Resulting Trusts.

See "Trusts."

Return.

See "Attachment;" "Writs."

Review.

On appeal, see "Criminal Law."

Revival.

Of judgment, see "Judgment."

Riparian Rights.

See "Waters and Water Courses."

Risks of Employment.

See "Master and Servant."

Roads.

See "Highways."

ROBBERY.

Sufficiency of allegation of the use of force in indictment. (N. C.) 51.

An indictment charging taking of \$10 in money is not objectionable as failing to designate the value of the money taken. (N. C.) 51.

Allegation in indictment that defendant feloniously did take and carry away the money, sufficiently alleges that he stole it. (N. C.) 51.

SALE.

See, also, "Fraudulent Conveyances;" "Judicial Sales;" "Vendor and Purchaser."

What constitutes constructive delivery. (Ga.) 293.

On purchase of a mine and implements, where vendee goes into possession, no further delivery of personality necessary. (Ga.) 293.

The purchaser cannot recover damages for nondelivery measured by profits of an intended resale without notice to seller of such contract. (Ga.) 308.

A sale on condition that, if the machine bought did not work to the seller's satisfaction, the seller could return it, gives an absolute right to reject. (W. Va.) 591.

Where goods are held in storage by carrier, under agreement between it and vendees of assignee, the right of stoppage in transitu is lost. (N. C.) 83.

Bill of sale describing the property as all that belonging to grantor at a certain house sufficiently describes it. (N. C.) 81.

Breach of guaranty by seller that article would satisfy purchaser's customers does not authorize a rescission. (S. C.) 218.

A plea of partial failure of consideration, caused by breach of warranty of goods sold, and alleging fraudulent concealment thereof, so that notice of defect could not be given within time provided for in contract, is good. (Ga.) 420.

A contract for the sale of a pile of fertilizer, estimated by seller to contain "253½ tons, more or less," is binding on purchaser, though pile contains 700 tons, where purchaser relied on his own judgment as to amount. (Ga.) 1000.

Warranty.

Where fertilizer sold contains the ingredients represented, the seller is not liable for its failure to produce desired results. (S. C.) 264.

Construction of warranty—Protection of purchaser against defects discovered within 30 days after first use. (Ga.) 420.

Satisfaction.

See "Composition with Creditors;" "Payment."

SCHOOLS AND SCHOOL DISTRICTS.

See "Disturbance of Public Schools."

Children of a white woman and a man whose father was a negro are not entitled to attend a white school. (N. C.) 55.

Trustees can only appoint a teacher at a meeting of which all the trustees had notice, and in the appointment two of the trustees must concur. (W. Va.) 923.

The value of a schoolhouse and site cannot be considered in estimating the amount of money available in the fiscal year, though the property is about to be sold. (W. Va.) 588.

A contract to build a schoolhouse, fixing a sum which may be in excess of the money available in the fiscal year, with a condition that no liability shall accrue for a larger sum than is available, is not unlawful. (W. Va.) 588.

Appointment of a teacher must be in writing. (W. Va.) 923.

Searches and Seizures.

See "Constitutional Law."

Secondary Evidence.

See "Evidence."

SEDUCTION.

Admissibility of evidence of what third person said to witness to impeach prosecutrix. (Ga.) 140.

Admissibility of certain declarations and promises of marriage made by defendant to prosecutrix. (Ga.) 140.

A verdict for seduction is not vitiated by what court may have charged touching the lesser offense of fornication. (Ga.) 140.

The legal definition of "a virtuous unmarried woman" is not for the jury. (Ga.) 140.

Repeating the engagement vow at time of sexual intercourse may imply persuasion. (Ga.) 140.

Female alleged to have been seduced is presumed to be virtuous till the contrary is shown. (Ga.) 140.

Impeachment of character of prosecuting witness in seduction case. (Ga.) 140.

Self-Defense.

See "Homicide."

Sentence.

See "Criminal Law."

Settlement.

See "Composition with Creditors;" "Payment." By executors, see "Executors and Administrators."

SHERIFFS AND CONSTABLES.

Sheriff may amend return so as to avoid penalty for false return. (N. C.) 503.

Where plaintiff objects to bail taken in a civil suit, the sheriff must notify him in writing when bail will justify; otherwise, he will be liable therefor as for failure to take bail. (N. C.) 672.

A sheriff delivering property at issue in claim and delivery without taking bond is liable on judgment for plaintiff only after return of execution nulla bona. (N. C.) 103.

A sheriff may proceed by motion against his deputy for default, for which a judgment has been rendered against the sheriff. (W. Va.) 737, 740.

The failure of a constable to obtain the court's approval of his bond does not affect his liability on the bond. (W. Va.) 949.

One orally "deputized" by the sheriff to assist in making an arrest for felony is not an officer, but a member of the sheriff's posse. (Ga.) 1018.

Slander.

See "Libel and Slander."

SLAVERY.

Marriage of emancipated slaves — Validity. (Ga.) 300.

Sleeping-Car Company.

See "Carriers."

Societies.

See "Building and Loan Associations;" "Corporations."

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SPECIFIC PERFORMANCE.

The successor to a master in chancery can maintain action against purchaser at a judicial sale. (S. C.) 237.

A decree for the sale of property purchased at judicial sale on failure of purchaser to perform is proper. (S. C.) 237.

A contract to convey land on payment of price gives vendee a right to specific performance. (S. C.) 680.

A petition for the specific performance of a contract that does not allege that plaintiff has made defendant a tender of the amount admittedly due him under the contract, is insufficient. (Ga.) 819.

Will not be decreed where complainant does not show himself to have been prompt in maintaining his rights. (W. Va.) 493.

Vendor who has failed for a year to carry out contract, without any reason, cannot enforce performance after a fall in prices. (Va.) 916.

Decree should provide for carrying out of a contract as made by the parties. (Va.) 916.

Issues for jury—Time of delivery of deed. (N. C.) 337.

STATES.

The state stands upon the same footing with other creditors as to enforcing its lien. (W. Va.) 375.

Statute of Frauds.

See "Frauds, Statute of."

Statute of Limitations.

See "Limitation of Actions."

STATUTES.

When statute is amended and re-enacted with the words "so as to read as follows," the new part is law from the time of the amendment. (W. Va.) 470.

Act 1882, c. 18, being "An act to amend and re-enact chapter 35, Code W. Va., concerning the recovery of claims due the state," is not unconstitutional because it embraces in its provisions a clause as to the effect of the statute of limitations on claims due the state. (W. Va.) 470.

"An act to regulate and restrict the rate of interest in the state, and for other purposes," restricting the rate to 8 per cent., and providing penalty for violation, states the object in the title. (Ga.) 403.

In action involving the meaning of a statute, evidence of a member of the legislature that passed the statute as to the legislative intent is incompetent. (Ga.) 981.

Of limitations—Must be given only prospective construction. (W. Va.) 470.

In interpreting statutes, they must be construed as prospective, unless the intent to act retrospectively is clearly expressed or necessarily implied. (W. Va.) 470.

Act Sept. 27, 1891, in relation to rate of interest, amending Act Oct. 14, 1879, does not modify the second section of the latter act, save as to contracts made after its passage. (Ga.) 403.

A statute revising the subject-matter of a former one, though it contains no express words to that effect, operates as a repeal. (W. Va.) 470.

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One paying purchase-money notes under agreement that he hold them as security is entitled to subrogation to the vendor's lien. (W. Va.) 620.

Where a purchaser at a void judicial sale is subrogated to the rights of the mortgagee, he can enforce the mortgage only to the amount paid at the sale. (S. C.) 1030.

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A municipality which does not assess the capital stock of incorporate bank therein, cannot assess a nonresident shareholder. (W. Va.) 467.

Where coal underlying a tract of land is sold, it should be assessed separately from the surface to the owner of the coal. (W. Va.) 566.

Assessment for municipal purposes in municipalities of less than 10,000 inhabitants must be identical with state, county, and district assessments. (W. Va.) 466.

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That sheriff sold tract without trying to divide it does not render sale invalid. (S. C.) 517.

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Persons claiming undivided interest, who are in possession, cannot claim whole tract by adverse possession for seven years. (N. C.) 73.

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TRESPASS.

The fact that land on which trespass was committed was covered by water does not prevent application of doctrine of constructive possession. (N. C.) 91.

Where, to preserve himself from loss, a person damages the property of another, the latter is entitled to compensation. (W. Va.) 740.

The amount of compensation to be paid for damage to real property is for the jury. (W. Va.) 740.

TRIAL.

See, also, "Appeal;" "Certiorari;" "Continuance;" "Evidence;" "Exceptions, Bill of;" "Judgment;" "Jury;" "New Trial;" "Pleading;" "Practice in Civil Cases;" "Witness."

Where witness has been ordered to remain out of court room, his excuse for disobedience may be heard in presence of jury. (Ga.) 29.

Effect of disobedience by witness, through mistake of his counsel, of order that he stay out of court room. (Ga.) 29.

Where the judge, during the trial, in overruling objections to evidence, expressed an opinion as to the material facts in the presence of the jury, it may be taken advantage of on motion for new trial, though not objected to when made. (W. Va.) 563.

Where plaintiffs do not show that they were prevented from explaining to the jury the law applicable to the facts, they cannot question the discretion of the court in making up the issues. (N. C.) 706.

A motion to postpone submission to the jury is addressed to the discretion of the trial court. (W. Va.) 953.

Demurrer to evidence.

On demurrer to evidence, it is not necessary to state that the evidence set forth is all that was offered. (W. Va.) 737.

Remarks and arguments of counsel.

Improper statements by counsel, to which no objection is made at the time, will not require the granting of a new trial. (Ga.) 406.

Pleadings considered in action on note, and *held* that there were such admissions of execution as gave defendant the right to open and close. (S. C.) 125.

Comment of counsel not objected to when made cannot be complained of on appeal. (N. C.) 209.

It is within the discretion of the court to permit counsel to read to the jury from law books. (W. Va.) 926.

Instructions.

Refusal to give special instructions after time prescribed, not reviewable. (N. C.) 328.

Failure to submit issue to jury is waived by neglect to ask for such submission. (N. C.) 320.

Instructions based on facts not in evidence erroneous. (Ga.) 290.

A request to charge, not adjustable to a proper theory of the evidence, is properly refused. (Ga.) 525.

Instructions are properly refused if there is no evidence on which they can be based. (N. C.) 81.

Question whether instruction placed the burden of proof on plaintiff considered. (N. C.) 655.

An instruction that, while court has felt bound to say "so much" as to the law, the case must turn in great measure on the questions of fact, is not improper. (S. C.) 177.

It is error to direct the especial attention of the jury to the relevancy of a particular portion of the testimony favorable to one side. (Ga.) 1006.

Question whether instruction as to right of recovery was erroneous as ignoring plaintiff's burden of proof when this had already been explained to the jury. (S. C.) 177.

Question whether an instruction as to plaintiff's right of recovery was erroneous, as charging on the facts, when it was given only in considering question of plaintiff's diligence. (S. C.) 213.

It is not error to refuse to interrupt an argument to give an instruction to the jury. (Va.) 901.

An exception to a charge containing several propositions that there was a misdirection is too general. (N. C.) 328.

An erroneous instruction on a material point is presumed to be prejudicial to the party against whom it is given. (W. Va.) 591.

An erroneous instruction, which did not affect the verdict, is no ground for reversal. (S. C.) 680.

In action for injuries against two defendants, as joint tort feasons, an instruction discharging one is not injurious to the other, if the one discharged is not liable to contribution in favor of the other. (Ga.) 1015.

Directing verdict.

Where defense alleged and proved is plainly insufficient, a verdict should not be directed for defendant. (Ga.) 159.

On default in action on note, a verdict may be directed without proof of the account. (Ga.) 430.

Validity of verdict.

A verdict on foreclosure of a railroad mortgage declaring a lien on a part, instead of the whole, of the railroad, is void, and not amendable. (Ga.) 540.

Inconsistency between special findings.

Verdict will not be set aside where findings, though inconsistent, would each support judgment. (N. C.) 252.

Trover and Conversion.

Sufficiency of bond, see "Replevin."

Trustee Process.

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TRUSTS.

Where plaintiff paid for land, and title was taken by defendant, the fact that, when defendant prepared a deed to plaintiff, the latter allowed title to remain in defendant, to avoid payment of his debts, will not defeat his right to establish a trust. (N. C.) 712.

A purchaser of an insane married woman's property, under a void decree, with knowledge of the fraud of the committee, vitiating his title, is a trustee of such property for the insane married woman. (W. Va.) 721.

Where one pays for land and causes conveyance to be made to his brother, it does not constitute resulting trust. (Ga.) 311.

In action to establish resulting trust, the burden is on plaintiff. (N. C.) 712.

A trust results to a widow and children in land purchased by the administrator with money of the estate, and sold by him to pay his private debts. (Va.) 869.

A resulting trust must arise at the execution of the conveyance, and payments subsequent to the purchase will not attach a trust to the original purchase. (Va.) 869.

The burden is on the executor claiming under a deed from a distributee made before final settlement to show absence of fraud. (N. C.) 321.

A trustee, of his own motion, may apply to the court to remove any impediment to a proper execution of the trust. (W. Va.) 810.

Unless expressly authorized, trustee of married woman and minor children cannot sell land without order of superior court. (Ga.) 159.

Power of trustee to sell trust estate under the terms of the trust. (Ga.) 543.

Where trustee with authority has agreed in lease to keep shelving in repair, trust estate is liable for his failure to do so. (Ga.) 46.

Where surviving partner has conveyed to administrator of deceased partner assets of firm on certain trusts, he may sue latter individually for accounting. (N. C.) 943.

Action to establish—Sufficiency of evidence. (Va.) 869.

Action to establish resulting trust—Defense of laches. (Va.) 869.

USURY.

Rights of bona fide purchasers of notes, see "Negotiable Instruments."
What law governs, see "Conflict of Laws."

A note given for an old note tainted with usury and a new debt is not usurious. (S. C.) 229.

Notes given when there was no statute as to amount of interest are not usurious. (Ga.) 530.

Evidence of lending at a usurious rate of interest to other persons is not competent to prove a usurious rate in the case at bar. (W. Va.) 810.

A counterclaim for usurious interest is inadmissible in action for breach of warranty in a mortgage securing usurious note. (S. C.) 229.

Plea of usury considered and held sufficient, in the absence of a demurrer, to admit the statute of evidence. (Ga.) 131.

VENDOR AND PURCHASER.

See, also, "Deed;" "Fraudulent Conveyances;" "Judicial Sales;" "Sale;" "Specific Performance;" "Subrogation."

A party to a contract, providing that the costs of survey should be divided, does not forfeit his rights by refusal to pay more than half thereof. (N. C.) 947.

It is no defense to action for damages for fraudulent misrepresentation as to quantity that the land offered was worth more than the price paid. (Ga.) 355.

A vendee is not estopped from recovering for fraudulent misrepresentation as to quantity if actually deceived, though he had some knowledge of boundaries of land. (Ga.) 355.

A purchaser of land "more or less," though aware of deficiency of quantity, is not estopped if the deficiency is much greater than he thought. (Ga.) 355.

In enforcing a vendor's lien, a trustee in a deed of trust and the beneficiary are necessary parties. (W. Va.) 561.

Rights of purchaser of land, with notice that executor making sale had already disposed of the timber thereon. (Ga.) 62.

The possession of land under an oral contract of sale is notice to the vendor's subsequent grantee. (S. C.) 680.

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Where principal debtors and guarantors live in different county, the former are not subject to suit with the latter in the latter's county. (Ga.) 158.

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The right to turn the waters of a river down the canal does not cover the right to dam such waters so as to destroy the water power of mills already established. (W. Va.) 740.

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Admissibility of evidence that testator derived from his wife most of property on which he built up his estate, on issue as to mental capacity. (Ga.) 29.

Question whether one signing for testatrix did so in her presence, and in that of the witnesses. (S. C.) 216.

A person signing will for testatrix may sign also as witness to the will. (S. C.) 216.

Question whether one signing will for testatrix did so by her express direction. (S. C.) 216.

The execution of a foreign will must show by certified probate that it was subscribed by two witnesses, and a recitation in the attestation clause of the will is not sufficient. (N. C.) 208.

Construction.

Construction of will as to whether limitation upon life estate was vested. (Va.) 913.

Construction of devise to "children." (N. C.) 347.

Parol evidence is admissible to show the circumstances of testatrix at time of making her will in order to construe it. (Ga.) 17.

Construction of will as to whether certain nephews of deceased were to take per stirpes, in view of their relation to testatrix at time will was made. (Ga.) 17.

Rights of children of testator's brother, born after making a will but before testator's death, under clause giving land to brother's children after his death. (N. C.) 96.

Construction of will as to whether, on a devise to granddaughter and another, for equal division between them, there was a trust as to granddaughter's interest only. (Ga.) 157.

The estate of a life tenant with testamentary power does not change to fee on failure to exercise same. (N. C.) 251.

A devise to a daughter for her separate use during her life, with an executory devise to her brothers should she die without issue, vests a fee simple in the daughter upon her marrying and having issue. (N. C.) 603.

Under a devise to two children of a deceased son, providing that if they should die "leaving no lawful heirs, either or each of them, of their body," then the remainder should go to other persons, the latter take only on the death of both the children. (N. C.) 969.

Where testator devised a certain sum in trust, the interest to be used, as far as necessary, for the support of an intemperate son, and, in the residuary clause, named several sources from which the residue would arise, but did not specify this fund, the son acquired the entire interest in the fund, and could dispose of it by will. (N. C.) 967.

WITNESS.

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Absence as ground for continuance, see "Continuance."

Leading question, see "New Trial."

Privilege of witness not to criminate himself continues, though prosecution would be barred

by limitation, unless it appears that no prosecution is pending. (Ga.) 40.

In action on guardian's bond given before 1868, where there is reference for an accounting, the guardians are competent witnesses. (N. C.) 96.

Competency because of interest—Action to establish trust. (Va.) 869.

Transactions with decedents.

Testimony of an administrator, on cross-examination, as to transaction not testified to in chief, does not render defendant competent as to such transaction. (N. C.) 213.

If administrator of payee of bond proves its execution by defendant, the latter may testify concerning the same transaction. (N. C.) 213.

In an action to recover money deposited with the decedent, evidence by plaintiff as to the time decedent handed her a memorandum of the deposits is inadmissible. (N. C.) 117.

Plaintiff, in action against administrator, may testify that contract relied on by plaintiff, and signature of deceased thereto, are in latter's handwriting. (N. C.) 79.

Competency as to transactions with decedents. (Ga.) 316.

Competency as to transactions with decedent. (Ga.) 362.

Competency of general agent to testify as to transaction in principal's business with debtor now deceased. (Ga.) 415.

A grantor in a deed, after death of the grantee, cannot testify against his heirs that deed was delivered conditionally. (W. Va.) 765.

A debtor executing deed of trust to secure a creditor cannot testify that it was procured by fraud of the trustee, both trustee and creditor being dead. (W. Va.) 765.

In an action against a principal on contracts made by defendant's deceased agent, plaintiff may testify as to transactions with the agent. (N. C.) 701.

An alienee by executor's sale of land of deceased person is not deceased's "assignee," within the protection of Code, § 400, as to transactions with decedent. (S. C.) 680.

An executor, claiming title to land by deed from deceased, is competent, in proceedings by widow to have dower assigned her in such land, to testify as to communications with deceased concerning his purchase. (Ga.) 1006.

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Authority to accept service, see "Attorney and Client."

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Where an attorney fills out a blank summons and bond, and does not give the clerk opportunity to pass on the bond, but gives the papers to the sheriff, the process is void. (N. C.) 708.

An amendable variance between the writ and declaration can be taken advantage of only by plea in abatement. (W. Va.) 724.

Where previous writs have failed, plaintiff is entitled to an alias writ. (Va.) 278.

Admission of service by authorized attorney binding on defendant. (S. C.) 263.

Where, on motion to reverse a judgment for defective service, the only defendant prejudiced by the defect releases the error, it is no ground for reversal as to other defendants. (W. Va.) 728.

Acceptance of service for partnership by attorney need not be in firm name. (S. C.) 268.

A summons in action against a railroad before a justice may be served upon the freight and passenger agent of the company in the county where suit is brought, and where such agent resides. (W. Va.) 928.

One notified of appointment as director, who receives a writ against the company without remonstrance, will be presumed to have accepted it. (Va.) 278.

Personal service on a foreign corporation in another state gives no jurisdiction in South Carolina if the corporation has no property there. (S. C.) 120.

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If summons in special proceeding is improperly made returnable to court in term, proceeding may be remanded with directions that summons be amended so as to be returnable before clerk on certain day. (N. C.) 117.

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Sufficiency of return on summons to confer jurisdiction of defendant. (S. C.) 33.

A sheriff's return that a summons was executed by delivering a copy to J. and his wife sufficiently shows that a copy was delivered to each of them. (N. C.) 174.

A sheriff may amend his return to conform to the facts. (W. Va.) 748.

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